IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 28671

GARETH HAMEN AND SHARLA HAMEN,

Appellees,

v.

HAMLIN COUNTY, SOUTH DAKOTA; CHAD SCHLOTTERBECK, HAMLIN COUNTY SHERIFF; AND SHERIFF'S DEPUTIES JOH DOE AND JOHN ROE, et al., individually (names unknown)

Appellants.

Petition from the Circuit Court
Third Judicial Circuit
Hamlin County, South Dakota

THE HONORABLE ROBERT L. SPEARS
Circuit Court Judge

APPELLANTS' BRIEF

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Order Granting Petition for Allowance of Appeal
From Intermediate Order Filed on September 7, 2018

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Jurisdictional Statement

The circuit court's order denying summary judgment was signed and filed on July 13, 2018. (SR 390 (App. at 1-2).) Notice of Entry was filed on July 16, 2018. (SR 396.) The Appellants timely filed a petition for discretionary appeal on July 27, 2018. This Court entered an order allowing an intermediate appeal on September 7, 2018. (SR 404.)

Statement of the Issues

1. This Court has long recognized the distinction between a constitutional taking and the valid exercise of police power, and most courts have held that damage caused in the execution of an arrest warrant is not a taking. In the challenging arrest of Gary Hamen pursuant to a felony warrant, a trailer house owned by the Hamens was damaged. Is that damage a compensable taking, or the result of an exercise of police power?

   The circuit court did not decide this legal question of first impression.

   Darnall v. State, 79 S.D. 59, 108 N.W.2d 201 (1961)
   City of Rapid City v. Boland, 271 N.W.2d 60 (S.D. 1978)
   Customer Company v. City of Sacramento, 895 P.2d 900 (Cal. 1995)
   Eggleston v. Pierce County, 64 P.3d 618 (Wash. 2003)

2. Qualified immunity protects officials unless they violate a constitutional right that is clearly established. This means that existing law must be so clear that every reasonable official would interpret the precedent to preclude the official's conduct in the particular circumstances. No reported decision at the time of Gary Hamen's arrest established that an arresting officer who causes property damage through the use of force to clear a structure violates the Fourth Amendment. Was Sheriff Schlotterbeck entitled to qualified immunity?

   The circuit court confused acting under color of state law with the violation of a constitutional right, and concluded that questions of fact precluded judgment based on qualified immunity.

   District of Columbia v. Wesby, 138 S. Ct. 577 (2018)
   Ehlers v. City of Rapid City, 846 F.3d 1002 (8th Cir. 2017)
   Ginter v. Stallcup, 869 F.2d 384 (8th Cir. 1989)

Statement of the Case

On February 6, 2017, the Hamens filed a complaint against Hamlin County and Sheriff Chad Schlotterbeck stating two claims--a state-law claim seeking damages for

inverse condemnation under the South Dakota Constitution and a federal law claim for deprivation of constitutional rights under 42 U.S.C. § 1983. (SR 2-6.) The Hamens alleged that they were entitled to compensation for damage to their trailer house caused by law enforcement during the arrest of their son, Gary Hamen, pursuant to a felony warrant. (*Id.*)

On February 8, 2018, Hamlin County and Schlotterbeck filed a motion for summary judgment. (SR 35.) They raised three principal arguments. First, property damage caused by police officers while apprehending a fleeing suspect does not constitute a taking as matter of law. (SR 38.) Second, Schlotterbeck was entitled to qualified immunity under § 1983 because the Hamens did not allege the violation of a clearly established right. (*Id.*) Third, Hamlin County could not be liable under § 1983 absent an official policy or custom of Hamlin County that caused a constitutional violation. (*Id.*)

On March 21, 2018, the Hamens filed a cross-motion for summary judgment. (SR 195.) A hearing was held on the motions on April 4, 2018. (HT 1.) In a letter decision dated June 29, 2018, the circuit court denied summary judgment as to Sheriff Schlotterbeck on both counts, but dismissed Hamlin County without prejudice.[1] (SR 394-95 (App. at 17-18).)

[1] The circuit court refused to grant summary judgment with prejudice, even though it found no dispute of material fact and that Hamlin County was entitled to judgment as a matter of law. (SR 390 (App. 5-6).) If the judgment is reversed, the circuit court should be directed to enter final judgment as to Hamlin County.

Statement of the Facts[2]

The Hamens own a trailer house located outside Castlewood in Hamlin County, South Dakota. (SR 376.) The Hamens allowed their son, Gary, to stay at the trailer house on an intermittent basis. (*Id.*) On June 9, 2016, there were multiple outstanding warrants for Gary's arrest. (*Id.*) Around 11:30 a.m., Hamlin County Sheriff Chad Schlotterbeck and Watertown Police Department ("WPD") Detective Chad Stahl met with Gareth in an attempt to locate Gary to execute the warrants. (*Id.*) As they were talking, Gareth received a phone call from Gary. (SR 207 at ¶ 5 (App. at 21).) Gareth asked Gary where he was, and Gary replied that he was at the trailer house. (*Id.* at ¶ 6.) Schlotterbeck overheard Gary stating that Gareth needed to come pick him up, and that the police were looking for him. (*Id.*) Gary stated he was going to Canada or Mexico, because he was not going back to jail. (*Id.*)

Schlotterbeck asked Gareth if Gary possessed any firearms. (SR 207 at ¶ 7 (App. at 21).) Gareth replied that he knew Gary had a few guns, but he had not seen them. (*Id.*) Schlotterbeck and Stahl left Gareth's residence and drove to a location near the trailer house. (*Id.* at ¶ 8.) They then discussed how they were going to arrest Gary. (*Id.*) Because he thought Gary was armed, Schlotterbeck requested assistance from the WPD SWAT team, which brought an armored vehicle. (SR 208 at ¶ 9.)

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[2] The Hamens denied a number of the paragraphs in Defendants' Statement of Undisputed Material Facts (SR 63 (App. at 20-27)) in their Response to Defendants' Statement of Undisputed Material Facts (SR 205 (App. at 28-40)), but many of their denials were based on argument or lack of sufficient information to admit or deny a statement, not a citation to contrary facts in the record as required by SDCL § 15-6-56(c)(2). Most of the alleged disputes were insufficient to create a genuine issue of material fact. *See, e.g., Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 8, 817 N.W.2d 395, 398. The facts stated in this brief, however, do not include any disputed facts.

Schlotterbeck and WPD Deputy Lantgen went to the east side of the trailer house property. (SR 209 at ¶ 12 (App. at 22).) Schlotterbeck saw Gary come outside and then go back inside the trailer house. (*Id.*) WPD Sergeant Ellis and the SWAT team took the armored vehicle to the trailer house in an effort to make contact with Gary, but he did not respond. (*Id* ¶ 13.) Sergeant Ellis was then advised that a male matching Gary's description was seen running to the northeast of the property. (*Id.* at ¶ 14.) Sergeant Ellis drove the armored vehicle to the northeast, where he encountered a Castlewood resident who reported seeing someone he thought was Gary running towards the west. (*Id.*)

Around this same time, Schlotterbeck spoke with Tim Hofwalt, Gary's brother-in-law. (SR 210 at ¶ 15.) Hofwalt reported that Gary came to his residence the night before. (*Id.*) Hofwalt suspected that Gary was high. (*Id.*) Hofwalt also told Schlotterbeck that Gary had a handgun. (SR 301 at ¶ 14.) Schlotterbeck dispatched this information to all other officers. (SR 210 at ¶ 15 (App. at 22).)

Schlotterbeck then requested the assistance of the Codington County Sheriff's Department SWAT team and additional South Dakota Highway Patrol Troopers to ensure that the property was secure and to prevent Gary from entering Castlewood. (SR 210 at ¶ 16 (App. at 23).) Schlotterbeck advised Codington County Sheriff Wishard that Gary had last been seen in the shelterbelt to the east of Castlewood. (SR 211 at ¶ 18.) The Codington County Special Repose Team ("SRT") used a second armored vehicle to traverse the shelterbelt to find Gary. (*Id.*) Though the SRT did not find Gary in the shelterbelt, they did find an empty pistol case, confirming concerns that Gary was armed. (*Id.* at ¶¶ 21-22 (App. at 24).)

Sheriff Schlotterbeck and Sheriff Wishard agreed that the trailer house needed to be cleared next. (SR 212 at ¶ 23.) Wishard told Schlotterbeck about the tactical procedure--create communication portholes and then use gas munitions to flush out anyone inside. (*Id.*) Gareth was notified that law enforcement intended to clear the trailer house. (*Id.*)

The WPD armored vehicle was tasked with porting the front door of the trailer house, while the Codington County armored vehicle would port the east sliding doors. (SR 213 at ¶ 24.) The WPD armored vehicle removed the trailer's front stairs, which were not attached to the house or secured in the ground, and then pushed the front door in with the ram. (SR 214 at ¶ 25.) The Codington County armored vehicle made two communication portholes on the east side of the trailer house, and also opened the sliding doors. (*Id.* at ¶ 26 (App. at 25).) After several attempts with the loudspeaker to get Gary to comply, the Codington County team opened a window so that gas could be used. (SR 215 at ¶ 28.)

At the same time, a drone operator saw from the drone camera someone walking in the river. (SR 216 at ¶ 29.) Sheriff Wishard reported the sighting over the radio to all units. (*Id.*) The person was Gary. (*Id.* at ¶ 31.) All units converged near the south perimeter road, and Gary was taken into custody about 6:00 p.m. after a lengthy search involving the Hamlin County Sheriff's Office, the Codington County Sheriff's Office, the Watertown Police Department, and the South Dakota Highway Patrol. (SR 149 Ex A.) After Gary was in custody, he told Schlotterbeck that he could have shot officers while he was running from them. (SR 154 at ¶ 26.)

The Hamens bought the trailer house in 1997. (SR 216 at ¶ 31 (App. at 25).) They bought it for their daughter, who lived there for approximately ten years. (*Id.* at ¶ 33 (App. at 26).) The trailer house was moved to its present location in August 2014, and has not been moved since. (*Id.* at ¶ 34.) No improvements or repairs have been made to the trailer house since June 9, 2016, and the Hamens assert that the trailer house has been "unlivable" since then. (*Id.* at ¶ 36.) They obtained an estimate of $18,778.61 for repairs. (*Id.* at ¶ 37.)

Standard of Review

The Court's standard of review on summary judgment is well-settled. "Whether the facts viewed most favorably to the nonmoving party entitle the moving party to judgment on the merits as a matter of law is a question of law. We review questions of law de novo." *Thornton v. City of Rapid City*, 2005 S.D. 15, ¶ 4, 692 N.W.2d 525, 528-29.

An appeal regarding the infringement of a constitutional right is an issue of law to be reviewed under the *de novo* standard of review. *Benson v. State*, 2006 S.D. 8, ¶ 39, 710 N.W.2d 131, 145. "Under the *de novo* standard of review, we give no deference to the circuit court's conclusions of law." *Id.* "[T]he ultimate determination of whether government conduct constitutes a taking or damaging is a question of law for the court." *Rupert v. City of Rapid City*, 2013 S.D. 13, ¶ 29, 827 N.W.2d 55, 66. Similarly, "[q]ualified immunity is a legal question to be decided by the court, it is particularly amenable to summary judgment." *Spenner v. City of Sioux Falls*, 1998 S.D. 56, ¶ 26, 580 N.W.2d 606, 612. Thus, both issues should be reviewed de novo.

Argument

1. Property damage caused by law enforcement officers during the arrest of a fleeing suspect pursuant to a valid warrant is not a compensable taking under the South Dakota Constitution.

a. The issue is one of first impression in South Dakota.

The South Dakota Constitution provides in Article VI, Section 13, that "[p]rivate property shall not be taken for public use, or damaged, without just compensation, which will be determined according to legal procedure established by the Legislature and according to § 6 of this article." Because there is "no magic formula that enables a court to judge, in every case, whether a given government interference with property is a taking," this Court must decide the takings question in the factual context presented, namely the execution of an arrest warrant. *Rupert v. City of Rapid* City, 2013 S.D. 13, ¶ 10, 827 N.W.2d 55, 61. This Court has not decided whether property damage caused by law enforcement officers during the execution of an arrest warrant is a compensable taking. When considering matters of first impression, this Court has routinely considered not only its own cases bearing on the issue, but also the law of other jurisdictions. *See, e.g.*, *Jacquot v. Rozum*, 2010 S.D. 84, ¶ 15, 790 N.W.2d 498, 503; *Milstead v. Smith*, 2016 S.D. 55, ¶ 8 n.2, 883 N.W.2d 711, 716 n. 2; *In re Janklow*, 1999 S.D. 27, ¶ 3, 589 N.W.2d 624, 625.

b. This Court recognizes the distinction between a constitutional taking and a valid exercise of the police power.

In the context of road projects impairing a landowner's access to property, this Court has held that a court "must distinguish between a lawful exercise of police power and a taking or damaging of a property interest because of substantial impairment of access." *State v. Miller*, 2016 S.D. 88, ¶ 44, 889 N.W.2d 141, 156. The Court has also

held in the context of an inmate's claim that the State unconstitutionally seized his personal property, that if the seizure occurred under SDCL § 24-2-26, which authorizes the warden to seize property, then it was an exercise of the police power, not a compensable taking. *Cody v. Leapley*, 476 N.W.2d 257, 261 (S.D. 1991). "No return of the property nor compensation is allowed where the state establishes that its actions were done under its police power such as to abate a public nuisance." *Id.* Similarly, zoning ordinances are generally upheld as an exercise of the police power as long as they serve the public health, safety, and general welfare. *Schafer v. Deuel County Bd. Of Commr's,* 2006 S.D. 106, ¶ 12, 725 N.W.2d 241, 245. If the zoning restriction does not bear a substantial relationship to the general welfare, then the regulation may be an unlawful taking. *Id.* Thus, the Court has previously considered the intersection between constitutionally compensable takings claims and damage caused by a valid exercise of the State's police power, but not in the factual context of executing an arrest warrant.

1. In *Darnall*, this Court recognized an indistinct line between a taking and the exercise of police power.

In *Darnall v. State,* 79 S.D. 59, 108 N.W.2d 201, 205-07 (1961), this Court held that a landowner with access to Highways 14 and 79 did not have a compensable takings claim when Interstate 90 was constructed, resulting in a diversion of traffic. In so holding, the Court first recognized the conflict between the state's police power to regulate traffic, and a landowner's right of access. This was an example of the conflict between "'the constitutional mandate that compensation be paid when private property is taken or damaged for a public purpose and the exercise of police where when compensation need not be paid.'" *Id.* at 205 (quoting *Bacich v. Board of Control of State of California,* 144 P.2d 818, 823 (Cal. 1943)). As noted by several other courts, "'the

line between those two concepts is far from clearly marked.'" *Id.* (citations omitted) The Court concluded that "where there is no physical taking and the owner's access to the highway on which he abuts is not unreasonably diminished or interfered with, his loss is due to diversion of traffic, a lawful exercise of the police power and there can be no recovery." *Id.* at 207. Significantly, this Court recognized that "Section 13 of Art. VI of the State Constitution creates no property rights; it protects those that already exist. That which was damnum absque injuria before the adoption of the 'or damaged' clause remains the same." *Id.* Thus, South Dakota is clear that damage can occur at the hands of the state without the state having committed a wrongful and compensable act.

2. In *Hurley*, this Court recognized that a landowner's rights are subject to reasonable regulation under the police power.

In *Hurley v. State*, 82 S.D. 156, 143 N.W.2d 722 (1966), this Court addressed another damage claim brought by an abutting property owner who lost access to West Boulevard in Rapid City when Interstate 90 was constructed. As in *Darnall*, the Court recognized a conflict between compensable takings and lawful exercises of the police power. On the one hand, when the construction of a public improvement causes damage to property, the property owner may be entitled to compensation if the injury is peculiar to the owner's land and not of a kind suffered by the public as a whole. *Id.* at 725. On the other hand, an abutting landowner's right of access is not absolute, "but is subject to reasonable regulation and restriction by the state under its police power in the public interest." *Id.*

As in *Darnall*, the Court recognized that the inherent powers of the state to act in the interest of the general welfare and to take private property by eminent domain coexist such that "it is difficult to determine with exactitude when regulation under the police

power ends and a compensable taking of private property begins." *Hurley*, 143 N.W.2d at 725. To resolve any given case, the court must determine the reasonableness of the regulation. *Id.* "[T]he legislature cannot, under the guise of the police power, impose unreasonable or arbitrary regulations which go beyond that power, and in effect deprive a person of his property within the purview of the law of eminent domain." *Id.* at 726.

3. In *Boland*, the Court validated a civil-defense statute immunizing acts taken to protect life, safety, and the general welfare.

This distinction involving the police power is also evident in *City of Rapid City v. Boland*, 271 N.W.2d 60 (S.D. 1978), in which the Court considered the validity of South Dakota's civil defense immunity statute, SDCL § 33-15-38. The case involved Boland's challenge to the City's demolition of a six-unit apartment building that was in the flood zone and severely damaged by the Rapid City flood of 1972. *Id.* at 62-63. The City had created a committee to determine whether structures that were in flooded areas had been damaged beyond repair and required demotion to protect the public health and safety. *Id.* at 63. After Boland's property was destroyed, he sought just compensation.

The Supreme Court first considered whether the legislature could constitutionally grant immunity for every taking or damaging of private property done in the performance of "civil defense activities" as defined in SDCL Ch. 33-15. *Id.* at 64. The Court determined that the statute was constitutional because it was consistent with the common-law recognition that the state's power to take or damage is limited by the need in some situations to act "based upon the public necessity of preventing an impending hazard which threatens the lives, safety, or health of the general public." *Id.* at 65. The Court also considered whether the City's action was defensible as a summary abatement of a

public nuisance, which is another recognized exception to the rule that just compensation is required for property taken or damaged for public use. *Id.* at 65, 68. If the property constituted a nuisance and its destruction was necessary to abate the nuisance, then the destruction would not be compensable. *Id.* at 68.

Taken together, these cases require this Court to decide whether Sheriff Schlotterbeck's conduct during the search and arrest of Gary Hamen was a valid exercise of the police power.

c. A majority of courts have concluded that damage caused by law enforcement during the arrest of fleeing suspect is not a compensable taking.

The supreme courts of California, Oklahoma, Iowa, and Washington, as well as intermediate appellate courts in New Jersey, Florida, and Georgia, have all rejected inverse-condemnation claims arising from allegations that private property was damaged during the arrest of a suspect who resists or flees.

1. Based on the same constitutional provision as in South Dakota, the California Supreme Court held that damage caused when executing a warrant is not a compensable taking.

The California Supreme Court's decision in *Customer Company v. City of Sacramento*, 895 P.2d 900 (Cal. 1995), is particularly instructive due to the similarity between the two states' takings provisions.[3] *See also Gilbert v. Flandreau Santee Sioux Tribe*, 2006 S.D. 109, ¶ 23, n.6, 725 N.W.2d 249, 258 (noting that other state constitutions, including California, played a role in the drafting of South Dakota's bill of rights); *Darnall*, 108 N.W.2d at 207 (adopting rationale from California Supreme Court decision interpreting its takings provision.)

[3] Article I, Section 19 of the California Constitution provides, "Private property may be taken or damaged for a public use and only when just compensation . . . has first been paid to, or into court for, the owner."

In *Customer Company*, a felony suspect, reputed to be armed and dangerous, took refuge in a store and refused to surrender. 895 P.2d at 901. In an attempt to apprehend the suspect, the police fired tear gas into the store, causing extensive property damage. *Id.* The damage to the store included numerous broken windows and mirrors, and the store's entire inventory of food and merchandise was contaminated with tear gas. *Id.* at 904. The total damages exceeded $275,000. *Id.*

The California Supreme Court rejected the plaintiffs' inverse-condemnation claim, holding that "an action for inverse condemnation does not lie, because the efforts of the law enforcement officers to apprehend a felony suspect cannot be likened to an exercise of the power of eminent domain." *Id.* The court noted that it was not facing a case in which law enforcement officers commandeered a citizen's automobile to chase a fleeing suspect or appropriated ammunition from a private gun shop to replenish an inadequate supply. *Id.* "Application of the just-compensation clause in the present case would mean, for example, that every time a police officer fires a weapon in the line of duty, that officer exercises the power of eminent domain over any property that the officer reasonably could foresee might be damaged as a result." *Id.*

In reaching its holding, the court provided a detailed analysis of California's takings jurisprudence. *Id.* at 905. The court reasoned that the plaintiff's argument that its property was "damaged for public use" was based on a literal and overly simplistic interpretation of California's takings provision. *Id.* at 906. The court explained that inclusion of the "or damaged" language in section 19 was never intended "to impose a constitutional obligation upon the government to pay 'just compensation' whenever a governmental employee commits an act that causes loss of private property." *Id.* Instead,

the provision was "designed to expand the circumstances in which a private property owner may recover when the state takes property for a public use, or when the state's construction of a public work causes damage to adjacent or nearby property owners." *Id.*

The court further reasoned that the takings clause had never been extended to apply outside the realm of eminent domain or public works to impose liability for property damage incidentally caused by public employees in the scope of their public duties. *Id.* On the contrary, "such property damage, like any personal injury caused by the same type of public employee activity, has—throughout the entire history of section 19—been recoverable, if at all, under general tort principles, principles that always have been understood to be subject to the control and regulation of the Legislature." *Id.* Elucidating the underlying policy implications, the court concluded:

> [L]aw enforcement officers must be permitted to respond to emergency situations that endanger public safety, unhampered by the specter of constitutionally mandated liability for resulting damage to private property and by the ensuing potential for disciplinary action. This court never has sanctioned an action for inverse condemnation seeking recovery for incidental damage to private property caused by law enforcement officers in the course of efforts to enforce the criminal law. Permitting Customer to bring an action for inverse condemnation under the circumstances of the present case would constitute a significant, unprecedented, and unwarranted expansion of the scope of the just compensation requirement and might well deter law enforcement officers from acting swiftly and effectively to protect public safety in emergency situations.

Id. at 910-11.

2. Other courts have reached the same conclusion.

The Oklahoma Supreme Court reached the same result in *Sullivant v. City of Oklahoma City*, 940 P.2d 220 (Okla. 1997), when it held that damage to an apartment caused by law enforcement during the execution of a valid search warrant was not a

compensable taking under the Oklahoma constitution.[4] In holding that the damage did not give rise to an inverse condemnation claim, the court employed reasoning similar to the California Supreme Court's in *Customer Company.* The court explained that the takings provision of Oklahoma's Constitution related to condemnation proceedings where real property was actually taken and used for a public project. *Sullivant,* 940 P.2d at 224. "We have not allowed parties to use Art. 2 § 24 as a basis for recovery against government employees." *Id.*

The court also noted that the right to compensation for government interference with a landowner's property is not unlimited. *Id.* at 225. "[A]ll property is "held subject to the general police power of the state to control and regulate its use in proper cases so as to secure the general safety, the public welfare, and the peace and good order and morals of the community." *Id.* "[A]cts done in the proper exercise of the police power, which merely impair the use of property, do not constitute a taking[.]"

In *Kelley v. Story County Sheriff,* 611 N.W.2d 475 (Iowa 2000), the Iowa Supreme Court held that damage caused by law enforcement while executing an arrest warrant was not a compensable taking under the Iowa constitution. There, the plaintiff owned property that was leased to a tenant. *Id.* at 477. The police arrived at the residence with an arrest warrant for an individual who was the tenant's frequent guest. *Id.* After the officers' demands to enter went unanswered, the officers forcibly entered, causing damage to the two front doors at the residence. *Id.*

The trial court dismissed the plaintiff's inverse-condemnation claim, and the Iowa Supreme Court affirmed. On appeal, the court first considered the threshold issue of

[4] Oklahoma's Constitution is similar to South Dakota's: "Private Property shall not be taken or damaged for public use without just compensation." Okla. Const. Art. II, § 24.

whether damaged caused to the property constituted a taking. *Kelley*, 611 N.W.2d at 478. Like the court in *Sullivant*, the court distinguished between the government's authority under eminent domain and the police power: "'Eminent Domain' is the taking of private property for a public use for which compensation must be given. On the other hand 'Police Power' controls and regulates the use of property for the public good for which no compensation need be made." *Id.* at 479.

The court concluded that the damage caused to the plaintiff's doors was a reasonable exercise of the police power and did not amount to a taking. *Id.* at 483. The court reasoned that the damage to the plaintiff's property was more in the nature of a tort than a permanent deprivation of property as contemplated by the Iowa Constitution. *Id.* at 482.

The Washington Supreme Court found the rationales of both *Customer Company* and *Kelley* persuasive in its decision in *Brutsche v. City of Kent*, 193 P.3d 110 (Wash. 2008). There, law enforcement officers executing a search warrant on premises owned by the plaintiff used a battering ram to gain entry to several buildings, which caused damage to doors and door jams. *Id.* at 112. The plaintiff claimed a compensable taking under the Washington State Constitution and the United States Constitution.[5] *Id.*

The Washington Supreme Court had previously held that destruction of property by police activity other than collecting evidence pursuant to a warrant was not a taking under the Washington Constitution. *Brutsche*, 193 P.3d at 119 (citing *Eggleston v. Pierce County*, 64 P.3d 618 (Wash. 2003)). In *Eggelston*, the court noted its alignment

[5] The Washington Constitution provides, "No private property shall be taken or damaged for public or private use without just compensation having been first made." Wash. Const. Art. I, § 16.

with the courts in *Customer Company* and *Kelley*, and, like those courts, relied in part on the distinction between eminent domain and the police power. "'Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, *or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health, and general welfare of the public.*'" *Eggelston*, 64 P.3d 623 (quoting *Conger v. Pierce County,* 198 P. 377 (Wash. 1921)). The Court in *Brutsche* was unpersuaded by the plaintiff's efforts to distinguish *Eggelston*, and accordingly affirmed the grant of summary judgment. *Brutsche*, 193 P.3d at 112.

Finally, intermediate courts in several states have followed the majority position. *See, e.g., Amica Mut. Ins. Co. v. Gwinnett County Police Dep't,* 738 S.E.2d 622, 624 (Ga. Ct. App. 2013) (holding that damage to a house caused by law enforcement officers during an attempt to arrest a suspect was done pursuant to the police power and did not constitute a taking); *Simmons v. Loose*, 13 A.3d 366, 386-87 (N.J. Super. Ct. App. Div. 2011) (adopting majority position and holding that no taking occurred where police caused damage to landlord's property during execution of no-knock warrant); *Lloyd's London v. St. Petersburg*, 864 So.2d 1145, 1149 (Fl. Ct. App. 2003) (adopting majority position and holding damage to innocent property owner's building caused by fire arising from use of flash bang grenades was not compensable taking); *see also, Carolina Convenience Stores, Inc. v. City of Spartanburg*, 727 S.E.2d 28, 31 (S.C. Ct. App. 2012) (adopting majority position and holding that damage to private property that results from legitimate exercise of the police power does not constitute a taking of private property for public use) (affirmed by *Carolina Convenience Stores, Inc. v. City of Spartanburg*, Op. No. 27663 (S.C. Sup. Ct. filed August 31, 2016) (vacated by *Carolina Convenience*

Stores, Inc. v. City of Spartanburg, 804 S.E.2d 267, 268 (S.C. 2017), after settlement by the parties and petition for rehearing was granted)).

d. Public policy favors the majority position.

The courts following the majority position generally operate under the rationale articulated in *Eggelston* that the separate doctrines of eminent domain and police power have continuing vitality, and that "[t]he proper apportionment of the burdens and benefits of public life are best addressed to the legislature, absent a violation of a right held by an individual seeking redress under the appropriate vehicle." 64 P.3d at 626. In addition, a contrary holding could deter law enforcement from performing their duties. *See Customer Company*, 895 P.2d at 910-11. If damage caused during an arrest, a search, or a seizure becomes compensable as an inverse-condemnation claim, law enforcement, fearing the specter of future claims, may second-guess their decisions.

Adopting the majority rule will ensure that recovery against the state and its entities, if allowed, continues to be based on tort principles subject to regulation by the legislature, particularly given the long-standing history of this Court's caselaw on sovereign immunity. An inverse-condemnation claim under South Dakota law is not a tort-based claim, and is therefore not subject to sovereign immunity or notice under SDCL Ch. 3-21. *Wolff v. Secretary of the South Dakota Game Fish and ParksDepartment*, 1996 S.D. 23, ¶ 22, 544 N.W.2d 531, 535; *Long v. State*, 2017 S.D. 79, ¶ 17, 904 N.W.2d 502, 508; *Rupert*, ¶ 43, 827 N.W.2d at 71. As with the South Dakota cases distinguishing eminent domain from the police power, these cases support adopting the majority rule.

e. This Court should adopt the majority rule.

1. The minority position is not persuasive and misapprehends the nature of the police power.

Two decisions by the Texas Supreme Court in 1980 and the Minnesota Supreme Court in 1992 have been noted by courts adopting the majority position as cases indicating that damage caused by law enforcement during the arrest of a fleeing suspect *may* constitute a taking. Both decisions have been criticized by the supreme courts of California, Oklahoma, Washington, and Iowa. While driven by a strong sense of fairness, these cases misunderstand the nature of the police power and create a judicial claim for inverse condemnation rather than allowing the legislature to act.

In *Steele v. Houston*, 603 S.W.2d 786, 791 (Tex. 1980), the Texas Supreme Court held that police destruction of third-party property *could* amount to a taking under the Texas Constitution, but remanded with instructions that a showing of great public necessity would be a defense. There, the plaintiffs sued the City of Houston for damages they sustained when police officers caused the destruction of their home while attempting to recapture three escaped inmates. *Id.* On appeal, the court reversed the trial court's grant of summary judgment, and held the plaintiffs should be permitted to attempt to prove that the city intentionally set their house on fire and that the destruction was done for a "public use." *Id.* at 791-92.

By so holding, the court improperly blurred the line between a state's power of eminent domain and its police power. As noted by the California Supreme Court, the court's analysis in *Steele* is "poorly reasoned and internally inconsistent." *Customer Company*, 895 P.2d at 913. This is because, as the Washington Supreme Court in *Eggelston* explained, when law enforcement damages property when executing a warrant

or apprehending a suspect, it is exercising its police power, not the power of eminent domain, which is necessary for the safety and general welfare of society. *Eggelston*, 64 P.3d at 623.

The Minnesota Supreme Court's decision in *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38 (Minn. 1992), suffers from the same flaw. In *Wegner*, law enforcement officers severely damaged the plaintiff's house while attempting to apprehend a suspect, causing damages in excess of $71,000. *Id.* at 39. The Court held that "where an innocent third party's property is damaged by the police in the course of apprehending a suspect, the property is damaged within the meaning of the constitution." *Id.* at 41-42.

The city argued that there was no taking for a public use because the officers' actions constituted a legitimate exercise of the police power. *Id.* at 40. The court disagreed, holding that simply labeling the actions of the police as an exercise of the police power "'cannot justify the disregard of the constitutional inhibitions.'" *Id.* (quoting *Petition of Dreosch*, 47 N.W.2d 106, 111 (Minn. 1951). However, the court provided no analysis justifying the opposite conclusion, i.e., that the officers were not acting under the police power, and simply relied on the erroneous analysis from *Steele.* *Id.* (citing *Steele*, 603 S.W.2d at 789).

The fundamental error of the analysis in *Steele* and *Wegner* is the failure to articulate and consider the distinction between acts performed under a governmental entity's police power and acts performed under the power of eminent domain. Only acts that were performed, or *could* have been performed, under the power to condemn entitle a property owner to just compensation. Put simply, the government's authority to search for a suspect pursuant to a warrant and to search a house where the suspect was seen

derives from its police power, not the power of eminent domain. Accordingly, the better rule is that no claim for inverse condemnation exists on the facts of this case.

2. There is no factual question whether Sheriff Schlotterbeck acted under the police power.

Except for an attempt to distinguish *Customer Company* and *Ginter* because the subject of the arrest in those cases was found on the premises, the circuit court did not analyze this issue. (SR 385-86 (App at 17-18).) Instead, the circuit court concluded generally that issues of material fact precluded summary judgment. (*Id.*) The circuit court's decision does not, however, identify any disputes of fact material to the state-law takings claim. It is therefore a legal issue ripe for decision.

3. In the context of inverse condemnation, there is no distinction between a valid and an invalid exercise of police power.

The Hamens argued below that they "do not claim damage to property by officers under police power is a taking. They are claiming damage by an invalid or improper or excessive exercise of police power is a taking." (SR 238.) They contend that the decision to clear the trailer was improper or objectively unreasonable and therefore actionable as an improper exercise of the police power.

Their argument, which presents a question of law, is legally incorrect. The Hamens confuse tort law with a constitutional takings claim. In *Customer Company*, the court affirmed *judgment on the pleadings* that no constitutional takings claim existed for a property owner whose store had been damaged when officers threw tear gas inside to apprehend "a felony suspect, reputed to be armed and dangerous." 895 P.2d. at 901. The court held *not that* no takings claim occurred as long as the law enforcement officers acted reasonably or not negligently, *but that* "constitutional just-compensation principles

do not apply to damages caused by law enforcement officers in the course of performing their duties." *Id.* at 913.

Here, as in *Customer Company*, it is undisputed that Sheriff Schlotterbeck was performing his duties. The court stated a broad rule in *Customer Company* because to hold otherwise "would nullify all applicable governmental immunity statutes." *Id.* at 915 n.15. The same is true here. Sheriff Schlotterbeck and Hamlin County would be immune from a state-law tort claim under SDCL § 3-21-9(3), which provides immunity from any state-law claim seeking damages for injury caused by or resulting from "[a] person resisting arrest." Moreover, Sheriff Schlotterbeck's conduct would be protected by sovereign immunity, which applies to discretionary conduct. *See, e.g., King v. Landguth*, 2007 S.D. 2, ¶ 11, 726 N.W.2d 603, 607 (sovereign immunity protects discretionary acts of state employees). If a plaintiff had only to assert negligence to circumvent the majority rule that law enforcement officers are not constitutionally liable for property damage caused in the course of performing their duties, the rule would be meaningless. It would also subvert the doctrine of sovereign immunity and the legislature's role in regulating tort actions against the sovereign.

2. Sheriff Schlotterbeck is entitled to qualified immunity.

a. Qualified immunity shields officials in a § 1983 action unless the official's conduct violates a clearly established constitutional right of which a reasonable person would have known.

Qualified immunity has been described as "the most important doctrine in the law of constitutional torts." John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?* 62 Fla. L. Rev. 851, 852 (2010). The United States Supreme Court has, since *Harlow v. Fitzgerald* was decided in 1982, applied that decision "to uphold qualified immunity more than two dozen times, often with no recorded dissent." Aaron L Nielson &

Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1857 (2018). Support for the doctrine crosses ideological boundaries. "The Court's embrace of qualified immunity has thus been emphatic, frequent, longstanding, and nonideological. In short, for decades at the nation's highest court, qualified immunity has been an unquestioned principle of American statutory law." *Id.* at 1858. The Supreme Court's most recent decision addressing qualified immunity was a unanimous reversal of a district court's denial, in which the Supreme Court, first having found probable cause for a challenged arrest, nevertheless went out of its way to address the D.C. Circuit's analysis of qualified immunity, "readily conclud[ing]" that the officers were entitled to qualified immunity and that the circuit court violated "straightforward analysis" in holding otherwise. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589, 590, 591 (2018).

Against this bulwark, the Hamens argued to the circuit court that, "[g]enerally, qualified immunity is not a defense to a claim under 42 U.S.C. § 1983." (SR at 242.) Although it is unclear whether the circuit court accepted this false statement as true, its analysis did no credit to the doctrine or its application in this case.

1. Qualified immunity is a question of law and should be resolved early.

"Immunity is a legal question to be decided by the court and is particularly amenable to summary judgment." *Swedlund v. Foster*, 2003 S.D. 8, ¶ 12, 657 N.W.2d 39, 45. Qualified immunity is not a defense, but an immunity from suit. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Immunity is effectively lost if a case goes to trial when it should not, so when qualified immunity is raised by motion, it should be resolved "'at the earliest possible stage in litigation.'" *Pearson v. Callahan*, 555 U.S. 223, 232

(2009) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*)). *Accord Swedlund*, ¶ 12, 657 N.W.2d at 45. The doctrine was created to "ensure that insubstantial claims against government officials will be resolved prior to discovery." *Id.* at 231. This Court has characterized the doctrine's goals as avoiding "excessive disruption of government," ensuring that litigation and liability do not "inhibit government officials from discharging their duties," and permitting the resolution of insubstantial claims on summary judgment. *Id.* ¶ 16, 657 N.W.2d at 46.

2. Qualified-immunity analysis involves a two-step inquiry.

Qualified immunity protects officials if their conduct does not violate "clearly established statutory or constitutional rights." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This statement breaks down into two parts. "[O]fficers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established' at the time." *Wesby*, 138 S. Ct. at 589.[6] A court can answer either question first, and if either element is not met, qualified immunity applies and the analysis is finished. *Pearson,* 555 U.S. at 236.

To be clearly established, the law at the time of the officer's conduct must be sufficiently clear that every reasonable official in the officer's position would understand that the conduct is unlawful. *Wesby*, 138 S. Ct. at 589. "In other words, existing law must have placed the constitutionality of the officer's conduct 'beyond debate.'" *Id.* (quoting *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011). A clearly-established rule is "settled law," dictated by "controlling authority" or a "robust consensus of persuasive

[6] As this Court recognized in *Thornton v. Rapid City,* the three-part test discussed in *Swedlund* was later modified by the federal courts to require analysis of only two issues. 2005 S.D. 15, ¶ 10, 692 N.W.2d 525, 530.

authority." *Id.* at 589-90. "The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Id.* at 590.

This standard "also requires that the legal principle clearly prohibit the officer's conduct *in the particular circumstances before him*." *Id.* (emphasis added). This requires a "high degree of specificity," so that a court may not "define clearly stablished law at a high level of generality." *Id.* The most common way of determining whether law is clearly established is to search for closely analogous cases. Bryan A. Garner, *The Law of Judicial Precedent* at 109 n.24 (2016).

3. The burden to overcome qualified immunity is high.

This "demanding standard protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Wesby*, 138 S. Ct. at 589 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Based on the Supreme Court's qualified-immunity cases, critics of the doctrine have complained that the Supreme Court "dedicates an outsized portion of its docket to reviewing—and virtually always reversing—denials of qualified immunity in the lower courts," and that recent decisions "make it seem nearly impossible to find clearly established law that would defeat the defense." Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1798 (2018). Whatever the critics say, the doctrine is clear, demanding, and must be followed based on principles of *stare decisis*.

When an official seeks summary judgment based on qualified immunity, "the plaintiff must produce evidence sufficient to create a genuine issue of fact regarding whether the defendant violated clearly established law." *Chambers v. Pennycook*, 641

F.3d 898, 904 (8th Cir. 2011). *See also Swedlund*, ¶ 23, 657 N.W.2d at 49 (placing burden on the plaintiffs to show that constitutional rights were clearly established). Thus, a plaintiff bears some burden in responding to a motion based on qualified immunity.

b. The circuit court did not correctly analyze qualified immunity.

The circuit court's decision recited the three-part standard for qualified immunity under *Swedlund*, although it confused the standard with the plaintiff's required proof under 42 U.S.C. § 1983. (App. at 12-13.) In addressing the first part, whether the Hamens were deprived of a constitutional right, the circuit court concluded that because Sheriff Schlotterbeck was acting under color of state law, and because the Hamens sought damages for property that was severely damaged or destroyed, the Hamens had "asserted a violation of a constitutional right." (*Id.* at 13.)

This analysis is incorrect. It is undisputed that Sheriff Schlotterbeck was acting under color of state law, but that is a different question than whether he violated a constitutional right. Because the Hamens allege that excessive force was used to clear the trailer where Gary had been staying, whether they alleged the violation of a constitutional right turns on a reasonableness analysis under the Fourth Amendment. "Claims of excessive force are evaluated under the reasonableness standard of the Fourth Amendment." *Johnson v. Carroll*, 658 F.3d 819, 825 (8th Cir. 2011). The circuit court cited several cases, which it did not discuss, that the destruction of private property by law enforcement officers during the execution of an arrest or search warrant may be unreasonable under the Fourth Amendment. (SR 381-82 (App. at 13-14).)[7] The limited discussion is insufficient to establish a constitutional violation on the facts of this case.

[7] The other cases cited by the circuit court reinforce the proposition that section 1983 claims for destruction of property hinge on whether the officers' conduct was reasonable

As for whether the constitutional right was clearly established, the circuit court cited the Eighth Circuit's decision in *Carpenter v. Gage*, 686 F.3d 644 (8th Cir. 2012), but did not discuss the facts of that case and ultimately concluded that there were issues of material fact. (SR 82 (App. at 14).) The only issue of fact mentioned is whether Sheriff Schlotterbeck heard another officer say over the radio in response to the order to clear the trailer that Gary was not in the trailer. (SR 82-83 (App. at 14-15).) The circuit court's reliance on this particular alleged factual dispute is error: it is undisputed that Sheriff Schlotterbeck denied hearing the alleged radio transmission (App. 53-55, at ¶¶ 3-4), and no evidence in the record contradicts his affidavit. Regardless, the circuit court did not apply the Fourth Amendment standard of objective reasonableness and its analysis failed to recognize that factual disputes will defeat qualified immunity only in narrow circumstances. "Predicate facts that will defeat summary judgment based on qualified immunity include only the relevant circumstances and the acts of the parties themselves, and not the conclusions of others about the reasonableness of those actions." *New v. Denver*, 787 F.3d 895, 899-900 (8th Cir. 2015). Ultimately, the circuit court mistakenly relied on unidentified disputes of fact to deny summary judgment based on qualified immunity, and failed to address the central inquiry--whether Sheriff Schlotterbeck acted reasonably in ordering the trailer to be cleared based on his undisputed concerns that Gary presented a danger to himself, to the arresting officers, and to the community at large.

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under the Fourth Amendment. *See Pacific Marine Center, Inc. v. Silva*, 809 F.Supp.2d 1266, 1282 (E.D. Cal. 2011) ("Destruction of property that is not reasonably necessary to effectively execute a search warrant may violate the Fourth Amendment."); *Mena v. Simi Valley*, 226 F.3d 1031, 1041 (9th Cir. 2000) ("Only unnecessarily destructive behavior, beyond that necessary to execute a warrant effectively violates the Fourth Amendment.")

c. The facts do not establish a constitutional violation.

1. Claims of excessive force must be analyzed under the Fourth Amendment.

The Hamens alleged that their trailer was unreasonably searched and seized through the use of excessive force under the Fourth Amendment. (SR 2 at ¶¶ 19-24.) While the Supreme Court has recognized that "officers executing search warrants on occasion must damage property in order to perform their duty," *Dalia v. United States,* 441 U.S. 238, 258 (1979), the Court has also held that "[e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression." *United States v. Ramirez,* 523 U.S. 65, 71 (1998). *See also Johnson v. Carroll,* 658 F.3d 819, 825 (8th Cir. 2011) ("Claims of excessive force are evaluated under the reasonableness standard of the Fourth Amendment."). To determine whether force was excessive, "the court considers whether it was objectively reasonable under the circumstances, relying on the perspective of a reasonable officer present at the scene rather than the 20/20 vision of hindsight." *Ehlers v. City of Rapid City*, 846 F.3d 1002, 1011 (8th Cir. 2017). Whether conduct is objectively reasonable under the Fourth Amendment is a question of law. *Scott v. Harris,* 550 U.S. 372, 381 n.8 (2007) (at summary judgment stage, reasonableness of officer's actions under Fourth Amendment "is a pure question of law"); *Wenzel v. Bourbon,* 899 F.3d 598, 601 (8th Cir. 2018) (same).[8]

[8] This Court's contrary statement in *Thornton v. City of Rapid City*, that "the objective reasonableness of the officer's actions under the first prong of the qualified immunity analysis, which determines whether a constitutional violation has occurred, is a jury question," is incorrect. 2005 S.D. 15, ¶ 13, 692 N.W.2d at 531. The Supreme Court's later decision in *Scott* makes this clear. Moreover, the Eighth Circuit case on which the

In considering reasonableness, a court must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Johnson*, 658 F.3d at 826. A court must also consider the facts of each particular case, "including the severity of the crime at issue, whether the subject poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* Whether the use of force is reasonable in tense, uncertain, and rapidly evolving circumstances requires an "allowance for the fact that police officers are often forced to make split-second judgments about the amount of force that is necessary in a particular situation." *Id.*

The Eighth Circuit decided an analogous case in *Ginter v. Stallcup*, which was a civil-rights action arising from the attempted apprehension of Gordon Kahl. 869 F.2d 384 (8th Cir. 1989). Kahl, a federal fugitive, was hiding in Ginter's residence. *Id.* Several FBI agents, federal marshals, state troopers, and local police officers travelled to Ginter's residence to search it and attempt to apprehend Kahl. *Id.* After arriving on scene, three agents entered the residence. *Id.* at 386. Kahl shot one of the agents when they entered the kitchen. *Id.* At that point, the agents fled, and they then began firing tear gas projectiles and rifle fire into the house in an attempt to effectuate Kahl's arrest. *Id.* Eventually, agents introduced diesel fuel, tear gas grenades, and smoke canisters into

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Court relied in *Thornton* involved unusual pretrial procedure. The Court cited *Littrell v. Franklin*, 388 F.3d 578 (8th Cir. 2004), in which qualified immunity was not raised in a pretrial motion for summary judgment. The Eighth Circuit commented that "it would have been preferable for Officer Franklin to have sought a pre-trial ruling on the issue of qualified immunity." *Id.* at 581. In cases involving questions of historical fact, a jury must resolve those questions, but only so that "the court may make the ultimate legal determination of whether officers' actions were objectively reasonable in light of clearly established law." *Id.* at 586. Thus, *Littrell* does not stand for the blanket proposition that the reasonableness of an officer's conduct under the Fourth Amendment for purposes of determining whether a constitutional violation has occurred is a jury question.

a roof vent on top of the house. *Id.* Ginter's house burned to the ground, and Ginter lost all of her personal possessions. *Id.*

The Eighth Circuit affirmed summary judgment based on qualified immunity, holding that "any destruction caused by law enforcement officers in the execution of a search or arrest warrant must be necessary to effectively execute that warrant." *Id.* at 387. The court concluded that there was no evidence that any of the officers acted unreasonably. *Id.*

The decision in *Ramirez* is also instructive. Based on information from a reliable confidential informant, officers obtained and executed a no-knock search warrant on a residence where they believed an escapee, who was thought to have access to weapons, and who had a previous history of threatening police officers, was located. 523 U.S. at 68. The officers broke a garage window in the process of executing the warrant. *Id.* at 69. The Supreme Court found no Fourth Amendment violation. *Id.* at 71. The escapee's violent past, reported access to weapons, and his vow that he would "not do federal time" all supported reasonable suspicion on which the warrant was based. *Id.* at 71. Moreover, the officers broke the window to discourage anyone else in the house from rushing to the weapons that officers were told might be kept in the house. *Id.* at 71-72. Notably, the fact that the escapee was not present at the house when the warrant was executed was not relevant to the reasonableness of the search. *Id.* at 71 n.2. Whether the search was lawful turned on only what the officers had reason to believe at the time of the entry. *Id.*

2. Sheriff Schlotterbeck's conduct was objectively reasonable.

By the time Sheriff Schlotterbeck directed that the armored vehicles be used to clear the trailer house, the following facts were known:

- The officers involved in the search believed that Gary was armed with several guns, and possibly possessed an AR-15 and a Glock .22 handgun. (SR 63 at ¶¶ 7, 15, 21, 22 (App. at 21, 22, 24).) Gary's brother in law saw Gary the night before with one gun in a holster under his arm and thought that he was high on something. (*Id.* ¶ 9 (App at 22).) Officers found an empty gun case and a bag with needles during their search, from which they concluded that Gary was armed and dangerous. (*Id.* at ¶ 22 (App. at 24).)

- Sheriff Schlotterbeck dispatched to other law enforcement that Gary was armed, had stated that he would not go back to jail, had threatened to shoot anyone trying to catch him, and that he was high. (*Id.* at ¶ 13 (App. at 22).)

- Gary was wanted on several outstanding warrants, including a felony warrant. (*Id.* at ¶ 3 (App. at 20).)

- Gary told Gareth in a conversation overheard by Sheriff Schlotterbeck that he was going to Canada or Mexico, because he was not going back to jail. (*Id.* at ¶ 6 (App.at 21).)

- Despite a search conducted by officers of the South Dakota Highway Patrol, the Codington County Sheriff's Office, the Hamlin County Sheriff's Office, and the Watertown Police Department, Gary could not be located after several hours.

- Sheriff Schlotterbeck thought that the trailer needed to be cleared to protect the public, law enforcement, and Gary.

Under *Ginter* and *Ramirez,* these undisputed facts establish that it was objectively reasonable for Sheriff Schlotterbeck to believe that Gary posed a serious and imminent threat to himself, to the law enforcement officers attempting to apprehend him, and to the public. Accordingly, the decision to use armored vehicles to clear the trailer house was reasonable.

Gary posed an immediate threat to the safety of the officers and others in the adjacent town of Castlewood, and he was actively resisting arrest and attempting to evade arrest by fleeing. *See Johnson,* 658 F.3d at 826. This conclusion is only bolstered by the

deferential lens through which the Court must examine the Sheriff's conduct. *Id.* (quoting *Graham v. Connor*, 490 U.S. 386, 396-97 (1989)).

The damage to the Hamens' trailer was caused in an effort to execute a felony arrest warrant and to minimize the risk of physical injury or death to Gary, the law enforcement officers, and the public. In balancing the Hamens' interest in the integrity of their personal property against the state interest in arresting a person known to be armed and dangerous, who had successfully resisted and avoided arrest for several hours, the Court can readily conclude that the force used was not objectively unreasonable. Thus, the Hamens have not established the violation of a constitutional right.

d. Sheriff Schlotterbeck's conduct did not violate clearly established law.

Even if the Hamens had satisfied the first inquiry, Sheriff Schlotterbeck would still be entitled to qualified immunity because it was not clearly established this his conduct was unlawful. As discussed above, the Court must define "clearly established law" with respect to particular conduct. *Ehlers*, 846 F.3d at 1012. This is especially true in the Fourth Amendment context, where "'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.'" *Id.* (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015). Whether the law is clearly established is a legal question. *Id.* at 1012 n.4.

In its most recent qualified-immunity decision, the Supreme Court in *Wesby* reversed the denial of qualified immunity to officers who had arrested 16 persons for holding a raucous, late-night party in a house they did not have permission to enter. 138 S. Ct. at 582. First, the Court considered the particular circumstances that the officers confronted. They found a group of people in a house that the neighbors said was vacant. The partygoers scattered or hid at the sight of law enforcement. They gave inconsistent

and varied explanations for being at the house. And the person who had invited them to the party, a woman named Peaches, admitted that she did not have permission to use the house. *Id.* at 591. In concluding its discussion of whether the law was clearly established that the officers involved in the arrest had probable cause, the Supreme Court noted the absence of any controlling case or robust consensus of cases finding a Fourth Amendment violation under similar circumstances. *Id.*

Here, the circuit court did not identify in its memorandum decision any controlling case or robust consensus of cases establishing a Fourth Amendment violation in circumstances similar to those in which Sheriff Schlotterbeck ordered that the trailer house be cleared with the armored vehicles.

The Hamens argued below that *Swedlund v. Foster* is such a case, but the facts are not analogous. In *Swedlund,* this Court affirmed the denial of qualified immunity based on disputes of fact. ¶¶ 31-32, 657 N.W.2d at 52-53. But it was undisputed that the officers who were denied qualified immunity executed a search warrant at the wrong house, for which they did not have a warrant, and where they did not have probable cause to think that a crime was being committed. *Id.* at ¶ 26, 657 N.W.2d at 50. The facts are not analogous to the hours-long search for Gary Hamen by officers from four law enforcement agencies to execute a felony arrest warrant, when officers reasonably believed Gary to be armed and dangerous, and when he reportedly said he would not go back to jail. *Swedlund* cannot reasonably be read to stand for the proposition that an officer who decides to clear a house where a suspect resisting arrest has been seen and is known to be staying, after hours of searching for him, is "plainly incompetent" or has "knowingly violated the law" simply because the suspect is later found outside the house.

Id. at ¶ 29, 657 N.W.2d at 51. To the contrary, the fact that Gary was not in the trailer is irrelevant. *Ramirez,* 523 U.S. at 71 n.2. As already discussed, the facts in *Ginter v. Stallcup* are more analogous to this case and support a holding that it was not clearly established that Schlotterbeck used excessive force in clearing the trailer. 569 F.2d at 387-88.

No existing precedent establishes that the constitutionality of Sheriff Schlotterbeck's particular conduct was beyond debate. *Wesby,* 138 S. Ct. at 590. Sheriff Schlotterbeck was entitled to qualified immunity.

Conclusion

The first issue in this case requires the Court to decide a question of first impression, but not one without footings in South Dakota law. The acknowledged distinction between eminent domain and the State's police power, together with a clear majority rule anchored in sound public policy, provide ample reason for this Court to hold as a matter of law that the damage to the Hamens' trailer house is not a compensable taking.

The second issue offers the Court a chance to clarify the application of qualified immunity, which is sometimes challenging. Here, however, the legal standards are clear and their application to undisputed facts does not leave room for the Court to avoid deciding the two legal questions presented: (1) Sheriff Schlotterbeck did not violate the Hamens' Fourth Amendment rights because his decision to use force to clear the trailer was objectively reasonable; and (2) the law was not clearly established that an officer in the particular circumstances of this case acted unlawfully in clearing the trailer with force.

Sheriff Schlotterbeck and Hamlin County respectfully request that the order denying summary judgment be reversed with instructions to dismiss the claims against them with prejudice.

Dated this ____ day of December, 2018.

WOODS, FULLER, SHULTZ & SMITH P.C.

By_____

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Certificate of Compliance

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point) and contains 9,986 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this ___ day of December, 2018.

WOODS, FULLER, SHULTZ & SMITH P.C.

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Certificate of Service

I hereby certify that on the ____ day of December, 2018, I electronically served via e-mail transmission, a true and correct copy of the foregoing Appellants' Brief to the following:

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Appendix

STATE OF SOUTH DAKOTA SS COUNTY OF HAMLIN	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
* * * * * * * * * * * * * * * * * GARETH HAMEN AND SHARLA HAMEN * Plaintiffs, * v. * HAMLIN COUNTY, SOUTH DAKOTA; * CHAD SCHLOTTERBECK, HAMLIN * COUNTY SHERIFF; and SHERIFF'S * DEPUTIES JOHN DOE AND JOHN * ROE, et al., individually * (names unknown) * Defendants. * * * * * * * * * * * * * * * * * *	28CIV17000011 ORDER DENYING SUMMARY JUDGMENT

On January 8, 2018, the Defendants filed a Motion for Summary Judgment. On March 21, 2018, The Plaintiffs filed a Motion for Summary Judgment. A hearing was held on April 4, 2018 before the Honorable Robert L. Spears. The Plaintiffs were personally present, along with their attorney, David R. Strait, of Watertown, South Dakota. The Defendants were represented by attorney James E. Moore, of Sioux Falls, South Dakota. The Court has received and reviewed the written submission of the parties as well as arguments of counsel. The Court has issued a Memorandum Decision dated June 29, 2018.

GOOD CAUSE APPEARING,

IT IS HEREBY ORDERED, for reasons set forth in the Court's Memorandum Decision, that:

1. The Plaintiffs' Motion for Summary Judgment is denied.

2. The Defendants' Motion requesting Summary Judgment on the Plaintiffs' claims, other than the claim against Hamlin County, is denied. The Court's ruling with respect to Hamlin County is set forth in a separate order.

Signed: 7/13/2018 10:59:06 AM

Robert L. Spears

Robert L. Spears
Judge, Circuit Court

Attest:
Stieg, Amy
Clerk/Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF HAMLIN	)	THIRD JUDICIAL CIRCUIT

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GARETH HAMEN AND SHARLA HAMEN	:	28CIV. 17-11
Plaintiffs,	:	
v.	:	
HAMLIN COUNTY, SOUTH DAKOTA; CHAD SCHLOTTERBECK, HAMLIN COUNTY SHERIFF; and SHERIFF'S DEPUTIES JOHN DOE AND JOHN ROE, et al., individually (names unknown)	:	**SUMMARY JUDGMENT IN FAVOR OF HAMLIN COUNTY**
Defendants.	:	

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On February 8, 2018, Defendants Hamlin County and Chad Schlotterbeck filed a motion for summary judgment. On March 21, 2018, Plaintiffs Gareth and Sharla Hamen filed their own motion for summary judgment. Both motions were fully briefed. On April 4, 2018, the Court held a hearing at which the parties were represented by counsel of record. After considering the oral and written arguments of counsel, all of the materials on file, and otherwise being fully advised, the Court issued a memorandum decision dated June 29, 2018. For the reasons stated in the decision, it is hereby

ORDERED AND ADJUDGED that Hamlin County's motion for summary judgment is granted and Plaintiffs' claims against Hamlin County are dismissed without prejudice.

Dated this ___ day of _____, 2018.

BY THE COURT:

Attest:
Keimig (Nelson), Amy
Clerk/Deputy

Signed: 7/16/2018 3:20:49 PM

Robert L. Spears

The Honorable Robert L. Spears

ATTEST:

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF HAMLIN	)	THIRD JUDICIAL CIRCUIT

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GARETH HAMEN AND SHARLA HAMEN	:	28CIV. 17-11
Plaintiffs,	:	
v.	:	
HAMLIN COUNTY, SOUTH DAKOTA; CHAD SCHLOTTERBECK, HAMLIN COUNTY SHERIFF; and SHERIFF'S DEPUTIES JOHN DOE AND JOHN ROE, et al., individually (names unknown)	:	**SUMMARY JUDGMENT IN FAVOR OF HAMLIN COUNTY**
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Dated this ___ day of _____, 2018.

BY THE COURT:

Denied: 07/13/2018
Please contact judge.
/s/ Robert L. Spears
The Honorable Robert L. Spears

ATTEST:

Attest:
Stieg, Amy
Clerk/Deputy

STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT
CODINGTON COUNTY COURTHOUSE
14 1st Avenue S.E., Watertown, SD 57201
Fax Number (605) 882-5106

HON. ROBERT L. SPEARS
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KELLI ASLESEN
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June 29, 2018

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James E. Moore
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Ref: Gareth Lee Hamen and Sharla Hamen v. Hamlin County, South Dakota; Chad Schlotterbeck, Hamlin County Sheriff; and Sheriff's Deputies John Doe and John Roe, et al., individually (names unknown), Hamlin County Civil File No. 28CIV17-0011.

Counselors,

The opinion of the Court is set forth below. For the reasons stated herein, the plaintiffs' motion for summary judgment is denied. The defendants, Schlotterbeck and Sheriff's Deputies' motion for summary judgment is denied; Defendant Hamlin County's motion for summary judgment is granted.

FACTS

The plaintiffs are owners of property in Hamlin County on which they reside (Affidavit. Gareth Hamen, ¶'s 3, 5, 6). The legal dispute that is currently before the Court concerns the actions of the defendants, all of which are law enforcement officers, that occurred on June 9, 2016 (Affidavit. Gareth Hamen ¶ 8). On the above date, Chad Schlotterbeck, Hamlin County Sheriff, (Schlotterbeck) and Chad Stahl (Stahl) of the Watertown Police Department showed up at the Plaintiffs' residence. Stahl and Schlotterbeck informed Gareth Hamen (Gareth) that they were looking for his son Gary Hamen (Gary) and they had warrants for his son's arrest (Affidavit. Gareth Hamen ¶ 9).

The Hamens have a trailer home on their residence (Affidavit. Gareth Hamen ¶ 6). Although Gary did not live in the trailer home on a permanent basis, the plaintiffs allowed Gary to stay on an occasional basis. Gary had stayed in the trailer home the night before or Gary had been in the trailer home shortly before Schlotterbeck and Stahl's arrival (Affidavit. Gareth Hamen ¶ 12).

Schlotterbeck had information, albeit disputed, that Gary was dangerous and that he was in possession of several firearms, threatened to kill anyone that would try to arrest him and then kill himself (Schlotterbeck Affidavit. ¶s 15, 8, 18, 21, and 22). According to Schlotterbeck, much of this information was obtained by him in a conversation he had with Julie Hofwalt (Julie), Gary's sister, and Julie's

husband Tim Hofwalt. Schlotterbeck's conversation with Julie took place when Schlotterbeck stopped Julie on the road to her father's residence on the day of this incident (Schlotterbeck Affidavit. ¶ 21). Julie denies she made such comments to Schlotterbeck. Julie asserts that she did not know Gary was at her home the night before at the time she spoke to Schlotterbeck (Julie Hofwalt Affidavit. ¶s 8, 13, 14, 15).

After the arrival of Schlotterbeck and Stahl, other law enforcement officers arrived about one hour later at the trailer home to see if Gary could be located there. The officers began talking to Gary by using a loud speaker. Gary was not in the trailer home at this time (Affidavit. Gareth Hamen ¶ 21). At some point law enforcement officers "secured" the trailer home by placing law enforcement officers around it (Affidavit. Tim Hofwalt ¶s 13 and 17). Gareth and Julie informed law enforcement that Gary could "most likely" be located in the willow bed adjacent to the Sioux River which ran through or adjacent to the plaintiffs' property (Affidavit. Julie Hofwalt ¶ 20).

Apparently, Schlotterbeck did not believe that Gary was not in the trailer home or in the alternative Schlotterbeck thought Gary may have returned to the trailer. Schlotterbeck ordered other law enforcement officers on the scene to look for Gary once again at the trailer home (Schlotterbeck Affidavit. ¶ 24; Jurrens Affidavit. ¶ 5). Troy Jurrens (Jurrens) lives in the same vicinity as the Hamens

(Jurrens Affidavit. ¶s 2 and 3). Jurrens was observing and listening to a police scanner as events occurred on June 9, 2016 (Jurrens Affidavit. ¶ 4). Jurrens claims that shortly before the armored vehicles and/or law enforcement officers were ordered back to the trailer house, he heard a voice state, "He is not in the trailer." The first voice answered back saying, "They were going back anyway" (Jurrens Affidavit. ¶ 5).

Two armored vehicles were deployed to the plaintiff's residence. Once the armored vehicles were on the scene, they were positioned immediately outside the trailer home. An officer using a loud speaker asked Gary to surrender himself (Affidavit. Gareth Hamen ¶ 19). Gary did not come out of the trailer home as requested because he was not there (Affidavit. Julie Hofwalt ¶ 21). Hofwalt claims that if anyone was in the trailer home, they could have heard the officers over the loud speakers (Affidavit. Julie Hofwalt ¶ 21; Affidavit. Gareth Hamen ¶ 19).

Shortly thereafter, Schlotterbeck ordered one of the armored vehicles, which was equipped with an apparatus to drill holes inside of buildings, to drill a hole in the wall of the trailer home, purportedly to open a "communication portal." At least one or more armored vehicles bored or attempted to bore a "communication portal" through the wall of the trailer home. As a result thereof, a deck attached to the trailer home was destroyed (Jurrens Affidavit. ¶s 5 and 6), along with windows,

the front door, and a wall. As a result, the trailer home was substantially damaged (Jurrens Affidavit. ¶s 5 and 6; Affidavit. Gareth Hamen ¶s 25, 26, and 27).

This entire incident was recorded by a law enforcement drone hovering over the site (Affidavit. Gareth Hamen ¶ 28). At some point toward the end of this incident, someone adjusted the height of the camera drone and Gary can be seen in the middle of the Sioux River wading away from the residence. It appears to this Court that Gary was in the approximate location that Gareth and Julie initially told law enforcement where Gary would be located (Affidavit. Gareth Hamen ¶s 28 and 29). Gary was arrested apparently without incident and unarmed. (Plaintiffs' Brief p. 6). Although once in custody, Schlotterbeck claims Gary told him he could have shot the officers (Affidavit. Schlotterbeck ¶ 26).

As a result of this incident, the trailer home was severely damaged and the septic system was destroyed. The plaintiffs have claimed damages in excess of $18,000 (Affidavit. Gareth Hamen ¶s 31 and 32). The plaintiffs have initiated this lawsuit claiming the actions of the defendants were unreasonable and the force used by law enforcement was excessive (See Complaint). The Court notes that the plaintiffs have filed this complaint under 18 U.S. Civil Code § 1983 and as such, Plaintiffs have consented to state court jurisdiction over this federal claim. Likewise, the defendants have submitted to state court jurisdiction. In so much as both sides have filed motions for summary judgment, this Court conducted a

hearing on April 4, 2018. Additional facts as necessary will be developed in the section below.

ANALYSIS/DECISION

The plaintiffs have filed this present lawsuit pursuant to 42 USC § 1983 claiming a deprivation of their legal right without due process of law. (Complaint ¶s 17, 18, 19, 21, 22, 23, and 24). The defendants counter that they are entitled to an order for summary judgment because under 42 USC § 1983 the defendants, most of them, are law enforcement officers and were acting under authority of State law and are immune from a lawsuit such as this. (Answer ¶s 12, 14, and 15). Moreover, the defendants assert that the doctrine of qualified immunity is just that, an immunity from suit not a defense to be raised at trial, and if a non-meritorious case proceeds to trial, qualified immunity is lost. *(See Mitchell v Forsyth, 472 U.S. 511, (1985)).* This Court will conduct its 42 USC § 1983 analysis first and then conduct its summary judgment analysis.

42 USC § 1983

The plaintiffs must prove the following in a 42 USC § 1983 claim: 1) The plaintiffs must prove they were deprived of a constitutional. right. 2) The plaintiffs must prove the constitutional legal right was clearly established. 3) Plaintiffs must prove a reasonable officer would have understood that what he was doing violated

their constitutional/legal rights. *(Swedlund v. Foster, et al., 2003 SD 8, ¶ 19, other citations omitted).*

In the present case, it is unrefuted that the defendants, who are members of the Hamlin County Sheriff's Office or acting on his behalf and direction, were acting under the authority of a state or federal law. As referred to in the Facts section above, the law enforcement officer showed up at the plaintiffs' property to execute felony arrest warrants on the plaintiffs' son. Law enforcement officers had reason to believe that the plaintiffs' son Gary could be located there. Gareth confirmed that Gary was at the trailer, and Gary called Gareth when law enforcement officers were speaking to Gareth.

Consequently, the plaintiffs have met the first prong of the above-mentioned test. Likewise, the plaintiffs are seeking damages for their property that was severely damaged or destroyed. Although there is no South Dakota case directly on point, based on the current record of this case, the Court will find that the plaintiffs have asserted a violation of a constitutional right, as further explained below.

Other courts have held that the unreasonable destruction of private property by law enforcement officers during the execution of an arrest/search warrant in some cases, may constitute an unreasonable search/seizure under the Fourth Amendment of the U.S. Constitution. *(See United States v. Ramirez 523 U.S. 65*

(1988); Mena v. Simi Valley, 226 F.3d 1031 (9th Cir. 2000); Pacific Marine Center v. Silva, F. Supp. 2d 1266 (E.D. Cal 2011)).

Additionally, it is a well-established and fundamental legal proposition that when private property is taken or damaged by state action, the owners are entitled to just compensation *(See Art. VI, § 13, South Dakota Constitution).* Thus, this Court determines the plaintiffs have met the second prong of the above-mentioned test. Now, it is incumbent upon this Court to determine whether a reasonable officer would have known that his actions were unlawful or, in other words, violated the constitutional/legal rights of the plaintiffs.

This Court would normally apply an objectively reasonable standard as articulated by the Eighth Circuit Court of Appeals in the case of *Carpenter v. Gage, 686 F.3d 644 (8th Cir. 2012).* In *Gage*, the Eighth Circuit Court of Appeals held that in determining whether force was excessive, the Court considers whether it was objectively reasonable under the circumstances relying on the perspective of a reasonable officer on the scene rather than 20/20 hindsight (*See Carpenter v. Gage Supra).*

However, it should be obvious in the Facts section above, there appears to this Court, based on careful review of all the affidavits submitted thus far, there are several genuine issues of material fact. For example, did Schlotterbeck hear the response that Gary was not in the trailer home when Schlotterbeck ordered law

enforcement personnel to return to the trailer and ordered the law enforcement officers to begin drilling communication portals or holes in the trailer home to facilitate communication with Gary and, whether communication portals were necessary at all, constitutes question(s) of fact. This Court determines that the record thus far in this 42 USC § 1983 action is a written record only and I'm being asked to make credibility determinations and I have not had the opportunity to observe any live testimony of any of the witnesses.

Fortunately, the South Dakota Supreme Court has addressed this issue in past cases relative to 42 USC § 1983 litigation.

"If the Court finds the plaintiffs proved intentional misconduct or total incompetence and denies qualified immunity, then the Court has effectively directed a verdict on the merits of plaintiffs' claim.

The better approach is to have the trier of fact decide when there is genuine issue of material fact as to whether the officials' conduct was effectively reasonable, summary judgment is not appropriate" *(See Swedlund v. Greg Foster, et al., 657 N.W.2d 39, 2003 SD 8, ¶s 29 and 30, see also Hart v. Miller, 609 N.W.2d 138, 2000 SD 53).*

SUMMARY JUDGMENT

This is exactly the situation this Court faces and this Court will not paint itself into a corner concerning a qualified immunity analysis on these disputed facts. *(See Swedlund Supra 2003, SD 8, ¶ 29).*

The legal standards a court must apply when deciding an application or order for summary judgment are well settled. Pursuant to SDCL 15-6-56 et.seq and case precedent summary judgment is appropriate when the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, show there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. *(Johnson v. Matthew J. Batchelder Co., Inc., 779 N.W.2d 690, 2010 SD 23).* However, summary judgment is not a substitute for trial and is not the appropriate method to dispose of factual questions. *(See Stern Oil, Inc., v. Brown, 817 N.W.2d 395, 2012 SD 56).*

This is exactly what both sides are asking me to do. I'm being asked to rule for one side or the other based on affidavits and the briefs submitted. In essence, I'm being asked to try and decide several issues of material fact. For example, I'm being asked to determine what Sheriff Schlotterbeck heard or did not hear over the radio when he ordered law enforcement back to the trailer home. (Compare Jurrens Aff. and Schlotterbeck's Amended Aff.)

Additionally, I am being asked to decide whether "communication portals" were necessary to communicate with Gary when more than one witness signed a sworn statement to the effect that if Gary was in the trailer home, he could have heard the law enforcement personnel talking to him over the loud speaker. (Compare Affidavits of Gareth Hamen, Troy Jurrens, and Julie Hofwalt).

Furthermore, I'm being asked to judge the credibility of witnesses who submitted affidavits thus far. For example, I'm being asked to determine who is telling the truth and who told what to Sheriff Schlotterbeck about Gary's threat to

"shoot" law enforcement officers who would attempt to arrest him, whether Gary was armed and, if so, with what (Compare Affidavits of Tim Hofwalt, Julie Hofwalt, and Schlotterbeck). This, the Court will not do. The circumstances listed above are just a few of the examples of what this Court considers to be genuine issues of material fact best resolved by a jury composed of the citizens of Hamlin County selected from a duly summoned panel, then properly instructed at trial.

This Court is mindful that this is a 42 USC § 1983 claim and absent disputed material facts, it would be incumbent on the trial court to rule on the issue of qualified immunity through the summary judgment process. *(Spenner v. City of Sioux Falls, 1998 SD 56, 580 N.W.2d 606.)* However, as stated above, it appears to this Court that the standard in South Dakota is when there are disputed issues of material fact, it is best to allow the case to proceed to a jury even in 42 USC § 1983 actions. *(See Swedlund and Hart - Supra).*

This Court is also mindful that the defendants cited several cases in support of their motion for order of summary judgment on issues of qualified immunity, and under "police" powers of the unit of government no compensation is due. The line of cases cited by the defendants in their brief on the above issue are easily distinguished from the facts in the present litigation.

The cases cited by the defendants pertain to factual situations wherein the person law enforcement personnel were attempting to arrest was actually at the

premises damaged and the person sought by law enforcement was either armed, shooting back at police, or ignoring instructions to drop a dangerous weapon, or was about to attack what law enforcement officers thought was an innocent victim.

For example, *(See Ginter v. Stall Cup, 869 F.2d 384 (8th Circuit 1989); Customer Company v. City of Sacramento, 895 P.2d 900 (Cal. 1995))*. In the cases cited by the defendants in their brief, there is no language in these cases wherein a court was asked to adjudicate disputed material facts at the summary judgment phase and, as I stated above, the law in South Dakota is such that when facts are disputed, a § 1983 case should be allowed to proceed to trial.

Finally, this Court has reviewed the statutes and case law pertaining to Defendant Hamlin County. Since there is no vicarious liability regarding a § 1983 action -- unless the defendant participated in, supervised, or had a policy condoning the actions of the Hamlin County Sheriff, liability cannot be imputed on the County. There is nothing in the record before this court which claims or tends to prove that, for example, the Hamlin County Commissioners nor any department heads -- other than the sheriff -- approved, condoned, ordered, or anyway assisted in the damage to plaintiffs' trailer home. Accordingly, this Court will enter an order for summary judgment on behalf of Hamlin County.

CONCLUSION

Based on the foregoing, the plaintiffs' motion for summary judgment is denied. The defendants Hamlin County Sheriff's and the law enforcement officers named in plaintiffs' complaint who have filed a motion for summary judgment is denied. The defendant Hamlin County's motion for summary judgment is granted.

Mr. Strait shall draft an order consistent with this opinion regarding the denial of the defendants' motion for summary judgment. Mr. Moore shall prepare an order consistent with this opinion regarding Hamlin County's motion for summary judgment and an order denying the plaintiffs' motion for summary judgment. Such orders shall be submitted to the Court within 10 days of the date of this opinion.

Robert L. Spears
Circuit Court Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF HAMLIN	)	THIRD JUDICIAL CIRCUIT

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GARETH HAMEN AND SHARLA HAMEN	:	28CIV. 17-11
Plaintiffs,	:	
v.	:	
HAMLIN COUNTY, SOUTH DAKOTA; CHAD SCHLOTTERBECK, HAMLIN COUNTY SHERIFF; and SHERIFF'S DEPUTIES JOHN DOE AND JOHN ROE, et al., individually (names unknown)	:	**STATEMENT OF UNDISPUTED MATERIAL FACTS**
Defendants.	:	

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Defendants offer the following Statement of Undisputed Material Facts pursuant to SDCL § 15-6-56(c)(1).

1. Plaintiffs Gareth and Sharla Hamen own an 85 x 16 foot trailer house located on property they own at 458th Avenue outside Castlewood in Hamlin County, South Dakota. (Cmplt. ¶ 4.)

2. The Hamens' son, Gary Hamen, was living in the trailer house during the events at issue in this lawsuit. (Cmplt. ¶ 10.)

3. On June 9, 2016, there were multiple warrants out for the arrest of Gary Hamen, including a warrant for felony burglary. (Schlotterbeck Aff. ¶ 5.)

4. At around 11:30 a.m. that day, Hamlin County Sheriff Chad Schlotterbeck and Watertown Police Department Detective Chad Stahl met with Gareth Hamen at Gareth's residence in an attempt to locate Gary Hamen. (Schlotterbeck Aff. ¶¶ 3-4.)

5. As Detective Stahl and Sheriff Schlotterbeck were speaking to him, Gareth received a phone call from Gary. (*Id.* ¶ 6.)

6. Gareth asked Gary where he was, and Gary replied that he was at the trailer house, owned by Gareth and Sharla, where Gary was living. Gary could be heard screaming that Gareth needed to come pick him up because the officers were looking for him in connection with some warrants. Gary said he was going to Canada or Mexico because he was not going back to jail. (Schlotterbeck Aff. ¶¶ 6-7.)

7. Sheriff Schlotterbeck asked Gareth if Gary possessed any firearms. Gareth replied that he had not seen Gary's guns, but that Gary had previously bragged about an AR-15 rifle and a Glock .22 handgun. (Schlotterbeck Aff. ¶ 8.)

8. Sheriff Schlotterbeck and Detective Stahl left Gareth's residence and drove to the Sioux Rural Water Plant, near the trailer house where Gary was living. (Schlotterbeck Aff. ¶ 9.) The two then discussed how they were going to take Gary into custody. (*Id.* ¶ 10.)

9. Because of the danger of apprehending someone who is armed, Sheriff Schlotterbeck requested assistance from the Watertown Police Department SWAT team. (Schlotterbeck Aff. ¶¶ 10-11.)

10. Shortly thereafter, the Watertown Police Department SWAT team arrived on scene and assisted with creating a loose perimeter around the property. (Schlotterbeck Aff. ¶ 14.) The SWAT team brought an armored vehicle used to clear structures. (*Id.*)

11. Sheriff Schlotterbeck informed Sergeant Ellis of the Watertown Police Department that Gary Hamen was in possession of firearms, and had threatened to shoot himself and anyone he came into contact with. (*Id.* ¶ 14.)

12. Sheriff Schlotterbeck directed Watertown Police Department Deputy Lantgen to the east side of the trailer house. As they watched the residence, Sheriff Schlotterbeck saw Gary come outside of the trailer house and then go back inside. (Schlotterbeck Aff. ¶¶12-13.)

13. Sergeant Ellis and the Watertown SWAT team took an armored vehicle that they had brought to the trailer house in an effort to make contact with Gary, but Gary did not respond to any of the commands given to come out of the residence. (Schlotterbeck Aff. ¶¶ 14-15.)

14. Sergeant Ellis made numerous attempts to contact Gary through the armored vehicle's PA system, to no avail. While doing so, Ellis was advised that a male matching Gary's description was seen running to the northeast of the property. (Schlotterbeck Aff. ¶¶ 15-16.) Sergeant Ellis drove the armored vehicle to the northeast and met a Castlewood resident, Dana Rhody, on the northeast corner of the section. (*Id.*) Rhody indicated that he had seen a man, who he believed to be Gary Hamen, running towards the west. (*Id.*)

15. Around this same time, Sheriff Schlotterbeck spoke with Tim Hofwalt, Gary Hamen's brother-in-law, who reported that Gary had burst into his residence the night before and said they had to hide him because the officers were looking for him. (Schlotterbeck Aff. ¶¶ 17-19.) Hofwalt reported that Gary had two handguns on his hip, and further reported that he saw a long rifle and three fully loaded magazines in Gary's vehicle. (*Id.*) Hofwalt told Sheriff Schlotterbeck that Gary stated he would not go back to jail, and that he would shoot the officers or anyone else who tried to catch him. (*Id.*) Hofwalt felt that Gary Hamen was high on something, because he was acting crazy and Hofwalt was afraid he was going to hurt someone. Sheriff Schlotterbeck dispatched this information to all relevant law enforcement personnel. (*Id.*)

16. At this point, Sheriff Schlotterbeck requested the assistance of the Codington County Sheriff's Department SWAT team and additional South Dakota Highway Patrol Troopers to ensure that the property was secured and to prevent Gary Hamen from entering Castlewood. (Schlotterbeck Aff. ¶ 20.)

17. A short time later, Julie Hofwalt, Gary's sister, came to Sheriff Schlotterbeck's location and confirmed that Gary had two handguns and was acting violently when he was at her house the previous evening. (Schlotterbeck Aff. ¶ 21-22.) Julie Hofwalt warned Sheriff Schlotterbeck to be careful and to make sure everyone was aware that Gary did not want to go back to jail and could hurt someone. (*Id.*)

18. Sheriff Schlotterbeck advised Codington County Sheriff Wishard that Gary had last been seen in the shelterbelt west of Castlewood, but that it had not yet been cleared. (Schlotterbeck Aff. ¶ 23.) Sheriff Wishard advised Sheriff Schlotterbeck that the Special Response Team ("SRT") would circle around the shelterbelt to look for Gary. (*Id.* ¶ 23.) Codington County brought a second armored vehicle to the search area. (*Id.*)

19. Sergeant Ellis spoke with DCI Agent Kollars about the area and the plans to take Gary into custody. Chief Deputy Sheriff Brad Howell of Codington County would drive one armored vehicle on the west side of the property while Sergeant Ellis drove the other armored vehicle on the east side of the property. (Ellis Aff. ¶ 2, Ex. A.) The deputies patrolled the tree belt which broadcasting through a loudspeaker, attempting to contact Gary. (*Id.*)

20. While driving along the tree belt approximately 60-70 yards behind the trailer house, officers in Codington County's armored vehicle found a black suitcase and a path into the tree belt. (Ellis Aff. ¶ 2, Ex. A.)

21. Officers also found an empty pistol case, confirming the suspicion that Gary Hamen was armed. (Ellis Aff. ¶ 2, Ex. A.)

22. Codington County officers requested that the Watertown armored vehicle come to the west side of the property to assist in recovering the suitcase. (Ellis Aff. ¶ 2, Ex. A.) The Codington County armored vehicle provided cover while the team in the other armored vehicle retrieved the suitcase. (*Id.*) The suitcase contained male clothes, a Crown Royal bag with needles, a phone, and an empty gun case. (*Id.*)

23. Once the tree belts were cleared, Sheriff Schlotterbeck and Sheriff Wishard agreed that the trailer house needed to be cleared next. (Wishard Aff. ¶ 2, Ex. A; Schlotterbeck Aff. ¶ 24.) Sheriff Wishard informed Sheriff Schlotterbeck that the tactical procedure using the armored vehicles was to create communication portholes in the trailer house and to call out any subject or subjects hiding inside. (Wishard Aff. ¶ 2, Ex. A.) This procedure is intended to limit the risk of personnel confronting an armed individual without proper cover. The next step would be to use gas munitions to flush out anyone inside the trailer house. (*Id.*) Gareth Hamen was notified that officers intended to clear the trailer house. (Schlotterbeck Aff. ¶ 25.)

24. Sergeant Ellis was tasked with porting the front door of the trailer house with the ram on the Watertown armored vehicle, while the Codington County armored vehicle would port the east sliding doors on the trailer house. (Ellis Aff. ¶ 2, Ex. A.)

25. Due to the height of the front door and the wooden stairs, the front door could not be ported with the stairs in place. (Ellis Aff. ¶ 2, Ex. A.) The stairs were hooked with the front of the ram and dragged into a field. The stairs were not attached to the house or secured in the ground. Once the stairs were removed, Sergeant Ellis proceeded to push the front door in and back straight out. (*Id.*)

26. The Codington County armored vehicle made two communication portholes on the east side of the trailer house, and also opened the French sliding doors. (Howell Aff. ¶ 2, Ex. A.)

27. Once the communication portholes were made, the Codington County armored vehicle pulled back and ordered Gary out of the house on the loudspeaker for a several minutes with no answer. (Howell Aff. ¶ 2, Ex. A.)

28. After several attempts to get Gary to comply with orders over the loudspeaker, the Codington County team opened a window as the next tactical step would be to inject gas into the house. (Howell Aff. ¶ 2, Ex. A.)

29. At this point, Andy Wicks, who was operating a drone, observed someone walking in the river near the trailer. Sheriff Wishard used the radio to advise all units. (Wishard Aff. ¶ 2, Ex. A.)

30. The person Wicks saw was Gary Hamen. All units converged on near the south perimeter road, and Gary was taken into custody without further incident. (Ellis Aff. ¶ 2, Ex. A; Wishard Aff. ¶ 2, Ex. A.)

31. The Plaintiffs purchased the trailer house on October 3, 1997 from CAJ Enterprise Inc., d/b/a County View Mobile Home Sales, in Sioux Falls, South Dakota. (Plaintiffs' Answers to Defendants Interrogatories and Requests for Production of Documents (First Set), at 3.) (Attached as Exhibit A.)

32. The original cash purchase price of the trailer house was $56,598.50. The purchase was financed by Green Tree Financial Servicing Corporation. The total price (cost of down payment and subsequent monthly payments) was $140,189.20 (Ex. 1 to Plaintiffs' Answers to Defendants Interrogatories and Requests for Production of Documents (First Set).)

33. The Plaintiffs bought the trailer house for their daughter, Julie Hofwalt, who lived there for approximately ten years. After Julie Hofwalt moved out, the trailer house sat vacant for the next ten years, with the exception of Gary Hamen staying there intermittently when he was not on the road working. (Plaintiffs' Answers to Defendants Interrogatories and Requests for Production of Documents (First Set), at 4.)

34. The trailer house was moved to its present location on August 18, 2014, and has not been moved since. (*Id.*)

35. The Plaintiffs have never received rent from any tenant living in the trailer house. (*Id.*)

36. No improvements or repairs have been made to the trailer house since June 9, 2016, and the Plaintiffs assert that the trailer house has been "unlivable" since then. (*Id.* at 4-5.)

37. The Plaintiffs obtained an estimate from Wittnebel Construction for the costs of the repairs to the trailer house. The estimate is for $18,778.61.[1] (*Id.* at Ex. 6.)

[1] The Defendants do not concede that this is the appropriate amount for repairs to the trailer house, and reserve the right to dispute that figure in the event this motion is denied. However, that figure will be accepted for purposes of this motion.

Dated this 8th day of February, 2018.

WOODS, FULLER, SHULTZ & SMITH P.C.

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Attorneys for Defendants Hamlin County and Chad Schlotterbeck

Certificate of Service

I hereby certify that on the 8th day of February 2018 I served a true and correct copy of the foregoing Statement of Undisputed Material Facts using the Odyssey File & Serve system which will automatically send email notification of such service to the following:

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One of the Attorneys for Defendants Hamlin County and Chad Schlotterbeck

STATE OF SOUTH DAKOTA SS COUNTY OF HAMLIN	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
* * * * * * * * * * * * * * * * * GARETH HAMEN AND SHARLA HAMEN Plaintiffs, v. HAMLIN COUNTY, SOUTH DAKOTA; CHAD SCHLOTTERBECK, HAMLIN COUNTY SHERIFF; and SHERIFF'S DEPUTIES JOHN DOE AND JOHN ROE, et al., individually (names unknown) Defendants. * * * * * * * * * * * * * * * * *	28CIV17000011 PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS (FEBRUARY 8, 2018)

Pursuant to SDCL 15-6-56(c)(2), the Plaintiffs, Gareth Hamen and Sharla Hamen, respond to the Defendants' Statement of Undisputed Material Facts dated February 8, 2018, as set forth below. First we will set forth the alleged undisputed material fact followed by the Plaintiff's response. Abbreviations are:

a. Complaint. ("Cmplt.").

b. Answer. ("Ans.").

c. Plaintiffs' Answers to Defendants' Interrogatories and Requests for Production of Documents to Plaintiffs (First Set) dated June 13, 2017. ("Pltf. Ans. & Prod.").

d. Affidavit of Gareth Hamen dated March 13, 2018. ("Hamen Aff.").

e. Affidavit of Tim Hofwalt dated March 14, 2018. ("T. Hofwalt Aff.").

f. Affidavit of Julie Hofwalt dated March 13, 2018. ("J. Hofwalt Aff.").

g. Affidavit of Troy Jurrens dated March 8, 2018. ("Jurrens Aff.").

h. Affidavit of Chad Schlotterbeck in Support of Motion for Summary Judgment dated February 2, 2018 ("Schlotterbeck Aff.").

i. Affidavit of Toby Wishard in Support of Motion for Summary Judgment dated January 30, 2018 ("Wishard Aff.").

j. Affidavit of Brad Howell in Support of Motion for Summary Judgment dated January 30, 2018 ("Howell Aff.").

k. Affidavit of Kirk Ellis in Support of Motion for Summary Judgment dated February 8, 2018 ("Ellis Aff.").

DEFENDANTS' ALLEGED UNDISPUTED MATERIAL FACTS

1. Plaintiffs Gareth and Sharla Hamen own an 85 x 16 foot trailer house located on property they own at 458th Avenue outside Castlewood in Hamlin County, South Dakota. (Cmplt. ¶ 4.)

Response: Admit.

2. The Hamens' son, Gary Hamen, was living in the trailer house during the events at issue in this lawsuit. (Cmplt. ¶ 10.)

Response: Denied.

It was not stated in Plaintiffs' Complaint that Gary Hamen was living in the trailer house. Gary stayed in the house intermittently when he was not working. (Pltf. Ans. & Prod., 8).

3. On June 9, 2016, there were multiple warrants out for the arrest of Gary Hamen, including a warrant for felony burglary. (Schlotterbeck Aff. ¶ 5.)

Response: Denied.

Plaintiffs are without sufficient knowledge to know if multiple warrants were out for the arrest of Gary Hamen. Plaintiff Gareth Hamen was informed law enforcement had an arrest warrant when they came to his house on June 9, 2016. They did not show a warrant. (Hamen Aff., ¶9).

4. At around 11:30 a.m. that day, Hamlin County Sheriff Chad Schlotterbeck and Watertown Police Department Detective Chad Stahl

met with Gareth Hamen at Gareth's residence in an attempt to locate Gary Hamen. (Schlotterbeck Aff. ¶¶ 3-4.)

Response: Admit.

5. As Detective Stahl and Sheriff Schlotterbeck were speaking to him, Gareth received a phone call from Gary. (*Id.* ¶ 6.)

Response: Admit.

6. Gareth asked Gary where he was, and Gary replied that he was at the trailer house, owned by Gareth and Sharla, where Gary was living. Gary could be heard screaming that Gareth needed to come pick him up because the officers were looking for him in connection with some warrants. Gary said he was going to Canada or Mexico because he was not going back to jail. (Schlotterbeck Aff. ¶¶ 6-7.)

Response: Admitted in part, denied in part. Plaintiffs admit to the facts as described except that the use of the work "screaming" is inaccurate.

7. Sheriff Schlotterbeck asked Gareth if Gary possessed any firearms. Gareth replied that he had not seen Gary's guns, but that Gary had previously bragged about an AR-15 rifle and a Glock .22 handgun. (Schlotterbeck Aff. ¶ 8.)

Response: Denied.

Schlotterbeck asked Gareth if he knew if Gary owned any guns. Gareth told them he knew Gary had a few guns, but that Gareth had not seen them. (Hamen Aff. ¶10).

8. Sheriff Schlotterbeck and Detective Stahl left Gareth's residence and drove to the Sioux Rural Water Plant, near the trailer house where Gary was living. (Schlotterbeck Aff. ¶ 9.) The two then discussed how they were going to take Gary into custody. (*Id.* ¶ 10.)

Response: Denied.

The men drove away and parked by the spillway on 184th Street just east of 458th Avenue outside Castlewood. This location is approximately one-fourth of a mile south of the trailer house and the trailer house can be seen from where they parked. (Hamen Aff ¶17). Plaintiffs are without sufficient information to know what they discussed.

9. Because of the danger of apprehending someone who is armed, Sheriff Schlotterbeck requested assistance from the Watertown Police Department SWAT team. (Schlotterbeck Aff. ¶¶ 10-11.)

Response: Denied.

Schlotterbeck asked for assistance from the Watertown Police Department SWAT Team to see if they could get Gary to surrender. (Schlotterbeck Aff. ¶¶ 11.).

With respect to Gary being armed, Schlotterbeck did not know Gary was armed. Schlotterbeck's testimony is that he considered the likelihood Gary was armed. (Schlotterbeck Aff. ¶10).

10. Shortly thereafter, the Watertown Police Department SWAT team arrived on scene and assisted with creating a loose perimeter around the property. (Schlotterbeck Aff. ¶ 14.) The SWAT team brought an armored vehicle used to clear structures. (*Id.*)

Response: Denied.

Law enforcement vehicles did begin arriving and moving around to view the trailer. (Hamen Aff., ¶18). The armored vehicle was called a rescue vehicle by Ellis. (Ellis Aff., Exh. A).

11. Sheriff Schlotterbeck informed Sergeant Ellis of the Watertown Police Department that Gary Hamen was in possession of firearms, and had threatened to shoot himself and anyone he came into contact with. (*Id.* ¶ 14.)

Response: Denied.

Plaintiffs are without sufficient knowledge to know what Schlotterbeck and Ellis said to each other.

Plaintiffs deny Schlotterbeck told Ellis that Gary Hamen was in possession of firearms, and had threatened to shoot himself and anyone he came into contact with. Kirk Ellis has stated the information he received about Gary shooting himself and anyone he comes into contact with came not from Schlotterbeck, but from Chad Stahl at approximately 11:34 a.m., when Ellis talked to Stahl by phone (Ellis Aff., Exh. A).

The first time Schlotterbeck states someone told him Gary was going to shoot himself and anyone he came into contact with was

later in the day when he talked to Tim Howfalt. (Schlotterbeck Aff., ¶18). Tim Hofwalt denies saying that to Schlotterbeck (T. Hofwalt Aff., ¶15).

12. Sheriff Schlotterbeck directed Watertown Police Department Deputy Lantgen to the east side of the trailer house. As they watched the residence, Sheriff Schlotterbeck saw Gary come outside of the trailer house and then go back inside. (Schlotterbeck Aff. ¶¶12-13.)

Response: Admitted in part, denied in part.

Schlotterbeck did write in his report that he saw Gary go outside and return to the trailer house (Schlotterbeck Aff. ¶ 13.) Plaintiff's deny Gary remained in the trailer house. He left and was spotted running toward Castlewood. (Schlotterbeck Aff. ¶¶ 15, 16.)

13. Sergeant Ellis and the Watertown SWAT team took an armored vehicle that they had brought to the trailer house in an effort to make contact with Gary, but Gary did not respond to any of the commands given to come out of the residence. (Schlotterbeck Aff. ¶¶ 14-15.)

Response: Denied.

The statement suggests Gary was in the trailer. Gary did not respond to commands to come out of the residence because he had already left. He was spotted running by Dana Rhody's residence. (Schlotterbeck Aff. ¶ 15).

14. Sergeant Ellis made numerous attempts to contact Gary through the armored vehicle's PA system, to no avail. While doing so, Ellis was advised that a male matching Gary's description was seen running to the northeast of the property. (Schlotterbeck Aff. ¶¶ 15-16.) Sergeant Ellis drove the armored vehicle to the northeast and met a Castlewood resident, Dana Rhody, on the northeast corner of the section. (*Id.*) Rhody indicated that he had seen a man, who he believed to be Gary Hamen, running towards the west. (*Id.*)

Response: Admit.

15. Around this same time, Sheriff Schlotterbeck spoke with Tim Hofwalt, Gary Hamen's brother-in-law, who reported that Gary had burst into his residence the night before and said they had to

hide him because the officers were looking for him. (Schlotterbeck Aff. ¶¶ 17-19.) Hofwalt reported that Gary had two handguns on his hip, and further reported that he saw a long rifle and three fully loaded magazines in Gary's vehicle. (*Id.*) Hofwalt told Sheriff Schlotterbeck that Gary stated he would not go back to jail, and that he would shoot the officers or anyone else who tried to catch him. (*Id.*) Hofwalt felt that Gary Hamen was high on something, because he was acting crazy and Hofwalt was afraid he was going to hurt someone. Sheriff Schlotterbeck dispatched this information to all relevant law enforcement personnel. (*Id.*)

Response: Denied.

Tim Hofwalt reported to Schlotterbeck that Gary was at the Hofwalt house the night before. (T. Hofwalt Aff., ¶14). He did not tell Schlotterbeck, or anyone else, that when Gary was at his house the night before that he burst in, that he was violent, that he asked Tim to hide him, that Tim saw two guns on Gary, that Tim walked Gary to a black car and saw a rifle and ammunition in the car, or that Gary told Tim he would not go back to jail and that he would shoot the cops or anyone else that tried to catch him. (T. Hofwalt Aff., ¶15).

16. At this point, Sheriff Schlotterbeck requested the assistance of the Codington County Sheriff's Department SWAT team and additional South Dakota Highway Patrol Troopers to ensure that the property was secured and to prevent Gary Hamen from entering Castlewood. (Schlotterbeck Aff. ¶ 20.)

Response: Denied.

The Codington County Sheriff's armored vehicle was already at the trailer house before Tim Hofwalt talked go Schlotterbeck. (T. Hofwalt Aff. ¶13).

17. A short time later, Julie Hofwalt, Gary's sister, came to Sheriff Schlotterbeck's location and confirmed that Gary had two handguns and was acting violently when he was at her house the previous evening. (Schlotterbeck Aff. ¶ 21-22.) Julie Hofwalt warned Sheriff Schlotterbeck to be careful and to make sure everyone was aware that Gary did not want to go back to jail and could hurt someone. (*Id.*)

Response: Denied.

Julie Hofwalt did not tell Schlotterbeck Gary had been at her house the night before. She did not know Gary had come to her house the night before. (J. Hofwalt Aff., ¶14). She did not tell Schlotterbeck that Gary had two handguns on his person and was acting violently when he was at her house the night before. She did not tell Schlotterbeck to make sure everyone was aware Gary did not want to go back to jail and that he could hurt someone. (J. Hofwalt Aff., ¶15).

18. Sheriff Schlotterbeck advised Codington County Sheriff Wishard that Gary had last been seen in the shelterbelt west of Castlewood, but that it had not yet been cleared. (Schlotterbeck Aff. ¶ 23.) Sheriff Wishard advised Sheriff Schlotterbeck that the Special Response Team ("SRT") would circle around the shelterbelt to look for Gary. (*Id.* ¶ 23.) Codington County brought a second armored vehicle to the search area. (*Id.*)

Response: Plaintiffs are without sufficient knowledge to know what was discussed among law enforcement. The Codington County armored vehicle was brought in, but it was there before Tim Hofwalt arrived at Gareth Hamen's house. (T. Hofwalt Aff. ¶13).

19. Sergeant Ellis spoke with DCI Agent Kollars about the area and the plans to take Gary into custody. Chief Deputy Sheriff Brad Howell of Codington County would drive one armored vehicle on the west side of the property while Sergeant Ellis drove the other armored vehicle on the east side of the property. (Ellis Aff. ¶ 2, Exh. A.) The deputies patrolled the tree belt which broadcasting through a loudspeaker, attempting to contact Gary. (*Id.*)

Response: Plaintiffs are without sufficient knowledge to know what was discussed among law enforcement. Law enforcement, including armored vehicles were in the area. (T. Hofwalt Aff. ¶¶13, 17).

20. While driving along the tree belt approximately 60-70 yards behind the trailer house, officers in Codington County's armored vehicle found a black suitcase and a path into the tree belt. (Ellis Aff. ¶ 2, Exh. A.)

Response: Admit.

21. Officers also found an empty pistol case, confirming the suspicion that Gary Hamen was armed. (Ellis Aff. ¶ 2, Exh. A.)

Response: Admitted in part, denied in part.

Plaintiffs do not deny that officers found an empty pistol case. They deny that it confirmed Gary was armed. The discovery of the items on the ground outside the trailer only suggest Gary had left the trailer.

22. Codington County officers requested that the Watertown armored vehicle come to the west side of the property to assist in recovering the suitcase. (Ellis Aff. ¶ 2, Exh. A.) The Codington County armored vehicle provided cover while the team in the other armored vehicle retrieved the suitcase. (*Id.*) The suitcase contained male clothes, a Crown Royal bag with needles, a phone, and an empty gun case. (*Id.*)

Response: Admitted in part, denied in part.

Plaintiffs are without sufficient knowledge to know what was discussed among law enforcement. Plaintiffs do not dispute the suitcase contained male clothes, a Crown Royal bag with needles, a phone, and an empty gun case.

23. Once the tree belts were cleared, Sheriff Schlotterbeck and Sheriff Wishard agreed that the trailer house needed to be cleared next. (Wishard Aff. ¶ 2, Exh. A; Schlotterbeck Aff. ¶ 24.) Sheriff Wishard informed Sheriff Schlotterbeck that the tactical procedure using the armored vehicles was to create communication portholes in the trailer house and to call out any subject or subjects hiding inside. (Wishard Aff. ¶ 2, Exh. A.) This procedure is intended to limit the risk of personnel confronting an armed individual without proper cover. The next step would be to use gas munitions to flush out anyone inside the trailer house. (*Id.*) Gareth Hamen was notified that officers intended to clear the trailer house. (Schlotterbeck Aff. ¶ 25.).

Response: Denied.

Plaintiffs are without sufficient knowledge to know what Schlotterbeck and Wishard discussed.

Plaintiffs deny there was a reasonable expectation Gary was in the trailer. Plaintiffs also deny the tactics described were reasonable.

Law enforcement did not clear all the shelterbelts. Both Gareth Hamen and Julie Hofwalt advised law enforcement that they

should look for Gary in the willows west of Gareth's house. Julie also told law enforcement that when Gary was a kid, he liked to play and hide out in those willows. (Hamen Aff. ¶21; J. Hofwalt Aff., ¶22). When Gary was found, he was in the river near the willows west of Gareth's house. (Strait Aff., Exh. A).

An officer did come to Plaintiffs' home and tell Gareth Hamen they were going to enter the house. The officer does not describe how they would enter the trailer and tear out multiple windows and doors. (Hamen Aff. ¶23.)

The statement the "trailer house needed to be cleared next", suggests there was a reasonable expectation Gary was in the trailer. Wishard's affidavit and report does not state Wishard discussed with Schlotterbeck that Gary might have returned to the trailer (Wishard Aff, Exh. A). Wishard's report states he described procedures to call out any subject or subjects that may be hiding inside. (Wishard Aff. ¶ 2, Exh. A) (emphasis added). Schlotterbeck's affidavit states that he decided that since the shelterbelt had been cleared, Gary might have returned to the house. (Schlotterbeck Aff. ¶24.) (emphasis added). According to Wishard, Schlotterbeck and Wishard agreed the trailer should be cleared next, and Wishard made recommendations that Schlotterbeck accepted and authorized, including the procedure of creating portholes in the trailer to call out the subject and limit personnel confronting an armed individual without proper cover. The next step after that would be to use gas munitions to flush out anyone inside. (Wishard Aff., Exh. A). They both claim they agreed this is what was decided, and Schlotterbeck cited the safety of Gary, law enforcement personnel and the public as the reason to use the methods Wishard described. (Wishard Aff., Exh. A; Schlotterbeck Aff., ¶25). The next thing they actually did was to proceed to the Hofwalt residence and clear the premises. (Wishard Aff., Exh. A). They cleared the Hofwalt residence without using any of the tactics they had alleged were necessary to confront Gary. They cleared the Hofwalt residence without causing any damage (J. Hofwalt Aff., ¶19.).

24. Sergeant Ellis was tasked with porting the front door of the trailer house with the ram on the Watertown armored vehicle, while the Codington County armored vehicle would port the east sliding doors on the trailer house. (Ellis Aff. ¶ 2, Exh. A.)

Response: Admitted in part, denied in part.

The front door and east sliding doors were ripped out of the trailer by the armored vehicles described. However, those were not the only holes created in the trailer. (Howell Aff., Exh. A; Ellis Aff., Exh. A).

25. Due to the height of the front door and the wooden stairs, the front door could not be ported with the stairs in place. (Ellis Aff. ¶ 2, Exh. A.) The stairs were hooked with the front of the ram and dragged into a field. The stairs were not attached to the house or secured in the ground. Once the stairs were removed, Sergeant Ellis proceeded to push the front door in and back straight out. (*Id.*)

Response: Admitted in part, denied in part.

Plaintiffs admit Ellis did use the armored vehicle to remove the deck and stairs, and he did port the front door. Plaintiffs deny he did it as described. This point of entry into the house from the west was with the armored vehicle through the front door, which had a deck and stairs in front of it. (Ellis Aff., Exh. A, ¶ 29). The deck was not just "removed." Ellis dragged the deck and stairway far away from the house out into the adjoining soybean field, which destroyed the stairway and damaged the deck. The armored vehicle did not go straight in and out of the doorway, only knocking in the door. The vehicle damaged the wall and floor surrounding the doorway, hitting it with such great force it bent the frame of the trailer and knocked the trailer off the foundation on south end. This point of entry was the most obstructed point on the west side of the house. (Hamen Aff. ¶26; Hamen Aff. Exh. D). The armored vehicles crushed the septic tank for the trailer. The tank must be replaced. (Hamen Aff. ¶31; Hamen Aff. Exh. D).

26. The Codington County armored vehicle made two communication portholes on the east side of the trailer house, and also opened the French sliding doors. (Howell Aff. ¶ 2, Exh. A.)

Response: Admitted, in part, denied in part.

Plaintiffs admit the armored vehicle was used to open up three areas on the east side of the trailer. Plaintiffs deny they were simply "communication portholes" and the sliding doors were "opened". The armored vehicle did significantly more damage than described. They tore out several doors and windows with armored

vehicles, and caused other significant damage to the trailer in that process. (Hamen Aff. ¶25; Hamen Aff. Exh. D).

27. Once the communication portholes were made, the Codington County armored vehicle pulled back and ordered Gary out of the house on the loudspeaker for a several minutes with no answer. (Howell Aff. ¶ 2, Exh. A.)

Response: Admitted in part, denied in part.

Plaintiffs admit they ordered Gary out of house on the loudspeaker. Gary could not have answered, because he was not in the trailer. (Hamen Aff., ¶30, Wishard Aff., Exh. A).

The armored vehicles did significantly more damage than making communication portholes. They tore out several doors and windows with armored vehicles, and caused other significant damage to the trailer in that process. (Hamen Aff. ¶25; Hamen Aff. Exh. D).

28. After several attempts to get Gary to comply with orders over the loudspeaker, the Codington County team opened a window as the next tactical step would be to inject gas into the house. (Howell Aff. ¶ 2, Exh. A.)

Response: Admitted in part, denied in part.

Plaintiffs admit they ordered Gary out of house on the loudspeaker. They deny Gary did not answer. Gary could not have answered, because he was not in the trailer. (Hamen Aff., ¶30, Wishard Aff., Exh. A).

The armored vehicles did significantly more damage than making communication portholes. They tore out several doors and windows with armored vehicles, and caused other significant damage to the trailer in that process. (Hamen Aff. ¶25; Hamen Aff. Exh. D)

Plaintiffs were not told by law enforcement they knew Gary was in the house. They were told law enforcement was going to enter the house. (Hamen Aff. ¶23). They are also without sufficient knowledge to agree the next tactical step would be to inject gas into the house. It was unnecessary given the fact there was no reasonable suspicion that Gary was in the house, as he was seen running in the area. (Schlotterbeck Aff. ¶ 15). In addition, there had been communications among law enforcement that they knew Gary was not in the trailer house immediately before they began destroying it. (Jurrens Aff. ¶5).

29. At this point, Andy Wicks, who was operating a drone, observed someone walking in the river near the trailer. Sheriff Wishard used the radio to advise all units. (Wishard Aff. ¶ 2, Exh. A.)

Response: Admit.

30. The person Wicks saw was Gary Hamen. All units converged near the south perimeter road, and Gary was taken into custody without further incident. (Ellis Aff. ¶ 2, Exh. A; Wishard Aff. ¶ 2, Exh. A.)

Response: Admit.

31. The Plaintiffs purchased the trailer house on October 3, 1997 from CAJ Enterprise Inc., d/b/a County View Mobile Home Sales, in Sioux Falls, South Dakota. (Plaintiffs' Answers to Defendants Interrogatories and Requests for Production of Documents (First Set), at 3.) (Attached as Exhibit A.)

Response: Admit.

32. The original cash purchase price of the trailer house was $56,598.50. The purchase was financed by Green Tree Financial Servicing Corporation. The total price (cost of down payment and subsequent monthly payments) was $140,189.20 (Exh. 1 to Plaintiffs' Answers to Defendants Interrogatories and Requests for Production of Documents (First Set).)

Response: Admit.

33. The Plaintiffs bought the trailer house for their daughter, Julie Hofwalt, who lived there for approximately ten years. After Julie Hofwalt moved out, the trailer house sat vacant for the next ten years, with the exception of Gary Hamen staying there intermittently when he was not on the road working. (Plaintiffs' Answers to Defendants Interrogatories and Requests for Production of Documents (First Set), at 4.).

Response: Admit.

34. The trailer house was moved to its present location on August 18, 2014, and has not been moved since. (*Id.*)

Response: Admit.

35. The Plaintiffs have never received rent from any tenant living in the trailer house. (*Id.*)

Response: Admit.

36. No improvements or repairs have been made to the trailer house since June 9, 2016, and the Plaintiffs assert that the trailer house has been "unlivable" since then. (*Id.* at 4-5.)

Response: Admit.

37. The Plaintiffs obtained an estimate from Wittnebel Construction for the costs of the repairs to the trailer house. The estimate is for $18,778.61.1 (*Id.* at Exh. 6.).

Response: Admit.

Dated at Watertown, South Dakota, this 21st day of March, 2018.

AUSTIN, HINDERAKER, HOPPER,
STRAIT & BENSON LLP

BY: _____
David R. Strait
Attorneys at Law
25 1st Ave. S. W., P. O. Box 966
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CERTIFICATE OF SERVICE

David R. Strait, one of the attorneys for the Plaintiff, certifies that the above Plaintiffs' Response to Defendants' Statement of Undisputed Material Facts (February 8, 2018) was served on the Defendants by Notice of Electronic Filing Generated by the Odyssey File & Serve system, intended as service by electronic mail to the following:

James E. Moore	Joel E. Engel III
Attorney at Law	Attorney at Law
James.Moore@woodsfuller.com	Joel.Engel@woodsfuller.com

this 21st day of March, 2018.

_____
David R. Strait

STATE OF SOUTH DAKOTA SS COUNTY OF HAMLIN	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
* * * * * * * * * * * * * * * * * GARETH HAMEN AND SHARLA HAMEN * Plaintiffs, * v. * HAMLIN COUNTY, SOUTH DAKOTA; * CHAD SCHLOTTERBECK, HAMLIN * COUNTY SHERIFF; and SHERIFF'S * DEPUTIES JOHN DOE AND JOHN * ROE, et al., individually * (names unknown) * Defendants. * * * * * * * * * * * * * * * * * *	28CIV17000011 PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiffs submit the following statement of undisputed facts as required by SDCL 15-6-56(c) for their Motion for Summary Judgment dated March 21, 2018.

ABBREVIATIONS:

- Affidavit of Chad Schlotterbeck in Support of Motion for Summary Judgment dated February 2, 2018 ("Schlotterbeck Aff.").
- Affidavit of Toby Wishard in Support of Motion for Summary Judgment dated January 30, 2018 ("Wishard Aff.").
- Affidavit of Brad Howell in Support of Motion for Summary Judgment dated January 30, 2018 ("Howell Aff").
- Affidavit of Kirk Ellis in Support of Motion for Summary Judgment dated February 8, 2018("Ellis Aff.").
- Plaintiffs' Answers to Defendants' Interrogatories and Requests for Production of Documents to Plaintiffs (First Set) dated June 13, 2017 ("Pl. Ans. to Interrog.").
- Affidavit of Gareth Hamen dated March 13, 2018 ("Hamen Aff.).
- Affidavit of Julie Hofwalt dated March 13, 2018 ("J. Hofwalt Aff.").

- Affidavit of Tim Hofwalt dated March 14, 2018 ("T. Hofwalt Aff.").
- Affidavit of Troy Jurrens dated March 8, 2018 ("Jurrens Aff.").
- (Defendants') Statement of Undisputed Material Facts dated February 8, 2018 ("SUMF").

FACTS:

1. On June 9, 2016, around 11:30 a.m. or noon, Sheriff Chad Schlotterbeck ("Schlotterbeck"), and Watertown Police Department Detective Chad Stahl ("Stahl") arrived at the residence of Gareth Hamen ("Gareth") in Castlewood South Dakota, to talk to Gareth about the whereabouts of his son, Gary Hamen ("Gary"). The two officers claimed to have a warrant for Gary's arrest (Schlotterbeck Aff., ¶¶3-4; Hamen Aff. ¶9).

2. While at Gareth's house, the two men did not tell Gareth they had reason to believe Gary was in possession of firearms and that he had threatened to shoot himself or anyone else he came into contact with. (Hamen Aff., ¶10).

3. While the officers were at Gareth's house, Gareth's phone rang. It was Gary calling. Gary wanted Gareth to bring him a car so he could run from the police. There was no indication he was suicidal or going to hurt someone. (Hamen Aff., ¶11; Schlotterbeck Aff., ¶¶6-7).

4. Gareth told Schlotterbeck and Stahl that Gary was at a trailer on a nearby property. (Hamen Aff., ¶12; Schlotterbeck Aff., ¶¶6-7).

5. Gary Hamen was not living in the trailer house. Gareth allowed Gary to stay in the house intermittently when he was not working. (Pltf. Ans. & Prod., 8; SUMF ¶33).

6. Schlotterbeck asked Gareth about firearms Gary may have. Gareth said he knew Gary had a few guns, but that Gareth had not seen them. (Schlotterbeck Aff., ¶8; Hamen Aff. ¶10).

7. Schlotterbeck and Stahl left Gareth's home, drove away and parked nearby. Gareth saw them park by the spillway 184th Street just east of 458th Avenue outside Castlewood. (Hamen Aff. ¶17).

8. Schlotterbeck asked the Watertown Police Department SWAT Team for assistance to see if they could get Gary to surrender. (Schlotterbeck Aff., ¶11).

9. Stahl called Kirk Ellis at Watertown Police Department for assistance around 11:34 a.m. (Ellis Aff., Exh. A).

10. Before Ellis and the Watertown SWAT personnel arrived, Schlotterbeck observed Gary come outside of the trailer on the east side, and then go back inside the trailer. (Schlotterbeck Aff., ¶¶12-13).

11. A loose perimeter was set up around the trailer, but manpower was not immediately available to fully surround it (Ellis Aff., Exh. A).

12. The perimeter was tightened later by officers so they could see all sides of the trailer (Ellis Aff., Exh. A).

13. Ellis approached the trailer in an armored vehicle and used a public address system to call Gary out of the house. While this was occurring, Gary had been spotted on foot running toward Castlewood (Schlotterbeck Aff., ¶15; Ellis Aff., Exh. A).

14. After Gary left the trailer, Schlotterbeck parked his car at the intersection of Elm Avenue and 184th Street in Castlewood. (Schlotterbeck Aff., ¶17). He talked to Gareth Hamen's son-in-law and daughter, Tim Hofwalt and Julie Hofwalt, separately while he was parked there. (T. Hofwalt Aff ¶14; J. Hofwalt Aff ¶13;).

15. Tim Hofwalt and Julie Hofwalt were both at Gareth Hamen's house on June 9, 2016. Both arrived after Gary had left the trailer. (T. Hofwalt Aff ¶12, 17; J. Hofwalt Aff ¶16;).

16. Two or three minutes after Tim Hofwalt arrived at Gareth Hamen's house, someone pounded on the door. The person at the door was an officer who wanted to know who Tim was because he thought Tim might be Gary. The officer said the reason he was checking was because Tim drove up in a black car and the officer had been told Gary has a black car. (T. Hofwalt Aff. ¶12).

17. Before talking to Schlotterbeck that day, Tim Hofwalt observed law enforcement vehicles and people everywhere around the trailer. Two armored vehicles brought by the Watertown Police Department and Codington County Sheriff's Office were already there. The black one was on 458th Avenue and the tan one was in the driveway in front of the trailer. (T. Hofwalt Aff., ¶13).

18. Tim Hofwalt went outside Gareth Hamen's house and was called over by Schlotterbeck, who was parked on the corner. (T. Hofwalt Aff., ¶14). During their conversation, Hofwalt told Schlotterbeck that Gary Hamen had been to the Hofwalt residence the night before. (Schlotterbeck Aff., ¶17; T. Hofwalt Aff., ¶14).

19. All Schlotterbeck wanted to know from Tim is he had seen Gary with any guns. Tim told Schlotterbeck that Gary had a handgun when he was at his house the night before. (T. Hofwalt Aff., ¶14).

20. Tim went back into Gareth's house and continued watching events out the window. The trailer house had not been damaged yet. There were a lot of people walking around the river. (T. Hofwalt Aff., ¶17).

21. Shortly after Tim arrived at Gareth Hamen's, Tim's wife, Julie Howfalt, arrived at Gareth's house. Tim told Julie that Gary had been at their house the night before. (T. Hofwalt Aff.,

¶17). Julie did not know about Gary coming by the house until Tim told her while she was at Gareth Hamen's. (J. Hofwalt Aff. ¶14).

22. While talking to one of three officers he encountered that day, Tim Hofwalt heard a transmission come from one of the officer's radio indicating the trailer was cleared and Gary was seen running toward the river. (T. Hofwalt Aff., ¶16).

23. Tim left Gareth's house about 20 minutes after Julie arrived. When he left, there were still people on foot and in vehicles all around the trailer house and the area. He also saw a 4-wheeler in the area. (T. Hofwalt Aff., ¶18). At this point, the trailer had been cleared, Gary had been spotted running in the area and the trailer was surrounded. (T. Hofwalt Aff., ¶¶16, 18).

24. Later in the day, Julie Hofwalt was at home with her children, sitting at the end of the driveway and watching all the law enforcement vehicles moving around north of her house and around the trailer. (J. Hofwalt Aff., ¶17). The trailer is about 600 yards north of Julie Hofwalts' home. (J. Hofwalt Aff., ¶10). There were vehicles, 4-wheelers and people moving around on the ground. Someone launched a small boat into the river at the spillway south of the trailer. (J. Hofwalt Aff., ¶18).

25. After searching for hours, Schlotterbeck decided to clear the trailer house because Gary might have returned to it (Schlotterbeck Aff., ¶24), although the trailer had been cleared, Gary had been spotted running in the area and the trailer was surrounded and secured. (T. Hofwalt Aff., ¶¶16, 18, Jurrens Aff., ¶5).

26. Wishard advised Schlotterbeck that tactical procedure would be to create communication portholes in the trailer to call out any subject or subjects that may be hiding inside. (Wishard Aff., Exh. A).

27. Schlotterbeck accepted Wishard's advice and gave permission to move forward with the tactics Wishard laid forth (Wishard Aff., Exh. A; Schlotterbeck Aff., ¶24).

28. Before briefing his SRT staff on the strategy authorized by Schlotterbeck, Wishard and others, including an armored vehicle (J. Hofwalt Aff. ¶18), moved to the Tim and Julie Hofwalt residence. (Wishard Aff., Exh. A).

29. With Julie Hofwalt's consent (J. Hofwalt Aff., ¶18), law enforcement personnel cleared the house, camper and outbuildings at the Hofwalt farm and before returning to the trailer. (Wishard Aff., Exh A.).

30. While law enforcement cleared the Hofwalt house, they searched the entire property on foot, except a locked building. They were calm and respectful and did not damage anything during the search. (J. Hofwalt Aff., ¶19).

31. Tayt Alexander told Gareth they were going to enter the trailer house, but did not explain how they would enter the house. (Hamen Aff., ¶23).

32. Throughout the day of June 9, 2016, Troy Jurrens ("Jurrens"), who operates Castle Woodworks at his home, and who lives across the road from Gareth to the south, was in his shop watching what was going on in the area and listening to conversations among law enforcement personnel on a scanner (Jurrens Aff., ¶¶3-4).

33. Moments before the two armored vehicles started smashing the trailer, Jurrens heard someone announce on the radio that they were "going back to the trailer". Then another voice on the radio said "he's not in the trailer". The first voice answered back saying they were going back anyway. At that point, there was already a car sitting at the trailer. They had already secured

the trailer so that Gary could not go back in it if he was not already there. It was then that the armored vehicles and several other cars converged on the trailer. Shortly after that Jurrens heard someone on the radio calling out what seemed to me, positions they wanted others to be in but it was phrased in a code he could not understand. At that point, someone said "switchover" and at that point communications became garbled. The armored vehicles then started smashing the trailer. (Jurrens Aff., ¶5). The radio transmissions heard by Jurrens are consistent with the radio transmissions heard by Tim Hofwalt. (T. Hofwalt Aff., ¶16).

34. Two armored vehicles were used to open and remove several windows and doors in the trailer. (Ellis Aff., Exh. A; Howell Aff., Exh. A).

35. A drone, equipped with a camera, was being used to film the armored vehicles as they opened the trailer. Just after the Codington County Sheriff's vehicle made a third opening on the east side of the house, the drone was raised to pan the area and two minutes and thirty seconds after the camera was raised, Gary could be seen walking in the river. He was not in the trailer. (Wishard Aff., Exh. A). Wishard watched the camera while it followed Gary. He directed units in the area and Gary was taken into custody. (Wishard Aff., Exh. A).

36. The area was searched with dogs and people several days following June 9, and no firearms were found. (Ellis Aff., Exh. A).

37. Gareth and Sharla Hamen's property, including the underground septic tank, the location of which was known by law enforcement (Ellis Aff. Exh. A), was damaged significantly by law enforcement personnel authorized by Schlotterbeck. (Hamen Aff., ¶25).

38. The cost of repairs to the trailer, estimated by Barret Wittnebel (of Wittnebel Construction), is $18,778.61. (Pl. Ans. to Interrog., Ex. 6).

Dated at Watertown, South Dakota this 21st day of March, 2018.

AUSTIN, HINDERAKER, HOPPER, STRAIT & BENSON LLP

BY: _____
David R. Strait
Attorneys at Law
25 1st Ave. S. W., P. O. Box 966
Watertown, SD 57201-0966

CERTIFICATE OF SERVICE

David R. Strait, one of the attorneys for the Plaintiffs, certifies that the above Plaintiff's Statement of Undisputed Material Facts was served on the Defendants by the Odyssey File & Serve system, intended as service by electronic mail to the following:

James E. Moore	Joel E. Engel III
Attorney at Law	Attorney at Law
James.Moore@woodsfuller.com	Joel.Engel@woodsfuller.com

this 21st day of March, 2018.

_____
David R. Strait

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF HAMLIN	)	THIRD JUDICIAL CIRCUIT

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

GARETH HAMEN AND SHARLA HAMEN	:	28CIV. 17-11
Plaintiffs,	:	
v.	:	
HAMLIN COUNTY, SOUTH DAKOTA; CHAD SCHLOTTERBECK, HAMLIN COUNTY SHERIFF; and SHERIFF'S DEPUTIES JOHN DOE AND JOHN ROE, et al., individually (names unknown)	:	**DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS**
Defendants.	:	

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

Under SDCL § 15-6-56(c), Defendants Chad Schlotterbeck and Hamlin County submit this response to Plaintiffs' Statement of Undisputed Material Facts.

1. Undisputed.

2. Undisputed.

3. Undisputed, except that there were indications other than during that conversation that Gary was threatening to hurt others. (Ellis Aff. Ex A.)

4. Undisputed.

5. Undisputed.

6. Undisputed.

7. Undisputed, except that Sheriff Schlotterbeck described a different location in paragraphs 9-10 of his affidavit.

8. Undisputed.

9. Undisputed.

10. Undisputed.

11. Undisputed.

12. Undisputed.

13. Undisputed.

14. Undisputed.

15. Undisputed.

16. Undisputed.

17. Undisputed.

18. Undisputed.

19. Undisputed.

20. Undisputed.

21. Disputed. When Sheriff Schlotterbeck talked to Julie, she told him that Gary had been at her house the night before with two guns and that he was acting violently. (Schlotterbeck Aff. ¶ 21.)

22. Undisputed.

23. Undisputed except for the reference that the trailer had been cleared. The timing is not precise, but the trailer was not cleared until the armored vehicles were used later in the afternoon and Gary was seen by drone running in the river. (Ellis Aff. Ex. A; Schlotterbeck Aff. Ex. A.)

24. Undisputed except for the time reference.

25. Undisputed that Sheriff Schlotterbeck decided that the trailer needed to be cleared. Disputed that the trailer had already been cleared and secured. (Schlotterbeck Aff. ¶ 24.)

26. Undisputed.

27. Undisputed.

28. Disputed because the sentence has no subject and is grammatically unclear.

29. Undisputed.

30. Undisputed.

31. Undisputed for purposes of the motion.

32. Undisputed for purposes of the motion.

33. Disputed. (Schlotterbeck Second Aff. ¶¶ 3-4.)

34. Undisputed.

35. Undisputed.

36. Disputed. The Ellis report says that a Glock pistol was found in the search. (Ellis Aff. Ex. A.)

37. Undisputed.

38. Undisputed.

Dated this 28th day of March, 2018.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore
James E. Moore
Joel E. Engel III
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Fax (605) 339-3357
Email James.Moore@woodsfuller.com
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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March 2018 I served a true and correct copy of the foregoing Defendants' Response to Plaintiffs' Statement of Undisputed Material Facts using the Odyssey File & Serve system which will automatically send email notification of such service to the following:

David R. Strait
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/s/ James E. Moore
One of the Attorneys for Defendants
Hamlin County and Chad Schlotterbeck

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF HAMLIN	)	THIRD JUDICIAL CIRCUIT

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GARETH HAMEN AND SHARLA HAMEN	:	28CIV. 17-11
Plaintiffs,	:	
v.	:	
HAMLIN COUNTY, SOUTH DAKOTA; CHAD SCHLOTTERBECK, HAMLIN COUNTY SHERIFF; and SHERIFF'S DEPUTIES JOHN DOE AND JOHN ROE, et al., individually (names unknown)	:	**SECOND AFFIDAVIT OF CHAD SCHLOTTERBECK**
Defendants.	:	

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

STATE OF SOUTH DAKOTA	)	
	:SS	
COUNTY OF HAMLIN	)	

1. I am the Sheriff of Hamlin County and previously signed an affidavit dated February 2, 2018. I have personal knowledge of the facts stated in this affidavit.

2. I have reviewed the affidavit of Troy Jurrens dated March 8, 2018.

3. In paragraph 5, he refers to a radio conversation between two speakers about whether Gary Hamen was in the trailer owned by his parents. I was not one of the speakers and I did not hear on June 9, 2016, the conversation Jurrens describes.

4. I have reviewed the available recording of radio traffic that day. A copy of what I reviewed is attached on a disc. I did not hear on the recording the conversation that Jurrens describes.

Filed: 3/28/2018 4:02:14 PM CST Hamlin County, South Dakota 28CIV17-000011

Dated this 27 day of March, 2018.

Chad Schlotterbeck

Subscribed and sworn to before me
this 27 day of March, 2018.

Notary Public – South Dakota
8|16|19

HEIDI TRAUTNER
Notary Public
SEAL
South Dakota

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March 2018 I served a true and correct copy of the foregoing Second Affidavit of Chad Schlotterbeck using the Odyssey File & Serve system which will automatically send email notification of such service and the referenced recording on disc by separate email transmission to the following:

David R. Strait
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/s/ James E. Moore
One of the Attorneys for Defendants
Hamlin County and Chad Schlotterbeck

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

Appeal No. 28671

GARETH HAMEN AND SHARLA HAMEN,

Appellees,

v.

HAMLIN COUNTY, SOUTH DAKOTA; CHAD SCHLOTTERBECK, HAMLIN COUNTY SHERIFF; AND SHERIFF'S DEPUTIES JOHN DOE AND JOHN ROE, et al., individually (names unknown),

Appellants.

Appeal from the Circuit Court
Third Judicial Circuit
Hamlin County, South Dakota

THE HONORABLE ROBERT L. SPEARS
Circuit Court Judge

APPELLEES' BRIEF

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Order Granting Petition for Allowance of Appeal From Intermediate Order
Filed on September 7, 2018

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JURISDICTIONAL STATEMENT

The Circuit Court had jurisdiction because the cause of action arose in Hamlin County, South Dakota. SDCL 15-5-2. Plaintiffs/Appellee's complied with all conditions precedent to this suit by giving timely notice to Defendant Hamlin County of potential claims pursuant to SDCL §§ 3-21-2 and 3-21-3.

An Order Denying Summary Judgment was entered on July 13, 2018 (SR 392.), denying Defendant's/Appellant's motion. Notice of Entry of Order Denying Summary Judgment was served on July 16, 2018. (SR 396.) Appellants filed Defendant's Petition for Permission to Take Discretionary Appeal on July 27, 2018. 15-26A-13. The Supreme Court granted permission to take the appeal on September 7, 2018. (SR 404.)

STATEMENT OF THE ISSUES

1. Law enforcement, by unlawfully exercising police power, commits a constitutional taking, violation of Appellees' constitutional rights, and violation of 42 U.S.C. §1983. Appellant authorized the use of excessive force to enter and destroy a trailer home owned by Appellees while searching for Appellees' son during the execution of an arrest warrant. Did Appellant exercise an invalid, improper or excessive exercise of police power entitling Appellees to compensation?

   The circuit court found that Hamens' rights were violated by Schlotterbeck.

   Cody v. Leapley, 476 N.W.2d 257, 260 (S.D.,1991)
   Swedlund v. Foster, 2003 SD 8, 657 N.W.2d 39
   SD CONST Art. 6, § 13
   USCA CONST Amend. IV
   USCA CONST Amend. XIV
   42 U.S.C. §1983

2. Qualified immunity does not shield Appellant from an action pursuant to 42 U.S.C. §1983, when he does not act in an objectively reasonable manner. An affirmative defense of qualified immunity is analyzed as follows: 1. Have plaintiffs claimed a violation of a constitutional right? 2. Was the constitutional right clearly established? 3. Would a reasonable officer (using a two-part objectively reasonable test) know that the alleged actions violated the clearly established constitutional right?

The trial court found in favor of Appellees under the first two prongs of the test. As to the third prong, or the objectively reasonable test, the trial court followed the guidance of the South Dakota Supreme Court in deciding that the disputed material facts must be resolved by the trier of fact.

Swedlund v. Foster, 2003 S.D. 8, 657 N.W.2d 39
SD CONST Art. 6, § 13
USCA CONST Amend. IV
USCA CONST Amend. XIV
42 U.S.C. §1983

STATEMENT OF THE CASE

Hamlin County Sheriff Chad Schlotterbeck ("Schlotterbeck") ordered intentional destruction of a trailer home by law enforcement officers while searching for Hamens' son, Gary Hamen ("Gary"). (SR 2-26.). This action violated Hamens' rights under the Constitution of the State of South Dakota, Article VI, 13., and the Fourth and Fourteenth Amendments to the Constitution of the United States, and subjects Schlotterbeck to liability under 42 U.S.C. §1983.

After a hearing on cross-motions for summary judgment on April 4, 2018, the Circuit Court issued a letter dated June 29, 2018, dismissing Defendant Hamlin County, and denying both Hamens' and Schlotterbeck's motions. (SR 375-387.)

STATEMENT OF THE FACTS

Hamens own a trailer house (SR 206; 265-266.) located near Castlewood, South Dakota (SR 206).

On June 9, 2016, around 11:30 a.m. or noon, Sheriff Chad Schlotterbeck ("Schlotterbeck"), and Watertown Police Department Detective Chad Stahl ("Stahl")

arrived at the residence of Gareth Hamen ("Gareth") in Castlewood South Dakota, and talked to Gareth about the whereabouts of his son, Gary Hamen ("Gary"). The men claimed to have a warrant for Gary's arrest. (SR 149; 206-207; 266.) They did not tell Gareth they had reason to believe Gary was in possession of firearms and that he had threatened to shoot himself or anyone else. (SR 266; 348.) While they were talking, Gary called Gareth. (SR 207.) Gary wanted Gareth to bring him a car so he could run from police. (SR 207). There was no indication during that conversation that Gary was suicidal or going to hurt someone. (SR 150; 266; 348.)

Gareth told Schlotterbeck and Stahl that Gary was at a trailer on a nearby property. (SR 150; 267; 348.) The trailer was visible from Gareth's house. (SR 267.) Gary Hamen was not living in the trailer house, but Gareth allowed Gary to stay in the house intermittently when he was not working. (SR 308, 348.) The trailer belonged to Gareth. (SR 206; 265-266.) He had moved it to that site and was fixing it up so he could rent it out. (SR. 266.)

Schlotterbeck asked Gareth about firearms Gary may have. Gareth said he knew Gary had a few guns but he has never seen them. (SR 150; 266; 348.)

Schlotterbeck and Stahl left Gareth's home, drove away and parked nearby. (SR 267; 348.) Schlotterbeck asked the Watertown Police Department SWAT Team for assistance to get Gary to surrender. (SR 150; 348.) Stahl called Kirk Ellis ("Ellis"), of the Watertown Police Department, asking for the assistance around 11:34 a.m. (SR 138.) Before Ellis and the Watertown SWAT personnel arrived, Schlotterbeck observed Gary

come outside of the trailer on the east side, and then go back inside the trailer. (SR 150-151; 349.)

A loose perimeter was set up around the trailer, but man power was not immediately available to fully surround it. (SR 138; 349.) That is how Gary had opportunity to leave the trailer. After Gary left, the perimeter was tightened by officers, so they could see all sides of the trailer, (SR 139; 349.) thereby preventing Gary from returning. Not yet knowing that Gary had left the trailer, Ellis approached the trailer in an armored vehicle and used a public-address system to call Gary out of the house. While this was occurring, Gary had been spotted on foot running toward Castlewood. (SR 139; 151; 349.) Ellis left the trailer yard and drove to the area where Gary was spotted. He talked to Castlewood resident Dana Rhody, who said he knew Gary, and had seen him running. (SR 151; 139; 209.)

After Gary left the trailer, Schlotterbeck parked his car at the intersection of Elm Avenue and 184th Street in Castlewood, (SR 151; 349.) at the corner of Gareth's yard. (SR 260.) The terrain in this area is flat and the trailer can be seen approximately 600 feet northwest of Gareth's house. (SR 267.)

Hamens' son-in-law, Tim Hofwalt ("Tim"), was called home from work to rural Castlewood by his step-son, Tyler, because of all the law enforcement vehicles in the area. (SR 259.) Tim was routed through Castlewood by law enforcement, and as he drove by, he decided to stop at Gareth's house. (SR 259-260.) An officer pounded on the door minutes after Tim arrived. The officer wanted to identify Tim because he drove up in a black car and the officer had been told Gary has a black car. (SR 260.)

Tim looked out the window from Gareth's house and saw law enforcement vehicles and people everywhere. Two armored vehicles brought by the Watertown Police Department and Codington County Sheriff's Office were already there. The black one was on 458th Avenue and the tan one was in the driveway in front of the trailer. (SR 260.)

Tim went outside of Gareth's house and saw Schlotterbeck parked at the intersection Elm Avenue and 184th Street, on the corner of Gareth's yard. Schlotterbeck called Tim over. (SR 260; 349.)

During their conversation, Tim told Schlotterbeck that Gary Hamen had been to his house the night before. (SR 151; 260; 349.) All Schlotterbeck wanted to know from Tim is whether he had seen Gary with any guns. Tim said Gary had a handgun with him. (SR 260; 349.) The rest of the conversation between Schlotterbeck and Tim is disputed.

Schlotterbeck claims Tim said: Gary "burst" into his house; Gary told Tim he had to hide Gary because the cops were looking for him; Tim saw two handguns on Gary; Tim walked Gary to his car and saw a rifle and three fully loaded magazines in the passenger seat of Gary's car; Gary said he was not going back to jail and that he would shoot the cops or anyone else that tried to catch him; Tim thought Gary was high; and Gary was acting like a crazy man and Tim was afraid Gary was going to hurt someone. (SR 151-152.) Tim denies saying all of these things, except that the did tell Schlotterbeck that he thought Gary was high. (SR 260.)

After talking with Schlotterbeck about what happened the night before, Tim returned to Gareth's house and watched events out the window. He saw the trailer house,

which had not been damaged yet. The perimeter around the trailer was secured. He also saw a lot of people walking around the river, which is near the trailer. Shortly after that, his wife, Julie Hofwalt ("Julie") arrived at Gareth's house. It was then that Tim told Julie that Gary had been at their house the night before. (SR 261; 349.) Gary and Julie are siblings. (SR 261.)

While talking to one of three officers he encountered that day, Tim heard a transmission come from one of the officer's radio indicating the trailer was cleared and Gary was seen running toward the river. (SR 260; 349.) This is consistent with what Dana Rhody told Ellis. (SR 151; 139; 209.)

Tim left Gareth's house about 20 minutes after Julie arrived. (SR 349.) There were still people on foot and in vehicles all around the trailer house and the area. He also saw a 4-wheeler in the area. (SR 261.). The trailer was surrounded. (SR 260; 261; 349) Tim went back to work in Watertown and punched in around 3:15 P.M. (SR 261.)

Julie Hofwalt ("Julie"), Gareth and Sharla Hamens' daughter, was also called home from work that day by Tyler. (SR 251.) When she arrived, she went into the house. While there, Gareth called her and told her Tyler was at his house. (SR 251-251-252).

Julie's home is about 600 yards south of the trailer. (SR 251; 349). After talking to Gareth, she got in her car and drove to Gareth's, but was stopped at the corner north of her house by an officer who told her she needed to go south and around to get to Gareth's. (SR 251-252.)

On the way to Gareth's house, Julie was stopped again, this time by Schlotterbeck. (SR 252.) Julie and Schlotterbeck disagree about what was said.

Schlotterbeck claims Julie told him to make sure everyone was aware Gary did not want to go back to jail; that he could hurt someone; and that Gary had been at her house the night before. (SR 152.) Julie denies making these statements (SR 252.) At this point in time she did not know Gary had been at her house the night before. (SR 252.) She learned about that when she got inside Gareth's house and talked to Tim. (SR 261.)

While at Gareth's house, Julie and Gareth both told the officers it was likely Gary was in the willow grove to the west of Gareth's house alongside the river. (SR 267-268; 253-254.)

Julie went home and sat at the end of the driveway and watched all the law enforcement vehicles moving around north of her house and around the trailer. (SR 253; 349.) There were vehicles, 4-wheelers and people moving around on the ground. (SR 253; 349.) She saw someone launch a small boat into the river at the spillway south of the trailer. (SR 253; 349.) After a while, she went back into the house. (SR 253; 349.)

After hours of searching, Schlotterbeck decided to clear the trailer house because Gary might have returned to it, despite the facts that the trailer had already been cleared and had been surrounded by law enforcement, Gary had been spotted running in the area, and the trailer was surrounded and secured. (SR 350.) Schlotterbeck talked with Codington County Sheriff Toby Wishard ("Wishard") about clearing the trailer house again. (SR 152; 350.) Wishard advised Schlotterbeck that tactical procedure would be to create communication portholes in the trailer to call out any subject or subjects that may be hiding inside. (SR 134; 350.) (emphasis added.) Schlotterbeck accepted Wishard's

advice and gave permission to move forward with the tactics Wishard laid forth. (SR 134;152; 350.)

Before briefing his SRT staff on the strategy authorized by Schlotterbeck, Wishard and others moved to the Tim and Julie Hofwalt residence. (SR 134; 350.)

Officers brought one armored vehicle and several vehicles, (SR 253.) but they searched, with Julie's consent, the entire Hofwalt property on foot, except for a locked building. They were calm and respectful and did not damage anything during the search. (SR 253; 350.) Julie and her children were directed to stay by the grain bins on the south side of house during the search. (SR 253.)

Schlotterbeck claims Hamlin County Sheriff's Deputy Tayt Alexander ("Alexander") went back to Gareth's house and advised him the trailer was going to be cleared with the SWAT team. (SR 152.) This description is inaccurate. Alexander told Gareth they were going to enter the trailer house. (SR 213; 268.) He did not tell Gareth they thought Gary was in the house. (SR 269.) He did not explain to Gareth how they were going to enter the house. (SR 269; 350.) He did not tell Gareth they were going to tear out multiple windows and doors. Gareth was merely informed officers were going to enter the home. Gareth did not give consent. (SR 212-213; 268.)

Throughout the day, Troy Jurrens ("Jurrens"), a former Marine, who operates Castle Woodworks at his home across the road from Gareth to the south, was in his shop watching what was going on in the area and listening to conversations among law enforcement personnel on a scanner. (SR 247; 350.)

Moments before the two armored vehicles started smashing the trailer, Jurrens heard someone announced on the radio that they were "going back to the trailer" Then another voice on the radio said "he's not in the trailer". The first voice answered back saying they were going back anyway. Jurrens observed they had already secured the trailer so that Gary could not return. It was then that the armored vehicles and several other cars converged on the trailer. Shortly after that Jurrens heard someone on the radio calling out what seemed to be positioning instructions, but it was phrased in a code Jurrens could not understand. At that point, someone said "switchover" and the communications became garbled. The armored vehicles then started smashing the trailer. (SR 248.)

Schlotterbeck denies participating in or hearing the transmissions Jurrens described. (SR 352.) Schlotterbeck states he listened to the "available" radio transmission of that day, a copy of which he provided, and did not hear the transmission described by Jurrens (SR 352; SR 408, Defendant's Exh. 1.). The audio provided is only a short clip (36 minutes, 53 seconds), and ends before the armored vehicles had been assembled to attack the trailer. (SR 408, Defendant's Exh. 1.) The officers had been in the area of the trailer for about four hours.

Ellis broke into the trailer first, starting the west, or front, entry. (SR 141.) This point of entry was the least accessible, having a stairway and small deck in front of it. He used his armored vehicle to drag the deck and stairs away from the house, which destroyed the stairs and damaged the deck. He then crashed the armored vehicle through the front door of the house. The armored vehicle did not go straight in and out, only

knocking in the door. The vehicle damaged the wall, house frame and floor near the doorway. This great force knocked the trailer off the foundation on south end. The door was not opened, it was ripped out. (SR 268-269.) Ellis also ported a bedroom window on the on the west. (SR 141.) Brad Howell was in the Codington County Sheriff's armored vehicle, which was used to open three windows and doors on the east side of the trailer. (SR 148.)

A drone, equipped with a camera, was used to record the destruction. Just after the Codington County Sheriff's ripped out two doors and made a third opening on the east side of the house, the drone was raised to pan the area and two minutes and thirty seconds after the camera was raised, Gary could be seen walking in the river. (SR 134; 350; 271-273; 408, Ex. A.; App. 1-3.) Wishard watched the camera while it followed Gary. He directed units to the area and Gary was taken into custody. (SR 134; 350.).

Gareth and Sharla Hamen's property, including the underground septic tank, the location of which was known by law enforcement, was damaged significantly during the invasion authorized by Schlotterbeck. (SR 139; 268; 350.) The home is "unlivable". (SR 217.)

The cost of repairs to the trailer and septic tank, estimated by Barret Wittnebel of Wittnebel Construction), is $18,778.61. (SR 408, Plaintiffs' Exh. 6; 350). Hamens have produced photos documenting the extensive and excessive damage. (SR 269; 283.)

STANDARD OF REVIEW

This Court's review of summary judgment is well-settled:

> In reviewing a grant or a denial of summary judgment under SDCL 15–6–56(c), we must determine whether the moving party demonstrated the absence of any genuine issue of material fact and [established] entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party, and reasonable doubts should be resolved against the moving party.... Our task on appeal is to determine only whether a genuine ***529** issue of material fact exists and whether the law was correctly applied.

Thornton v. City of Rapid City, 2005 SD 15, ¶ 4, 692 N.W.2d 525, 529.

Further, the Court's review of the facts and the application of the law shall be *de novo*. *Id*.

"All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." Swedlund v. Foster, 2003 SD 8, ¶ 13, 657 N.W.2d 39, 46. In other words: "If there is any basis to support the court's ruling, affirmance of its decision is proper." Zoss v. Schaefers, 1999 SD 105, ¶ 5, 598 NW2d 550, 551–52.) (internal citations omitted.)

There are material facts in dispute with respect to the reasonableness of Schlotterbeck's actions. "The better approach is to have the trier of fact decide when there is a genuine issue of material fact as to whether the official's conduct was objectively reasonable. Summary judgment is not appropriate where the facts are in dispute." Swedlund at ¶ 30.

ARGUMENT

1. Property damage caused by law enforcement officers while executing an arrest warrant is a compensable taking when the officers' conduct exceeds the boundaries of police power.

Hamens will address every point of Schlotterbeck's brief, but first dispute the authoritative impact of all of his cases and arguments in this section. None are controlling or on point. Schlotterbeck only cites cases of "eminent domain". He correctly points out that "eminent domain" and "police power" are separate powers of the government. Eggleston v. Pierce County, 64 P.3d 618, 623, 148 Wash.2d 760, 766 (Wash.,2003). However, he only cited cases where eminent domain was the specific taking claimed, and/or or cases where the government acted within the bounds of their police power. Schlotterbeck does not provide any argument or authority contrary to what this Court has already determined: A taking may occur under the Constitution of the State of South Dakota, Article VI, 13, when the government exceeds its police power. Cody v. Leapley, 476 N.W.2d 257, 260 (S.D.,1991).

The South Dakota Constitution provides:

> Private property shall not be taken for public use, or damaged, without just compensation, which will be determined according to legal procedure established by the Legislature and according to § 6 of this article. No benefit which may accrue to the owner as the result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such owners, subject to the use for which it is taken.

SD CONST Art. 6, § 13.

Hamens assert a claim of a taking based on the damage to property, not eminent domain. The taking of damage to both real and personal property are subject Article VI, §

13 of the South Dakota Constitution. Cody at 260. Such cases turn on whether the government acts within its police power. *Id.* 261.

Schlotterbeck incorrectly asserts that use of the word "damage" in this context may not be oversimplified. In its analysis, the Supreme Court in Cody specifically stated the items at issue were not physically damaged. *Id*. At 262. If any damage to property was not a consideration, there would be no reason for the Court to make that finding in its analysis.

Hamens' first cause of action claims Schlotterbeck has committed a taking which is compensable under the Constitution of the State of South Dakota, Article VI, 13, and Constitution of the United States, Article V. Although the expression "inverse condemnation" is also used to describe the taking, the general and separate pleading of taking which falls under Article VI, 13, has been made. (SR 4.) A Complaint need only contain "[a] short and plain statement of the claim showing that the pleader is entitled to relief;" 15-6-8(a)(1). As such, Hamens' pleading of a "taking" is sufficient.

Customer Company v. City of Sacramento, 895 P.2d 900 (Ca. 1995) provides guidance, but not as claimed by Schlotterbeck. The California Supreme Court stated: "Always the question in each case is whether the particular act complained of is without the legitimate purview and scope of the police power. If it be, then the complainant is entitled to injunctive relief or to compensation." *Id. at* 910.

Hamens suffered a compensable taking. Officers illegally and intentionally invaded and destroyed their property, as will be addressed later. The trial court agreed,

and a fresh review will reveal that the trial court's denial of summary judgment for Schlotterbeck was correct.

The central question is, taking into consideration the undisputed material facts of this case, did the trial court err? The undisputed material facts include:

- On June 9, 2016, around 11:30 a.m. or noon, Schlotterbeck and Stahl arrived at Gareth's home, to talk to Gareth about the whereabouts of his son, Gary Hamen. They claimed to have a warrant for Gary's arrest (SR 149; 206-207; 266.)

- Hamens owned a trailer (SR 206; 265-266) situated on property near Hamens' home. (SR 348). Gareth told Schlotterbeck and Stahl Gary was at the trailer. (SR 348).

- The trailer was not Gary's residence. (SR 308; 348.)

- After talking with Gareth at Gareth's house on the day in question, Schlotterbeck witnessed Gary at the trailer. (SR 150-151; 349.)

- Schlotterbeck asked the Watertown Police Department SWAT Team for assistance to get Gary to surrender. (SR 150; 348.)

- A loose perimeter was set up around the trailer, but man power was not immediately available to fully surround it. (SR 138; 349.)

- Before officers tightened the perimeter around the trailer so they could see all sides of it, (SR 139; 349) Gary left the trailer and was seen running on foot near Castlewood. (SR 139; 151; 349.)

- There was a police radio transmission indicating that the trailer was cleared and Gary was seen running toward the river. (SR 260; 349.)

- There were vehicles, 4-wheelers and people moving around on the ground. (SR 253; 349.) At one point, Julie Hofwalt saw someone launch a small boat into the river at the spillway south of the trailer. (SR 253; 349.)

- After hours of searching, Schlotterbeck decided to clear the trailer house because Gary <u>might</u> have returned to it, despite the facts that the trailer had already been cleared, Gary had been spotted running in the area, and the trailer was surrounded and secured. (SR 350.) (emphasis added.)

- Schlotterbeck, relying on advice from Wishard, authorized the use of armored vehicles to open up the trailer. (SR 350.)

- Between the time Schlotterbeck gave authorization to tear up the trailer and the time those actions were carried out, law enforcement, including Wishard, looked for Gary at the neighboring Hofwalt residence without using any force and without causing any damage. (SR 350.)

- Hamen was advised that law enforcement would enter the trailer, but he was not advised they would be tearing the trailer apart with armored vehicles or that they would destroy the septic tank. (SR 350.)

- Two armored vehicles were used to open up the trailer. (SR 350.)

- Just after the Codington County Sheriff's vehicle made a third opening on the east side of the house, the drone was raised to pan the area. Two minutes and thirty seconds after the camera was raised, Gary could be seen walking in the river. (SR 134; 350.).

- Wishard watched the camera while it followed Gary. He directed units to the area and Gary was taken into custody. (SR 134; 350.).

- Significant damage was done to the trailer in this process. (SR 268; 350.)

- The damage to the trailer and septic tank is estimated to cost $18,778.61 to repair, (SR 350.)

There are three key undisputed material facts in this case. The first is that Schlotterbeck did not have a strong belief, or even an objectively reasonable suspicion, that Gary was in the trailer house when he authorized activity which resulted in its destruction.

The second fact is that, right after Schlotterbeck accepted Wishard's advice to order the use of armored vehicles to confront Gary, the next thing Wishard and other law enforcement officials did was travel to the Hofwalt residence and scour it inside and out on foot and without destroying anything. This is important for two reasons: 1. If there was a belief Gary was in the trailer, it would be unnecessary to search Hofwalts' residence. It was more likely Gary was at Hofwalts' than back at the trailer since the trailer was secured and monitored, and Gary

had been seen running in the area; and 2. If it was reasonable to use armored vehicles search for Gary in a structure, officers would have given Hofwalts' house the same treatment they gave the trailer.

The third fact is the extent to which the trailer was damaged while creating "communication portholes". If communication portholes were necessary at all, which is disputed by Hamens, it is easy to see that in that small trailer home, one small hole would have sufficed. The damage done to create the holes was excessive.

Not only was it impermissible for officers to enter the trailer at all, the destruction of the trailer was an excessive use of force. At Schlotterbeck's command, officers from several jurisdictions acted without proper police power and violated Hamens' constitutionally protected rights.

a. This case in one of first impression, but only in part.

Schlotterbeck concedes in his brief that the damage to Hamens' property is subject to analysis under the Constitution of the State of South Dakota, Article VI, 13.

This case is not entirely one of first impression. The South Dakota Supreme Court has found that damage to property may constitute a taking under Constitution of the State of South Dakota, Article VI, 13, where the government exceeds its police power. Cody at 260.

In Cody the Supreme Court was asked to determine if confiscation of photos and other materials by the warden of the South Dakota Penitentiary was a wrongful seizure amounting to a constitutional taking. The Supreme Court found in favor

of the warden because the plaintiff failed to establish ownership of the subject property. *Id.* at 260.

Schlotterbeck cited many cases involving damage to property by law enforcement. However, he does not cite any cases where the facts include allegations that the conduct causing the damage to the property of a third party exceeded the boundaries of police power during the execution of an arrest warrant. As such, the facts of this create one of first impression.

Schlotterbeck claims he did nothing improper because he used police power when he authorized the destruction of Hamens' trailer. His power is not unlimited and not without restraint. We do not live in a country where the authority of the police is unchecked. Police power is limited by what is "reasonable". Schlotterbeck's decision to order officers to enter and destroy the trailer in pursuit of Gary, particularly when he had no facts to support a belief Gary was in the trailer, was impermissible. His conduct violated Hamens' constitutional rights as a taking, and as violation of their Fourth Amendment and Fourteenth Amendment rights.

In its analysis in Ginter v. Stallcup, 869 F.2d 384 (C.A.8 (Ark.),1989), the Eighth Circuit Court of Appeals pointed out that if officers knew or believed the suspect in a home was dead before "any direct participation in the destruction of Ginter's residence by fire *after* that time would violate Ginter's fourth amendment right to be free from an unnecessarily destructive search and seizure." Ginter at 388. (citations omitted.) Such prohibition is clearly established. *Id.* As in Hamen, there was no belief a live suspect was in the house, and the forcible entry and destruction is impermissible.

b. This Court has found a constitutional taking occurs when law enforcement exceeds its police power.

The proper use of police power precludes compensation. Cody at 261. However, where the facts support claims that law enforcement engaged in the improper use of police power, a taking under Article VI, § 13 of the South Dakota Constitution may occur. *Id*. at 261.

1. Darnall is not controlling in this case.
2. Hurley is not controlling in this case.
3. Boland is not controlling in this case.

These three points from Schlotterbeck's brief are consolidated. Schlotterbeck claims a valid exercise of police power is not a compensable taking under Article VI, Section 13 of the South Dakota Constitution, citing several cases involving valid exercises of police power, including Darnall v. State, 108 N.W. 2d 201 (S.D. 1961); Hurley v State, 143 N.W.2d 722 (S.D. 1966); and City of Rapid City v. Boland, 271 N.W.2d 60 (S.D.,1978).

Losses by reason of a valid or lawful exercise of police power are not recoverable. Darnall at 207. Losses are compensable only if they are peculiar to the owner. Hurley at 725. Some losses for public necessity may not be compensable. Boland at 65. Hamens' claim is distinguishable from these cases because Hamens suffered a taking through the unlawful exercise of police power. Cody directs that such action may be taking.

c. **Damage occurring during pursuit of a fleeing suspect is compensable if officers exceed their police power.**

Without citing specific cases, Schlotterbeck claims the majority of courts have rejected claims that inverse condemnations are takings in cases where private property is damage during the execution of an arrest warrant. Hamens are not claiming

inverse condemnation. They are claiming that an improper use of police power resulted in a compensable taking under in Constitution of the State of South Dakota, Article VI, 13. In Cody, this court has accepted that a constitutional taking may occur through the improper use of police power.

1. The California Supreme has held that damage caused when validly executing warrant is not a compensable taking.

Schlotterbeck cites Customer Company v. City of Sacramento, 895 P.2d 900 (Ca. 1995), which is inverse condemnation case without claims of improper use of police power. It is not instructive. Hamens' claim is that of an improper use of police power which may result in a taking under Cody.

Schlotterbeck also claims the similarity between the takings clauses adopted by South Dakota California is instructive. The Constitution of the State of California Article 1, 19(a), states:

> (a) Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

This paragraph of the California Constitution is the section most comparable to the Constitution of the State of South Dakota, Article VI, 13. However, the California's Section 19 is lengthy, containing four more sections, describing powers of eminent domain. The sections are not comparable. Customer Company was granted

review solely on an inverse condemnation issue. *Id*. at 902. Damage to private property during an effort to apprehend a felony suspect cannot be likened to eminent domain. *Id*. at 913. However, damage to private property during the improper exercise of police power may be a taking under Cody.

Schlotterbeck incorrectly asserts that the use of the word "damage" in this context may not be oversimplified. *Id*. at 906. Any damage to property may be a taking. In Cody the Supreme Court had to determine whether confiscation of photos and other materials by the warden of the South Dakota Penitentiary amounted to a taking. In its analysis, the Supreme Court specifically stated the items at issue were not physically damaged. *Id*. At 262. If any damage to property was not a consideration, there would be no reason for the Court to make that finding in its analysis.

2. Other courts have reached conclusions about inverse condemnation, but not about a taking caused by the unlawful exercise of police power.

Schlotterbeck's cases are not controlling because not one includes allegations of improper use of police power. South Dakota has established that "where the facts support claims that law enforcement engaged in the improper use of police power, a taking under Article VI, § 13 of the South Dakota Constitution may occur." Cody. at 261. Some of Schlotterbeck's cases contain other details which support Hamens' claim of a taking by the improper use of police power.

Schlotterbeck cites Sullivant v. City of Oklahoma City, 940 P.2d 220, 225 (Okla. 1997) as an example of other courts' findings that damage caused when executing a search warrant is not a compensable taking. Sullivant supports Hamens' position that when the police exceed their authority, a taking has occurred. "[A]cts done

in the proper exercise of the police power, which merely impair the use of property, do not constitute a taking." Sullivant at 225. (emphasis added).

Schlotterbeck also cites Kelley v. Story County Sheriff, 611 N.W.2d 475, 477 (Iowa 2000), yet another case which does not involve an allegation or finding that law enforcement exceeded police powers. In Kelley, officers executing an arrest warrant arrived at a residence known to be frequented by their subject. After knocking on the door and receiving no response, they used force to enter, causing damage to the two front doors. The Iowa Supreme Court affirmed the was no taking because police exercised due cause under the Iowa statute permitting law enforcement to use force as "reasonably necessary to enter premises for purposes of making an arrest when officer has reasonable cause to believe that a person whom the officer authorized to arrest is present." *Id*. The destruction of Hamens' property amounts to the deprivation property, and is unlike the minor damage that occurred in Kelley.

d. Public Policy does not favor Schlotterbeck's position.

Again, Schlotterbeck focuses on the taking of inverse condemnation and the valid use of police power. Hamens assert a taking occurred under the Constitution of the State of South Dakota, Article VI, 13, when the government exceeds its police power. This court has previously accepted the theory that the invalid use of police power may create a taking. Cody at 260.

He further asserts that unless this Court adopts the findings in Eggelston and Customer Company, the result will deter officers from performing their duties and

will cause them to second guess their actions. In Hamen there is no question officers exceeded constitutionally protected limits.

e. Schlotterbeck has cited the incorrect majority rule.

The majority rules, as presented by Schlotterbeck are not controlling. Hamens are not asserting the taking in this case is one of eminent domain. They assert it is a taking based on the damage to their property through the improper exercise of police power. The taking of damage to both real and personal property are subject to Article VI, § 13 of the South Dakota Constitution. Cody at 260.

1. Schlotterbeck has cited the incorrect minority rule.

Citing Steele v. City of Houston, 603 S.W.2d 786 (Tex., 1980); Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38 (Minn.,1991), as the minority position, Schlotterbeck refers to the incorrect rule.

Schlotterbeck claims the minority position misapprehends the nature of the police power and creates a case for inverse condemnation where one does not exist. Hamens do not claim damage to property by officers acting under police power is a taking. They are claiming damage by an invalid or improper or excessive exercise of police power in this case is a taking. Cody at 260.

2. The facts support a conclusion Schlotterbeck acted beyond the scope of his power.

Schlotterbeck concludes that the police can do whatever they want, without limits. Schlotterbeck violated clearly established rules by entering and destroying the trailer. Law enforcement "may break open an outer or inner door or window of a

dwelling house or other structure for the purpose of making an arrest if, after giving reasonable notice of his intention he is refused admittance and if" he has an arrest warrant or exigent circumstances exist to support a warrantless arrest. SDCL 23A-3-5. (emphasis added). It is undisputed that the trailer house was not Gary's home, or that Gareth did not consent to entry into the home. It is also undisputed that officers broke more than one window or one door into the trailer house. The photographs in the Appendix (SR 271-273) confirm, undeniably, that they far exceeded what is reasonable.

In general, an arrest warrant only gives an officer the limited right to Gary's home "when there is reason to believe the suspect is within." State v. Hess, 2004 SD 60, ¶ 21, 680 N.W.2d 314, 324, citing Payton at 1388. The trailer was not Gary's home. To enter the structure the facts must prove exigent circumstances existed, including be a strong reason to believe Gary would be inside. State v. Meyer, 1998 SD 122, ¶ 23, 587 N.W.2d 719, 724. (emphasis added.)

There was no reason to believe Gary was in the trailer, a fact which is not disputed. Schlotterbeck's testimony is that he believed Gary "might" have returned there, but he provides no facts or explanation. He authorized destruction of the trailer house without any reasonably objective evidence Gary was inside.

Schlotterbeck claims he did not participate in or hear the radio transmissions described by Jurrens. However, whether Schlotterbeck heard them is irrelevant. Whether they occurred is relevant. It is not disputed that Troy Jurrens heard what he described. As such, it is undisputed that other officers present at the scene on June 9, 2016, voiced knowledge that Gary was not in the trailer and that it was not

reasonable to destroy the trailer in search of Gary. The undisputed facts demonstrate a reasonable officer would have known it was improper to enter the trailer and destroy it.

Cody applies, as the central question is, if the improper exercise of police power took place, a compensable taking occurred. *Id.* at 261. The undisputed material facts support a conclusion a taking occurred.

3. In the context of inverse condemnation there is no distinction between a valid and invalid exercise of police power.

Schlotterbeck argues that whether or not his actions were reasonable, it is a matter of law that "constitutional just-compensation principals do not apply . . . ." Customer Company at 901. In Customer Company, a store owner sought, and was granted, review in this court solely on an inverse condemnation issue, not on an issue of taking by the improper use of police power. *Id. at 902.* A valid claim of a taking is supported by Cody.

2. Sheriff Schlotterbeck is not entitled to qualified immunity by summary judgment.

Schlotterbeck violated Hamens' protection from a taking without compensation, as provided under the Constitution of the State of South Dakota, Article VI, 13. He also violated their constitutional rights under the Fourth and Fourteenth Amendments to the Constitution of the United States. In doing so, Schlotterbeck is liable to Hamens under 42 U.S.C. A. § 1983.

Schlotterbeck he is entitled to summary judgment under his affirmative defense of qualified immunity. The trial court found Schlotterbeck violated of Hamens' clearly established rights, thereby meeting the first two prongs of a three-pronged test necessary

in the analysis an affirmative defense of qualified immunity. The trial court further found that disputed material facts exist on the third prong, thereby precluding summary judgment on that basis. The third prong involves analysis of whether a reasonable officer in Schlotterbeck's position would know that the alleged actions violated the clearly established constitutional right. The Court's denial of summary judgment was sound, pursuant to Swedlund.

a. Qualified immunity shields officials in a §1983 action unless the official's conduct violates a clearly established constitutional right of which a reasonable person would have known.

Generally, qualified immunity is not a defense to a claim under 42 U.S.C. §1983. Swedlund at ¶ 16. However, "[q]ualified immunity is given to officers who have made a good faith mistake." *Id*. What does or does not constitute a good faith mistake is addressed below.

> Under the Civil Rights Act of 1871 (42 U.S.C. § 1983) a party may recover damages for the " 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States caused by any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.' " Tri County Landfill Ass'n, Inc. v. Brule County, 2000 SD 148 at 11, 619 N.W.2d 663, 667 (citing 24 U.S.C. § 1983). To establish a cause of action under § 1983, the plaintiff must establish the following two elements: "First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law."

Id. at ¶ 15. (Citations omitted.)

In Swedlund, officers executed a search warrant using high risk entry tactics at the wrong house. Officers observed the wrong house prior to the invasion,

despite being given directions to and a description of the house. Upon entry, officers subdued and cuffed a 48-year-old mentally retarded resident of the house. Upon realizing he led his team to the wrong house, the officer in charge of the reconnaissance said at the scene: "You win some, you lose some." *Id.* at ¶10. Under the three-part test adopted by this Court and taking the facts in the light most favorable to Hamens, Schlotterbeck is not entitled to qualified immunity as a matter of law at summary judgment.

1. Qualified immunity is a question of law and should be resolved early, but only if possible.

Under Swedlund, it is correct that "[I]immunity questions should be resolved as early as possible." Swedlund at ¶ 12. (internal citations omitted.) However, summary judgment in favor of Schlotterbeck is precluded because "objective reasonableness is not determined from the subjective vantage of the officer." Instead, the "trier of fact must determine whether a reasonable officer would have believed his actions were lawful." Swedlund at ¶ 36.

2. Qualified immunity analysis involves a three-step inquiry.

Schlotterbeck claims the analysis is twofold. It is actually three-fold, although analysis of the first two steps is frequently combined.

The three-part test adopted by this Court for considering claims of qualified immunity under a §1983 case includes: "1. Has plaintiff claimed a violation of a constitutional right? 2. Was the constitutional right clearly established? 3. Would a reasonable officer know that the alleged actions violated the clearly established constitutional right?" Swedlund at ¶ 17. Qualified immunity is applicable if any of the three steps produces a negative response. *Id.* at 18.

At the first step, the threshold question is, "[t]aken in the light most favorable to the [plaintiff], do the facts alleged show the officer's conduct violated a constitutional right?" *Id*. At ¶ 18. Hamens have claimed a violation of a constitutional right, thereby passing the first one.

Considering the second step, "[t]he inquiry as to whether the constitutional right was clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." Swedlund at ¶ 18. It is clearly established that an arrest warrant only gives an officer the limited right to Gary's home "when there is reason to believe the suspect is within." Hess at 60, citing Payton v. New York, 100 S.Ct. 1371, 1388, 445 U.S. 573, 603 (U.S.N.Y.,1980). It is undisputed that the trailer was not Gary's home. Therefore, a higher standard applies to permit entry. Officers must have consent, a search warrant, or the presence of exigent circumstances. Meyer at ¶ 19-23. The undisputed facts support a conclusion that Schlotterbeck failed to meet these elements.

Schlotterbeck had a warrant for Gary's arrest. He did not have a search warrant or consent of the owner to search the trailer. And, exigent circumstances did not exist.

Exigent circumstances exist in cases of emergency requiring immediate attention and insufficient time to obtain a warrant. Meyer at ¶ 23. This Court has identified seven considerations relevant to determining whether exigent circumstances exist, one of which is the necessity that officers to possess a strong belief the suspect is within. Absent that element, there is no exigency. *Id*. (Emphasis added.)

When considering the third step, the "relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Swedlund at ¶ 18. As a matter of law, officers are charged with awareness that people are protected by the Constitution from unreasonable search and seizure and excessive force. *Id.* at ¶¶ 23-24. The question is whether the summary judgment record shows the taking and/or seizure as unlawful, and/or that the amount of force used was excessive. Clearly established laws provide entry into the trailer was permitted only in the case of where there is a presence of consent, search warrant or exigent circumstances. *Id*. at ¶ 25. Unreasonable mistake in the execution of a warrant is not excusable. *Id*. at ¶¶ 27-28. In Hamen, we are confronted by unreasonable entry into a structure, followed by unreasonable total destruction of the property.

3. The burden to overcome qualified immunity may be high, but Hamens have met the burdens of step one and two of the three part test.

Schlotterbeck cited District of Columbia v. Wesby, 138 S.Ct. 577 (U.S.,2018), asserting qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Id.* at 589. (internal citations omitted.) In other words, officers are not entitled to qualified immunity under §1983 if they violate a constitutional right and the unlawfulness of their conduct is "beyond debate". *Id.* at 589.

A factor the Court should consider in this case is the result of the force. Thornton at ¶ 12.

> Law enforcement officers also know that they may not use excessive force. SDCL 23A–3–5 provides in

> part that "No person shall subject an arrested person to more physical restraint than is reasonably necessary to effect the arrest." Use of "excessive force is impermissible even during a lawful arrest." Horne, 1997 SD 65 at 13, 565 N.W.2d at 54, citing Weyant v. Okst, 101 F.3d 845, 858 (2d Cir.1996). The specific right to be free from excessive force was clearly established. Spenner, 1998 SD 56 at 27–28, 580 N.W.2d at 612–13; Pray, 49 F.3d at 1158.

Swedlund, at ¶ 24.

Hamens have presented undisputed facts show the entry into the trailer with such great force is unconstitutional. The question that remains is whether it is beyond debate that Schlotterbeck knew it was unlawful to go in anyway? Under Swedlund, the disputed material facts should submitted to a jury for this determination.

b. The circuit court properly analyzed qualified immunity.

Hamens disagree with Schlotterbeck's claim that the trial court delivered a confused analysis of qualified immunity.

The trial court found that Hamens established the requisite elements of a § 1983 claim, *i.e*., they have alleged someone deprived them of a right while acting under color of law. Swedlund at ¶ 14.

While the text in the opinion letter contains clerical errors (SR 380-381.), the court properly analyzed the elements that must be met to establish Schlotterbeck's affirmative defense of qualified immunity: "1. Has plaintiff claimed a violation of a constitutional right? 2. Was the constitutional right clearly established? 3. Would a reasonable officer know that the alleged actions violated the clearly established constitutional right?" Swedlund at ¶ 17.

The court found that Hamens have claimed violation of constitutional rights (step one), and there is clearly established law prohibiting takings, unreasonable search and seizure, and without due process of law (step two).

The trial court found that it could not grant summary judgment under step three because, where there are genuine issues of material fact as to the reasonableness of an officer's actions which would entitle him qualified immunity from §1983 actions, "[t]he better approach is to have the trier of fact decide when there is a genuine issue of material fact as to whether the official's conduct was objectively reasonable. Summary judgment is not appropriate where the facts are in dispute as they are in this case." Swedlund at ¶ 30.

Schlotterbeck points out that the court focused on the conflicting testimony of Schlotterbeck and Troy Jurrens concerning the radio transmissions Jurrens heard about Gary not being in the trailer and how, moments before the two armored vehicles started smashing the trailer, Jurrens heard someone announce on the radio that they were "going back to the trailer" Then another voice on the radio said "he's not in the trailer". The first voice answered back saying they were going back anyway. Schlotterbeck asserts he did not hear that information. He also asserts it did not occur based on his review of a recording he submitted to the court. A careful review of the recording shows the recording ended before transmission of the remarks Jurrens heard. Jurrens said he heard the transmissions "moments" before the armored vehicles started to smash into the trailer. (SR 248.) The teams were not fully assembled at the trailer by the time the recording ended. At 32:59 on the recording, Wishard confirms he will meet

Howell a half mile away from the trailer to pick up negotiators who want to "play". At 33:04, Wishard states he does not want to broadcast the plan on the radio and he will give his team the information when he meets up with them. At 35:44, Howell asks Wishard if he is still going to meet him. There are no more transmissions before the recording ends at 36:53. (SR 408, Def.'s Ex. 1).

Schlotterbeck denied he heard the radio transmissions Jurrens described. It is irrelevant whether Schlotterbeck heard them. The third prong of the qualified immunity analysis requires the court to consider whether a reasonable officer would have known his actions violated the clearly established constitutional right. Swedlund at ¶ 17. There is no evidence in the record that Jurrens did not hear the transmissions he described. The transmissions described by Jurrens serve as evidence there were other officers on the scene who knew it was wrong to break into the trailer because Gary was not in the trailer.

The trial court concluded, correctly, that Schlotterbeck's order for entry into the Hamens' trailer home in search of Gary violated Hamens' clearly established rights. The court denied summary judgment on Schlotterbeck's motion for qualified immunity based on the third prong of the qualified immunity test: The Objective Reasonableness Test. The trial court found that there were material disputed facts as to the objective reasonableness of Schlotterbeck's conduct that precluded that summary judgment. Following this Court's direction, the trial court ruled that the better approach is to have the trier of fact decide the case when there is a genuine issue of material fact as to whether the official's conduct was objectively reasonable. Swedlund at ¶ 30. The court

pointed to some of the disputed facts which preclude Schlotterbeck's motion summary judgment. The objectively reasonableness standard is, appropriately, left for the jury to decide. Swedlund at ¶ 30.

c. The facts establish a constitutional violation.

1. Claims of excessive force must be analyzed under the Fourth Amendment.

The trial court cited other courts that have held that unreasonable destruction of private property by officers during the execution of an arrest warrant may constitute unreasonable search and seizure under the Fourth Amendment. A court must decide if a reasonable officer in Schlotterbeck's shoes would have known the search was unlawful and the force used was excessive. Swedlund at ¶ 25. Claims of excessive force must be analyzed under the Fourth Amendment." Swedlund *at* ¶ 21. The trial court in this case conducted the required Fourth Amendment analysis and concluded, correctly, that summary judgment was not appropriate because disputed facts "cannot confer qualified immunity." Swedlund at ¶ 30.

Schlotterbeck claims this Court must make allowance for Defendants because this was a "tense, uncertain and rapidly evolving" that necessitated a split second decision to determine the amount of force necessary, citing Johnson v. Carroll, 658 F.3d 819 (C.A.8 (Minn.),2011). An acknowledgment of this allowance also appears in Swedlund at ¶ 62. However, Schlotterbeck's decision to authorize the use of armored vehicles to destroy the trailer, was not a split-second decision. The trailer had been surrounded for hours, possibly as long as four hours, and the decision to go in with armored vehicles was made after discussion between Wishard and Schlotterbeck. In

addition, Schlotterbeck had ample to reconsider his decision to break into the trailer between the time he made it and the time his orders were carried out. No allowance may be given under these circumstances.

Schlotterbeck asserts that reasonableness of an officer's actions "is a pure question of law." (citations omitted) Wenzel v. City of Bourbon, 899 F.3d 598, 601 (C.A.8 (Mo.), 2018); Scott v. Harris, 127 S.Ct. 1769, 1776 n.2, 550 U.S. 372, 381 (U.S.,2007). This is true only in a case where the court has already "determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*". *Id.*

2. Sheriff Schlotterbeck's conduct was not objectively reasonable.

It is disputed whether Schlotterbeck heard or participated in the radio transmissions described by Jurrens. However, if the Court determines he did not hear the transmissions, Hamens submit that is not a material fact. It is not disputed that Troy Jurrens heard them, and as such, it is not disputed that other officers present at the scene on June 9, 2016, voiced knowledge that Gary was not in the trailer and that it was not reasonable to enter the trailer and destroy it while opening it up in the search for Gary. The undisputed facts demonstrate a reasonable officer would have known it was improper to go back to the trailer and destroy it.

If the Court determines the objective reasonableness is a matter of law in this case, which Hamens' dispute, it must conduct a "relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."

Swedlund at ¶ 25. Hamens submit that under such an analysis, the Court would find that Schlotterbeck's actions were unlawful and the force the used was excessive.

"A police officer should know that the Fourth Amendment and the state constitution prohibit unreasonable searches." *Id.* at ¶ 23.

Schlotterbeck claims that his conclusion that Gary was armed and was going to shoot anyone who tried to catch him is a dispositive fact. That claim is a disputed fact. In addition, Hamens dispute whether such a fact is dispositive. A disputed fact is not material if it will not change the outcome of the case under the governing law. A-G-E Corp. v. State, 2006 SD 66, ¶ 14, 719 N.W.2d 780, 785.

Even if it was a fact Gary was armed and dangerous, Schlotterbeck has not presented dipositive facts that justified entering and destroying the trailer when he knew or should have known Gary was not there. The dispositive facts are that Schlotterbeck only thought he "might" be in the trailer. This fact is material, undisputed and comes from Schlotterbeck's testimony.

d. Schlotterbeck's conduct violated clearly established law.

Schlotterbeck contends there is no clearly established law with respect to excessive force, citing New v. Denver, 787 F.3d 895 (C.A.8 (Ark.),2015).

Schlotterbeck violated clearly established rules by entering and destroying trailer. Law enforcement "may break open an outer or inner door or window of a dwelling house or other structure for the purpose of making an arrest if, after giving reasonable notice of his intention he is refused admittance and if, and if" he has an arrest

warrant or exigent circumstances exist to support a warrantless arrest. SDCL 23A-3-5. (emphasis added). The trailer was not Gary's home. Gareth did not consent to entry into the home. There was no strong belief Gary was in the trailer. There was no search warrant, no consent, no exigent circumstances. It is well established that without one of those three elements, entry into a structure in pursuit of the subject of an arrest warrant is prohibited. Meyer at ¶ 23. If he was aware of these clearly established laws, and he should be, Schlotterbeck knowingly violated the law. If he did not, he is plainly incompetent.

Schlotterbeck urges application of Ginter v. Stallcup, 869 F.2d 384 (C.A.8 (Ark.),1989), rather than Swedlund, based on his opinion that Ginter contains facts more analogous to the present case than Swedlund. Hamens disagree. In Swedlund, officers entered a home they had no right to enter. In Hamen, officers entered a home they had no right to enter. They entered a home for which they no search warrant, no reason to believe the subject was within, no consent and no exigent circumstances.

In Ginter, officers obtained a search warrant to search the home of Norma Ginter, as it was known she was harboring a fugitive named Gordon Wendall Kahl. After four officers entered the house on foot, and one of them was fatally shot by Kahl, the three other officers retreated. After that, officers introduced diesel fuel, tear gas grenades and smoke canisters through a roof vent. The unintended result was that Ginter's house burned to the ground. Kahl died inside the home.

Notably, in its analysis in Ginter, the Eighth Circuit Court of Appeals pointed out that if law officers knew or believed Kahl was dead "before the fire started,

any direct participation in the destruction of Ginter's residence by fire *after* that time would violate Ginter's fourth amendment right to be free from an unnecessarily destructive search and seizure." Ginter at 388. (citations omitted.) Such prohibition is clearly established. *Id*. Affirming the trial court's ruling granting qualified immunity, the Ginter court found the facts did not support Ginter's claim that officers knew Kahl was dead before the fire started. There were no other material facts which created a jury question. *Id*.

Schlotterbeck also claims Hamens attempt to use the fact the Gary was apprehended outside the house minutes after officers destroyed the trailer, as hindsight. He further asserts that it is irrelevant Gary was not in the trailer, citing U.S. v. Ramirez, 523 U.S. 65, 71 n.2. (U.S.Or.,1998). In Ramirez, officials obtained a "no knock" warrant to search a home where they believed an escaped prisoner was hiding. The warrant was obtained using information from a reliable confidential informant that he had seen the escapee at the subject resident. After executing the warrant, the escapee was not found inside. The fact that is important is not the fact that Gary was not found in the trailer. The fact that is important, and not present in Ramirez, is that after hours of searching Schlotterbeck decided to clear the trailer house only because Gary might have returned to it. (SR 350.) (emphasis added.)

It is more than suspicious that law enforcement would send up a drone to video tape while two armored vehicles, one on each side, tear up and destroy the trailer. Yet with that same drone, it only took them 2.5 minutes to find Gary once they actually started looking for him with it. He was standing in the river about 50 years from the

trailer. The actions of law enforcement were more consistent with conducting a training exercise or a couple of officers decided simply to have some fun rather than a valid use of the police power. It should be up to the jury to determine whether Schlotterbeck's actions were are reasonable. What Schlotterbeck wants this court to rule is that there are no limits or restrictions on the use of police power. We are not a police state. Innocent people have a constitutional protection to be free from the government's unlawful taking of their property without just compensation.

CONCLUSION

Based on the foregoing reasons, Hamens respectfully request that this Court affirm the denial of Schlotterbeck's motion for summary judgment.

Dated at Watertown, South Dakota, this 25th day of February, 2019.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL §15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 9,907 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

_____
David R. Strait

CERTIFICATE OF SERVICE

David R. Strait, one of the attorneys for the Appellees, certifies that the above Appellees' Brief was mailed to the Clerk for the Supreme Court (original and 2 copies) and served on Defendants by mailing to:

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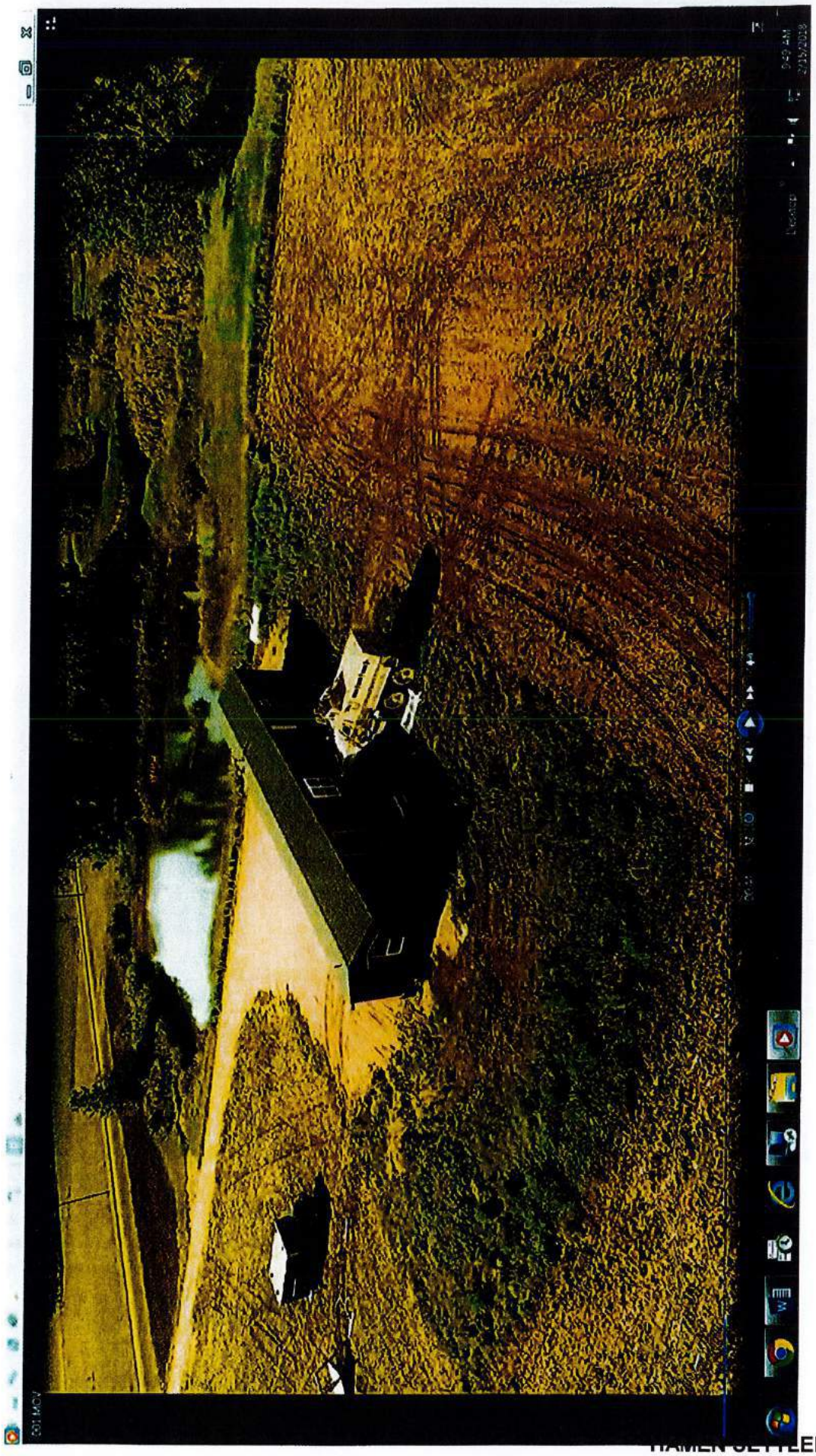

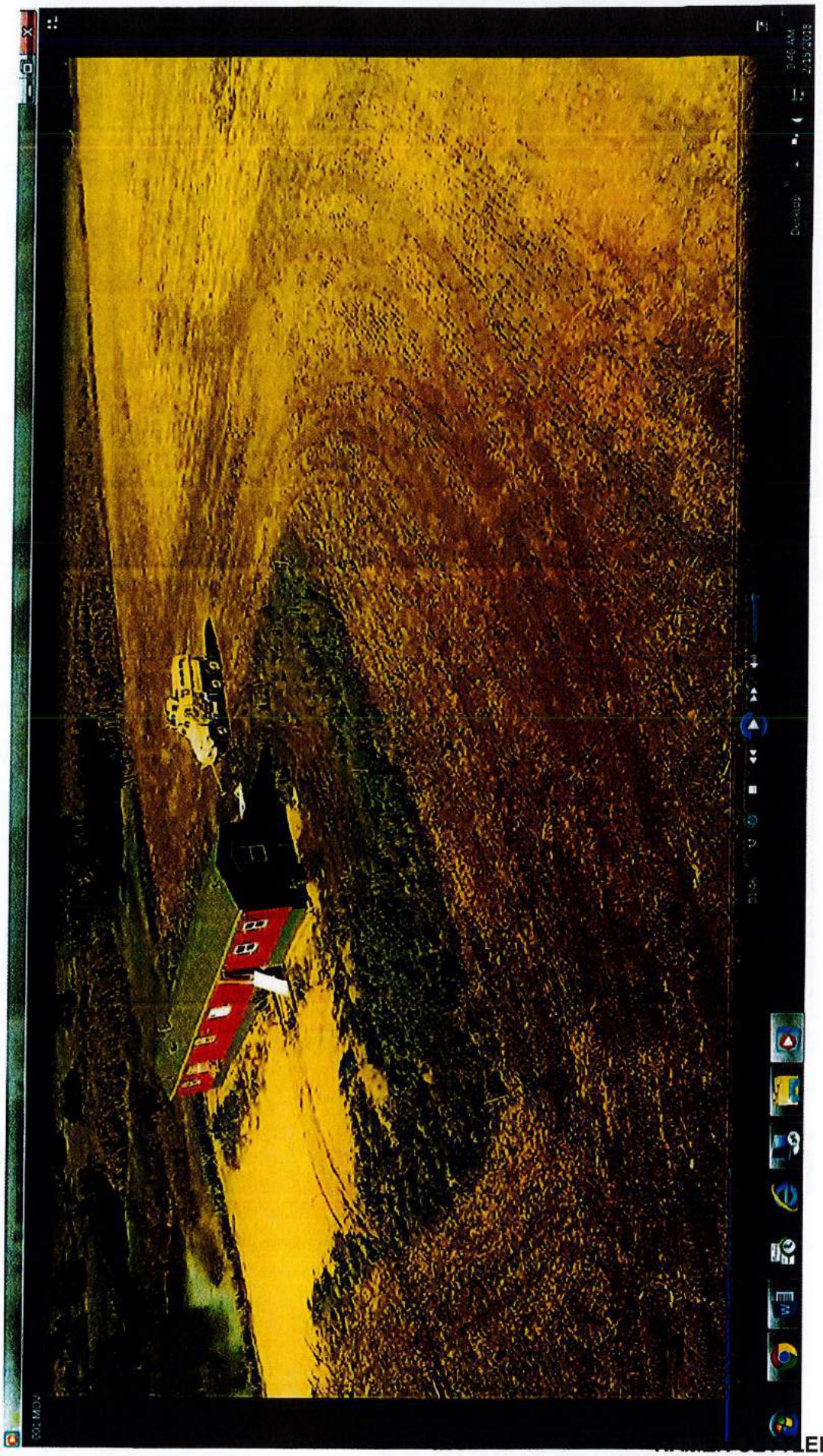

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 28671

GARETH HAMEN AND SHARLA HAMEN,

Appellees,

v.

HAMLIN COUNTY, SOUTH DAKOTA; CHAD SCHLOTTERBECK, HAMLIN COUNTY SHERIFF; AND SHERIFF'S DEPUTIES JOH DOE AND JOHN ROE, et al., individually (names unknown)

Appellants.

Petition from the Circuit Court
Third Judicial Circuit
Hamlin County, South Dakota

THE HONORABLE ROBERT L. SPEARS
Circuit Court Judge

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Order Granting Petition for Allowance of Appeal
From Intermediate Order Filed on September 7, 2018

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Statutes

The brief filed by Appellees Gareth and Sharla Hamen conflates the two claims they pleaded: a state-law takings claim and a Fourth Amendment claim for excessive force. Reversing the circuit court's order would not sanction a police state as the Hamens argue. (Appellees' Br. at 37.) Established law under the Fourth Amendment, subject to the defense of qualified immunity, protects them and others from an excessive use of force. The takings clause in the South Dakota Constitution should not be contorted to serve that purpose.

Argument

1. If Schlotterbeck's challenged conduct is an exercise of the State's police power, it is not a compensable taking even if claimed to be excessive.

The Hamens discuss their state-law takings claim and their federal constitutional claim as if they were the same claim, subject to the same defenses. In their takings argument, for example, the Hamens state that "there is no question officers exceeded constitutionally protected limits," and that they are claiming damage "by an invalid or improper or excessive exercise of police power." (Appellees' Br. at 22.) They state that Sheriff Schlotterbeck did not have "an objectively reasonable suspicion that Gary was in the trailer house." (*Id.* at 15.) And they cite *Ginter v. Stallcup,* 869 F.2d 384 (8th Cir. 1989), a case involving a claim of excessive force under the Fourth Amendment and the principles of qualified immunity, for the proposition that the "forcible entry and destruction" was impermissible. (*Id.* at 17.) These examples demonstrate confusion about the nature of the claims. The Fourth Amendment protects against claims of excessive force, which includes whether "destruction caused by law enforcement officers in the execution of a search or an arrest warrant [is] necessary to effectively execute that warrant." *Ginter,* 869 F.2d at 388. "Claims of excessive force are evaluated under the

reasonableness standard of the Fourth Amendment." *McKenney v. Harrison*, 635 F.3d 354, 359 (8th Cir. 2011). Thus, the reasonableness of an officer's conduct is relevant to a Fourth Amendment claim, not to a state-law takings claim.

The Hamens cite no authority in which a state court has held that whether an officer has exercised police power requires the court to consider the reasonableness of the officer's conduct. The issue is not the reasonableness of the officer's conduct, but whether the conduct constitutes a taking of private property for a public use (by the authority of the state's power of eminent domain), or action to preserve the safety, health, and general welfare of the public (by the authority of the state's police power). In cases involving damage to property caused by law enforcement, the courts have not drawn the line between eminent domain and police power based on the reasonableness of an officer's conduct. Instead, they have looked first at whether the conduct was an exercise of police power, and second at whether public policy is well served by maintaining the distinction.

This Court has held that "the three broad inherent powers of governmental sovereignty . . . are the power of taxation, police, and eminent domain." *Hurley v. State*, 82 S.D. 156, 162, 143 N.W.2d 722, 725 (1966). In cases involving regulation affecting property, the police power and eminent domain "may be and often are exercised simultaneously to perform a single governmental function," in which case line-drawing may be difficult. *Id.* This Court has considered the reasonableness of a municipality's actions in this context. *See, e.g., Lindquist v. Omaha Realty, Inc.*, 247 N.W.2d 684, 686 (S.D. 1976) (Rapid City's resolution prohibiting new construction in flood zone for a certain time after 1972 flood was "a reasonable exercise of the police power and not a

taking by eminent domain"); *City of Marion v. Schoenwald* , 2001 S.D. 95, 631 N.W.2d 213 (holding that "[t]he exercise of a police power must not be unreasonable or arbitrary" in the context of a challenge to a municipal ordinance regulating the number and weight of dogs permitted in a household).

But no South Dakota case suggests that the actions of law enforcement officers in executing a search warrant are an exercise of the power of eminent domain, as opposed to the police power. In this context, given the constitutional prohibition on the use of excessive force, the inquiry should end there. In other words, "'the question in each case is whether the particular act complained of is without the legitimate purview and scope of the police power.'" *Customer Company v. City of Sacramento*, 895 P.2d 900, 910 (Cal. 1995) (quoting *Gray v. Reclamation District No. 1500*, 163 P. 1024 (Cal. 1917)). *Legitimate* as used here refers not to an individual officer's conduct in effecting an arrest, but to whether an officer effecting an arrest is acting within the scope of the police power. Effecting an arrest is a traditional law enforcement function, and within the scope of the police power. The Hamens cite no authority to the contrary.

2. *Cody v. Leapley* is not dispositive of the takings issue.

The Hamens rely heavily on this Court's decision in *Cody v. Leapley*, 476 N.W.2d 257 (S.D. 1991), a highly unusual case, arguing that under *Cody* "[a] taking may occur under the Constitution of the State of South Dakota, Article VI, § 13, when the government exceeds its police power." (Appellees' Br. at 12.) Although the Court referred to a "proper" use of the police power in the decision, the issue addressed by the Court was not whether the warden's statutory authority to seize an inmate's property was *exceeded*, but whether it was even *exercised*. *Cody*, 476 N.W.2d at 261.

Cody, an inmate at the South Dakota State Penitentiary, sought the return of personal property that he claimed was wrongfully seized by prison officials. *Id.* at 259-60. Cody claimed that the seizure violated Article VI, § 13 of the South Dakota Constitution. *Id.* at 260. In this context, the Court considered whether the warden's statutory authority under SDCL § 24-2-26 to seize the personal property of inmates precluded the claim because the seizure was within the State's police power. *Id.* at 261. In resolving this issue, in Cody's favor, the Court found that the State failed to present evidence that the warden acted under SDCL § 24-2-26; absent evidence, "the trial court was not provided with a factual basis to determine the legality of the actions taken in regard to the seizure." *Id.* For that reason, the Court concluded that "we cannot say as a matter of law that the seizure was within the warden's authority." *Id.*

The Court did not say that there was a question of fact whether the warden exceeded his authority, for example, by seizing too much property, by employing the wrong officers to seize the property, by seizing it at the wrong time of day or night, by employing excessive force during the seizure, or by seizing the property without any lawful purpose. Rather, the Court simply held that it could not determine on the record whether the seizure was pursuant to the warden's authority under SDCL § 24-2-26, and was therefore an exercise of the police power.

More broadly, the decision recognizes the general principles that not "all takings or seizures by the state will result in compensation to the owner," and that "[n]o return of the property nor compensation is allowed where the state establishes that its actions were done under its police power such as to abate a public nuisance." *Id.* at 261. Here, it is

undisputed that Sheriff Schlotterbeck was acting under the State's police power in attempting to arrest Gary Hamen pursuant to a valid warrant.

3. The decision in *Customer Company* is not distinguishable.

The Hamens argue that the decision in *Customer Company* is unhelpful because it did not involve a claim that improper force was used, and the case acknowledged that the first question is whether the particular act complained of was, in the words of the court, outside the "legitimate purview and scope of the police power." (Appellees' Br. at 13, 19.) This is a cramped reading of the decision, in which the California Supreme Court stated a much broader holding particular to a claim when property is damaged by law enforcement officers executing a warrant. "In the present case an action for inverse condemnation does not lie, because the efforts of the law enforcement officers to apprehend a felony suspect cannot be likened to an exercise of the power of eminent domain." *Customer Company*, 895 P.2d at 913. The court did not consider whether an action was outside the legitimate scope of the police power by determining whether an individual officer's conduct was somehow excessive, but by concluding simply that it was an action of law enforcement officers to apprehend a felony suspect.

In reaching that conclusion, the Court recognized the distinction between the police power doctrine operating in the field of regulation, as in *Lindquist* and *City of Marion*, discussed above, and the doctrine also applying to the taking or damaging of property under emergency conditions, "i.e., when damage to private property is inflicted by government 'under the pressure of public necessity and to avert impending peril.'" 895 P.2d at 910 (quoting *Holtz v. Superior Court*, 475 P.2d 441, 446 (Cal. 1970). The court discussed cases in which compensation was denied for the destruction of an oil

terminal in Manila during World War II, and for bridges destroyed during the Civil War. *Id.* "*In the same manner*, law enforcement officers must be permitted to respond to emergency situations that endanger public safety, unhampered by the specter of constitutionally mandated liability for resulting damage to private property and by the ensuing potential for disciplinary action." *Id.* at 910-11 (emphasis added). It would be fair for the Hamens to disagree with the holding of the California Supreme Court in *Customer Company*, but not to deny its scope, which is that "constitutional just-compensation principles do not apply to damages caused by law enforcement officers in the course of performing their duties." *Id.* at 913.

The Hamens' argument that the case does not apply because, factually, it did not involve "claims of improper use of police power" is inaccurate. (Appellees' Br. at 19.) An expert witness "opined that an excessive amount of tear gas had been employed." *Customer Company*, 895 P.2d at 904. Moreover, the case was decided on a motion for judgment on the pleadings, meaning that the decision was made as a matter of law, despite an argument based on evidence that the force used was excessive. *Id.* at 902.

4. The Hamens ignore public policy.

Beyond suggesting that the result of a decision in favor of Sheriff Schlotterbeck and Hamlin County would be a police state in which the police "can do whatever they want, without limits" (Appellees' Br. at 22, 37), the Hamens do not engage public policy. The section in their brief addressing public policy acknowledges the concern that holding officers liable for damage to property based on inverse condemnation might cause them to second-guess their actions, but does not otherwise respond to it. (*Id.* at 21-22.) The consequences include not only the possible detrimental effects on law enforcement and

removing from the purview of the legislature what should be, under state law, tort-based damage claims, but also the confusion of state and federal law. The Hamens have pleaded a Fourth Amendment claim for property damage caused by the use of excessive force. A well-established body of law exists for the adjudication of such a claim. The Court need not stretch the takings clause of the South Dakota Constitution to provide a remedy.

5. The Hamens misconstrue the law of qualified immunity.

Even though the law of qualified immunity is well established, the Hamens misstate it several times. It is not an affirmative defense (Appellees' Br. at 24), but an immunity from suit. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). This Court has updated its three-part analysis (Appellees' Br. at 26-27) to a two-part analysis based on precedent from the United States Supreme Court. *Thornton v. City of Rapid City*, 2005 S.D. 15, ¶ 10, 692 N.W.2d 525, 530. Whether a constitutional right is clearly established cannot be defined generally (Appellees' Br. at 30 ("there is clearly established law prohibiting . . . unreasonable search and seizure")), but must be determined at a high level of specificity, especially in cases involving the Fourth Amendment. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018); *City of Escondido v. Marty Emmons*, 139 S. Ct. 500, 503 (2019) (rejecting as "far too general" the Ninth Circuit's formulation that "the right to be free of excessive force" was clearly established). Finally, whether an officer's conduct is objectively reasonable in the context of the qualified-immunity analysis is not a question of fact (Appellees' Br. at 26), but a question of law for the Court to decide. *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007).

6. No disputes of fact preclude the Court from deciding qualified immunity.

Schlotterbeck and Hamlin County have carefully stated the facts in the light most favorable to the Hamens. The statement of facts in their initial brief does not include any disputed facts. (Appellants' Br. at 3 n.2.) Despite this fact, the Hamens contend that there are disputed facts, without expressly stating what they are or how they affect the Court's analysis. Based on the Hamens' own brief, these essential facts are undisputed.

- The Hamens owned the trailer. Gary was staying at the trailer. Gareth told Sheriff Schlotterbeck that Gary was staying at the trailer. Gary was seen at the trailer that day. (Appellees' Br. at 3-4.)

- Gary told Sheriff Schlotterbeck that he knew Gary had a few guns, although he had not seen them. (*Id.* at 3.)

- Tim Hofwalt told Schlotterbeck that Gary had a handgun, and he thought Gary was high. (*Id.* at 5.)

- Officers found an empty pistol case in a shelterbelt during their search for Gary. (SR 211 at ¶¶ 21-22.)

- There were outstanding warrants, including a felony warrant, for Gary's arrest. (SR 376.)

- The search for Gary started about 11:30 a.m. and he was not located and arrested until about 6:00 p.m. (Appellees' Br. at 2; SR 149 Ex. A.)

- Many law enforcement officers and agencies were involved. There were "law enforcement vehicles and people everywhere." (Appellees' Br. at 5.)

- The initial security perimeter around the trailer was loose. (*Id.* at 4.)

- Gary was seen running toward Castlewood at one time. (*Id.*)

- Officers wanted to prevent Gary from entering Castlewood. (SR 210 at ¶ 16.)

- The armored vehicles were not used to clear the trailer until after a shelterbelt where Gary had been seen had been cleared and Gary had not been located elsewhere. (SR 211 at ¶ 18.)

The Court can decide the issue of qualified immunity based on these undisputed facts.

The factual disputes in the record are not material to the Court's determination of objective reasonableness under the Fourth Amendment.[1] Tim Hofwalt disputes Schlotterbeck's version of their conversation. (Appellees' Br. at 5.) Julie Hofwalt disputes Schlotterbeck's version of their conversation. (*Id.* at 7.) The Court should accept the versions of Tim and Julie as true. Nothing in their testimony precludes the Court from finding that Schlotterbeck's conduct was objectively reasonable under the Fourth Amendment.

Tim Hofwalt and Troy Jurrens says that they heard radio transmissions during the day that the trailer had been cleared, while Sheriff Schlotterbeck says that he did not hear those transmissions. (SR 247, 258, 352.) The fact that someone heard a radio transmission is not evidence that someone else did not hear it unless there were facts in the record that both were listening to the transmission. The record does not indicate who spoke, when, or what Sheriff Schlotterbeck was doing at the time. Thus, it is undisputed that two people say they heard transmissions that the trailer had been cleared, and that Schlotterbeck says he did not hear them.

Based on the undisputed facts, the Court must determine whether qualified immunity applies. The first inquiry is whether the facts establish a constitutional violation, which requires the Court to consider the reasonableness of Schlotterbeck's conduct under the Fourth Amendment. It is not sufficient that "Hamens have *claimed* a violation of a constitutional right." (Appellees' Br. at 27 (emphasis added).) The Court must consider whether the facts, taken most favorably to the injured party, show the

[1] There is no dispute in the record that there were outstanding warrants for Gary Hamen's arrest. The Hamens state that officers claimed to have a warrant (Appellees' Br. at 3), but the existence of the warrants was not disputed. (SR 376.)

violation of a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The Supreme Court has stated that this issue is for the court in the same procedural context as here—a motion for summary judgment in a case involving a § 1983 claim alleging the use of excessive force in violation of the Fourth Amendment. "At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record . . .*, the reasonableness of Scott's actions . . . is a pure question of law." *Scott*, 550 U.S. at 381 n.8. For all of the reasons previously argued (Appellants' Br. at 27-30), to which the Hamens have not directly responded, the evidence supports a legal determination that Schlotterbeck's conduct was objectively reasonable.

The second inquiry is whether Sheriff Schlotterbeck's conduct violated a clearly established right. The United States Supreme Court has addressed repeatedly how this inquiry must be addressed. *See Wesby*, 138 S. Ct. at 590; *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015); *Kisela v. Hughes*, 138 S. Ct. 1148, 1152-53 (2018); *City of Escondido*, 139 S. Ct. at 503-04. The Hamens discuss none of these cases in addressing the second qualified-immunity inquiry. (Appellees' Br. at 34-37.) The Hamens do not acknowledge that the right must be defined at a high level of specificity, especially in the Fourth Amendment context. *Wesby*, 138 S. Ct. at 590; *Mullenix*, 136 S. Ct. at 308; *Kisela*, 138 S. Ct. at 1152-53; *City of Escondido*, 139 S. Ct. at 503. Rather, the Hamens incorrectly define the right at a low level: "officers are charged with awareness that people are protected by the Constitution from unreasonable search and seizure and excessive force." (Appellees' Br. at 28.) Finally, the Hamens do not cite any case or cases based on which a reasonable officer would have understood that using armored vehicles to clear the

trailer in the search for Gary was unlawful. The Supreme Court has said three times in the past year that this sort of factual specificity is required. *Wesby*, 138 S. Ct. at 590; *City of Escondido*, 139 S. Ct. at 503-04; *Kisela*, 138 S. Ct. at 1153.

The Hamens cite *State v. Meyer*, 1998 S.D. 122, 587 N.W.2d 719, and SDCL § 23A-3-5, for the proposition that Schlotterbeck's decision was objectively unreasonable because he needed a search warrant to clear the trailer. (Appellees' Br. at 34-35.) While *Meyer* established that officers may not search the home of someone else for the subject of an arrest warrant without first obtaining a search warrant, this argument is misplaced. No law enforcement officer entered the trailer to search for Gary. Rather, as authorized by SDCL §23A-3-5, the officers involved acted to break open an outer door for the purpose of making an arrest. No authority establishes that in circumstances where officers knew Gary was armed and resisting arrest, had not been located after hours of searching by multiple law enforcement agencies, and was previously seen that day at the trailer where he was known to be staying, Schlotterbeck violated clearly established law by authorizing the use of armored vehicles to clear the trailer. The issue here is not a search in the context of a motion to suppress evidence, as in *Meyer*, but damage to personal property incident to a lawful arrest. The Hamens challenge the use of the armored vehicles, not an officer's entry into the trailer without a search warrant.

Like the Hamens' analysis, the circuit court's was far too general and contrary to clear guidance. "Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness." *Kisela*, 138 S. Ct. at 1153.

7. The decision in *Swedlund v. Foster* is not dispositive.

The Hamens rely heavily on *Swedlund v. Foster*, 2003 S.D. 8, 657 N.W.2d 39. The case is not dispositive, and, in light of the United States Supreme Court's cases on qualified immunity decided since, is not consistent with current caselaw.

First, in *Swedlund*, officers executed a search warrant at the wrong house. This Court considered whether the officers' conduct was objectively reasonable under the Fourth Amendment, but the facts are not analogous.

Second, for several reasons, the analysis in *Swedlund* is not consistent with current United States Supreme Court precedent on the law of qualified immunity.

- The decision states that the "right to be free from unreasonable search and seizures and the right to be free from excessive force" are both clearly established, and that "[a] police officer should know that the Fourth Amendment and the state constitution prohibit unreasonable searches." *Swedlund*, ¶¶ 22, 23, 657 N.W.2d at 49. The United States Supreme Court has clearly held, as discussed above, that these statements are too general and the constitutional right, especially in the Fourth Amendment context, must be defined with much greater specificity.

- The decision relied on *Dawkins v. Graham*, 50 F.3d 532 (8th Cir. 1995), which involved similar facts, to conclude that there was a material question of fact whether the officers' entry into the wrong house was unreasonable. *Swedlund*, ¶ 30, 657 N.W.2d at 51. *Dawkins* was decided in 1995. While this Court's reliance on *Dawkins* was appropriate in 2003, the Supreme Court has clarified since that the question of objective reasonableness is a pure question of law. *Scott*, 550 U.S. at 381 n.8. Even if there are disputed facts, the trier of fact should resolve those, but *the court must still determine objective reasonableness*. *Littrell v. Franklin*, 388 F.3d 578, 584-85 (8th Cir. 2004) ("'It is the province of the jury to determine disputed predicate facts, the question of qualified immunity is one of law for the Court.'" (quoting *Peterson v. City of Plymouth*, 60 F.3d 469 473 n.6 (8th Cir. 1995))). Thus, the statement that "[t]he better approach is to have the trier of fact decide when there is a genuine issue of material fact as to whether the official's conduct was objectively reasonable" is not correct. *Swedlund*, ¶ 30, 657 N.W.2d at 51.

- The material facts in *Swedlund* were not in dispute; what was disputed was whether the officers' conduct was objectively reasonable. This Court's opinion cites, on the one hand, the facts from which a trier of fact could decide that the search was not objectively reasonable, *id.* ¶ 31, and then, on the other hand, the

> facts cited in Chief Justice Gilbertson's dissent that would support a conclusion that the mistaken search was objectively reasonable. *Id.* ¶ 32. The facts were not disputed. Thus, the conclusion to be drawn from them was a question of law for the court.

The Court should decide this case based on the clear analytical principles recently emphasized by the United States Supreme Court for resolving an officer's entitlement to qualified immunity. Objective reasonableness is a question of law.

Conclusion

This case offers the Court an opportunity: (1) to hold that Article VI, § 13 of the South Dakota Constitution does not apply to damage caused by law enforcement officers when executing an arrest warrant; and (2) to clarify the law of qualified immunity in South Dakota based on recent United States Supreme Court precedent. Sheriff Schlotterbeck and Hamlin County respectfully request that the circuit court's judgment be reversed and the Hamens' claims against them dismissed.

Dated this ___ day of March, 2019.

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Certificate of Compliance

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point) and contains 4,012 words, excluding the table of contents, table of authorities, and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this ____ day of March, 2019.

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Certificate of Service

I hereby certify that on the ___ day of March, 2019, I electronically served via e-mail transmission, a true and correct copy of the foregoing Appellants' Reply Brief to the following:

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