IN THE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-2148

ERNESTO A. GUERRA,

Plaintiff-Appellant,

v.

MONTGOMERY COUNTY, MARYLAND, et al.,

Defendants-Appellees.

BRIEF OF APPELLEES

On Appeal from the United States District Court
for the District of Maryland
(Richard D. Bennett, Judge)

Charles W. Thompson, Jr.
County Attorney
Sharon V. Burrell
Principal Counsel for Self-Insurance Appeals
Patricia P. Via, Associate County Attorney

Executive Office Building
101 Monroe Street
Third Floor
Rockville, Maryland 20850
(240) 777-6700
Attorneys for Appellees

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JURISDICTIONAL STATEMENT

Appellees Montgomery County, Maryland and Detective Richard Harris accept Appellant's Jurisdictional Statement as set forth in his brief.

STATEMENT OF THE ISSUES

I. Did Detective Harris violate Mr. Guerra's Fourth Amendment rights by the accidental shooting?

II. Does the County have liability under 42 U.S.C. § 1983 for its alleged failure to train in the absence of individual liability?

STATEMENT OF THE CASE

Appellant Ernesto Guerra initiated this action in the United States District Court for the District of Maryland against Montgomery County, Maryland, and Detective Richard Harris, alleging various federal and state constitutional violations and state tort claims arising out of Mr. Guerra's being shot while he was trying to steal a car. Following discovery and extensive briefing by the parties on Defendants' motion for summary judgment, the district court dismissed the claims against Detective Harris, which were brought against him solely in his official capacity, and granted summary judgment in favor of the County. This appeal followed.

STATEMENT OF FACTS

A. The Incident

On the afternoon of January 31, 2002, police officers of the auto theft unit for the Montgomery County Police Department conducted a surveillance of an apartment complex near the White Oak Shopping Center and kept watch over a previously reported stolen vehicle. Detective Thomas Reich, who had been watching several vehicles near the apartment complex, noticed a male, later identified as Ernesto Guerra, walk out of the nearby apartments and, using a screwdriver, get into a stolen Honda. Detective Reich observed the suspect drive away and advised the other officers by radio. (J.A. 17-18, 69, 111-113)

The other officers picked up surveillance on the vehicle. Detective Richard Harris, who was in an unmarked car, spotted the Honda and observed it traveling at a high rate of speed. Detective Harris, and later Detective Michael Chaconas followed the car. (J.A. 17-18, 70) After continuing their surveillance, the officers decided to stop the car when Mr. Guerra was behind another car that was stopped at a red light. (J.A. 18)

Sergeant Michael Sugrue pulled his unmarked police car into the front of the lane in which Mr. Guerra was stopped, in front of another car. (J.A. 19, 162) Detective Chaconas moved his car to the left of the median on the opposite side of

traffic in an attempt to block the driver's side door. Detective Harris came up from behind and stopped his car immediately behind the stolen Honda. (J.A. 18, 75-76, 109) Detective Harris exited the vehicle with his gun drawn and approached. He banged on the rear quarter panel with his left hand and screamed "police, put your hands up." His gun was in his right hand, with his finger outside the trigger guard. (J.A. 81-83) Detective Harris then approached the driver's side door. As he reached for the door handle, he heard the car engine rev and his gun accidentally discharged. (J.A. 91)

B. Police Officer Training

In addition to the training received by every new recruit on felony car stops and high risk stops, Detective Harris received additional and different training on vehicle blocks and high risk stops as it related to stops made by plainclothes units. (J.A. 49-65) When he was first assigned to the auto theft unit, he was trained on dynamic vehicle blocks, which are used because the element of surprise is important in effectuating a stop in a safe manner. (J.A. 32-37) The dynamic stop involves blocking the suspect's car in so that the driver cannot move the car and then rushing up to the driver and either physically removing the person from the car or ordering him to get out. (J.A. 27-31, 34-36, 40-48)

The auto theft unit trained together to practice the techniques involved in the dynamic stop. (J.A. 32-34, 36-38) The training was consistent with what the Federal Bureau of Investigation, the Drug Enforcement Agency, regional task forces and other local jurisdictions have done. (J.A. 38-39, 105-08) Additionally, Detective Harris participated in a number of task forces which also conducted vehicle stops similar to the ones in Montgomery County. His training included approaching the vehicle with his gun drawn, if necessary. He was instructed that he should keep his finger off the trigger and on the slide or outside the trigger guard unless he was prepared to shoot. (J.A. 65-66)

Captain Drew Tracy, a 22-year veteran with the police department, participated in the development of the training program for plainclothes vehicle stops, sometimes referred to as "vehicle takedowns," and trained various units including the SWAT team, special assignment teams and other plainclothes teams. (J.A. 173-78) The general procedures for plainclothes vehicle takedowns were taught to all officers desiring to work in the specialized units. Once in the unit, the training continues. (J.A. 181-89)

The County provides significant training on the use of firearms. Detective Harris received classroom training relating to the use of force and firearms and range training. He participated in numerous programs known as FATS, which is

the firearms training simulator, and various firearms training scenarios that use a marking agent such as paint or other non-live ammunition. He trained and practiced repeatedly with the use of his weapon and knew that the proper procedure for all officers was that they were to keep their fingers off the trigger until they were ready to shoot. (J.A. 65-66)

Captain Tracy, an expert in firearms training, also has conducted firearms training for the Police Department. He testified in his deposition that the placement of the finger off the trigger was a significant part of the training that officers received. Tracy repeatedly instructed officers to keep their fingers outside the trigger guard and off the trigger unless they were on a "shootable target." (J.A. 197) With regard to the vehicle takedowns, Captain Tracy explained that the officers are required to practice the procedures and the instructor critiques officers about the positioning of the finger on the weapon. (J.A. 198-200) Officers receive further instruction on the placement of the finger off the trigger by reviewing video demonstrations. (J.A. 199) Proper finger placement is reinforced when the officers are training at the firearms range or doing simulation training. (J.A. 201-02)

At the time of the shooting, Detective Harris had participated in over 60 high- risk stops involving the type of takedown that occurred in this case. He never

intentionally or unintentionally discharged his weapon in any of those stops. (J.A. 103-04)[1]

SUMMARY OF THE ARGUMENT

The district court correctly granted summary judgment in this case based on the undisputed facts. First, the shooting in this case was unintentional and does not amount to a seizure under the Fourth Amendment. As such, Detective Harris is not liable for any federal constitutional violations. Even if the Fourth Amendment analysis is conducted in this case, Detective Harris' actions were objectively reasonable under the circumstances.

Second, because there was no individual violation of a constitutional right, Montgomery County is not liable under 42 U.S.C. § 1983 for its alleged failure to train. Moreover, the facts establish that the Police Department properly trained its officers on vehicle stops and the use of firearms.

ARGUMENT

STANDARD OF REVIEW

This Court reviews the grant of summary judgment de novo. *Mellen v. Bunting*, 327 F.3d 355, 363 (4th Cir. 2003). Summary judgment is appropriate if

[1]Detective Harris had been involved in at least 500 arrests, either in making the arrest or assisting in the arrest.

"'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Celotex Corporation v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). In determining whether there is a genuine issue of material fact, the Court reviews the record in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

I. Detective Harris did not violate Mr. Guerra's Fourth Amendment rights by the accidental shooting.

The law is well-settled that an accidental act is not a "seizure" within the meaning of the Fourth Amendment. In *Brower v. County of Inyo,* 489 U.S. 593, 596 (1989), the Supreme Court held that a "violation of the Fourth Amendment requires an intentional acquisition of physical control." The Court noted that "a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement . . . nor even when there is a governmentally caused and governmentally desired termination of an individual's freedom of movement . . . but only when there is a governmental termination of movement *through means intentionally applied.*" *Id.* at 596-97 (emphasis in original). The Fourth Amendment "addresses governmental 'misuse of power,'. . not the accidental effects of otherwise lawful governmental conduct." *Id*. (citations omitted). In other words, a violation of the Fourth Amendment

occurs only with the intentional and deliberate action intended to bring about a result — not with the inadvertent action that causes the result.

Following *Brower*, this Court in *Sturges v. Matthews*, 53 F.3d 659 (4th Cir. 1995), addressed what constitutes a "seizure" under the Fourth Amendment. In *Sturges,* a driver led a deputy sheriff on a high-speed chase that ultimately resulted in the driver's death. The decedent's personal representative sued the deputy and various members of law enforcement for constitutional and state tort violations. The district court dismissed all claims prior to trial except the Fourth Amendment excessive force claim, and the jury returned a defense verdict, finding that the deputy did not "intentionally or willfully seize" the decedent. *Id.* at 661. On appeal, the personal representative challenged the court's jury instruction on the definition of "seizure" under the Fourth Amendment. The judge had instructed the jury that a seizure requires willful conduct:

> Now, the violation of the Fourth Amendment requires an intentional acquisition of physical control. The detention or taking itself must be willful. This is implicit in the word 'seizure' but which cannot be applied to an unknowing act. The Fourth Amendment addresses misuse of power, not the accidental affects [sic] of otherwise lawful governmental conduct. Thus, if the injury and death in this case is found based upon a preponderance of the evidence to have resulted . . . from an accident or from an unknowing act, then, of course, there would be no violation . . . .

Id. at 662. This Court found that the instruction was proper, defining willful as something done voluntarily and intentionally.

More recently, in *Milstead v. Kibler*, 243 F.3d 157 (4th Cir. 2001), this Court affirmed that an unintentional and accidental shooting does not implicate a Fourth Amendment seizure "because the means of the seizure was not deliberately applied to the victim." *Id*. at 163-64. *See also Rucker v. Harford County*, 946 F.2d. 278, 281 (4th Cir. 1991) ("[o]ne is 'seized' within the Fourth Amendment's meaning only when one is the intended object of a physical restraint by an agent of the state"). Other circuits have ruled consistently with the Fourth Circuit.

In *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990), the plaintiff, who had been taken hostage, was accidentally shot by police officers when they were trying to apprehend the suspect. The plaintiff alleged that he had been "seized" because he had been shot. The First Circuit disagreed, rejecting "the notion that the 'intention' requirement is met by the deliberateness with which a given action is taken." *Id.* at 795. The Court found that simply because the officer had deliberately shot at the car in order to stop the robber did not mean that he intended to willfully detain the hostage. *Id.*

In *Dodd v. City of Norwich,* 827 F.2d 1 (2d Cir. 1987), the Second Circuit held that the constitutional rights of a burglar, who was accidentally shot and killed

during handcuffing, were not violated because the shooting was not intended for the purpose of seizing him. And in *Campbell v. White*, 916 F.2d 421 (7th Cir. 1990), the Seventh Circuit found no "seizure" and no violation of the Fourth Amendment when a police officer's vehicle hit a suspect who was being chased by the officer. The court made a distinction "between an accidental or tortious act which happens to be committed by a governmental official and an intentional detention that rises to the level of a constitutional violation." *Id*. at 423.

The weight of authority establishes that an accidental discharge of an officer's weapon does not create a viable constitutional claim under the Fourth Amendment.[2] In this case the facts are undisputed. Detective Harris had probable cause to believe that the car he was stopping was stolen and that the driver stole the car. Detective Harris, therefore, had the authority to stop the car to make an arrest. His actions in shooting Mr. Guerra were accidental: Detective Harris did not intentionally put his finger on the trigger and he did not intend to shoot the gun. Mr. Guerra's own expert and attorney agree with the unintentional nature of the

[2] Mr. Guerra relies on *Johnson v. City of Milwaukee,* 41 F. Supp.2d 917 (E.D. Wis. 1999), and *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970), to support his argument that an accidental shooting may violate the Fourth Amendment. But in each of those cases the officer pointed a gun at the plaintiff, thereby causing a seizure and the resulting injury. In this case, however, Mr. Guerra contends that the seizure occurred when police officers blocked in the stolen vehicle that he was driving.

shooting. (J.A. 217, 234) Thus, as a matter of law, there was no Fourth Amendment constitutional violation.

Detective Harris' Conduct Was Objectively Reasonable.

Here, since there is no liability for the unintentional shooting, Mr. Guerra attempts to set forth a claim that his constitutional rights were violated as a result of Detective Harris approaching the car with his weapon drawn and attempting to open the car door. Mr. Guerra claims that this conduct was a seizure. But, in order to state a claim under the Fourth Amendment, the conduct that is challenged as unconstitutional must cause some injury. Further, even if Detective Harris' conduct in stopping the car and approaching the stolen vehicle with his weapon drawn were to be analyzed as a "seizure" under the Fourth Amendment, no constitutional violation occurred because his actions were objectively reasonable.

The district court correctly found that the Fourth Amendment claim failed because: 1) there was probable cause to stop the car[3] and it was reasonable and lawful for Detective Harris to approach Mr. Guerra in the stolen car with his gun drawn; and 2) Mr. Guerra did not suffer any injury until Detective Harris' gun discharged and no violation could have occurred until then. (J.A. 553)

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[3]At the hearing before the district court on the motion for summary judgment, Mr. Guerra's attorney conceded that there was probable cause to stop the car. (J.A. 516)

The Supreme Court has made clear that the standard by which officers will be judged in cases of alleged excessive force is one of "objective reasonableness" considering the circumstances and actions at the time of the arrest. *Graham v. Connor,* 490 U.S. 386 (1989). "[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Id*. at 396. Allowance must be made for the fact that "police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain and rapidly evolving — about the amount of force that is necessary in a particular situation." *Id*. at 396-97.

Moreover, this Court has repeatedly held that the reasonableness inquiry is not determined by looking at the officer's antecedent alleged violations of police procedures but rather by reviewing the actions at the time the force is used. In *Greenidge v. Ruffin*, 927 F.2d 789 (4th Cir. 1991), this Court directed that an officer's conduct under the objective reasonableness standard must be judged by examining the situation immediately prior to and at the very moment that force is used and that the events leading up to that point are not relevant. In *Greenidge*, while working on the vice squad with other officers one evening, a plainclothes officer observed a person believed to be a prostitute enter a car. The officer, along with three other officers, followed the car until it parked and approached the car

from different directions without any flashlights. Officer Ruffin observed an illegal sex act in progress and approached the car door with her gun in hand and opened the door. She ordered the passengers to put their hands in view, but they did not comply. Officer Ruffin then pointed her gun into the car and repeated the order. The officer observed one of the passengers reach for what she thought was a shotgun, and she fired her weapon at the passenger, striking him in the jaw. *Id.* at 790. The plaintiff alleged that the officer recklessly created the dangerous situation by not following proper police procedures in her approach to the car because the officer failed to wait for backup and did not use her flashlight. *Id.* at 791.

This Court held that evidence of alleged violation of police procedures immediately preceding the arrest and all evidence of matters prior to the immediate moment that the decision to use force was made were properly excluded. *Id.* at 791. The Court relied on *Graham* in analyzing the claim under the Fourth Amendment and also relied on several cases from the Seventh Circuit which held that the "objective reasonableness" standard requires "that the officer's 'liability be determined exclusively upon an examination and weighing of the information [the officers] possessed *immediately prior to and at the very moment [they] fired the fatal shots*.'" 927 F.2d at 792 (emphasis in original) (relying on and quoting *Ford*

v. Childers, 855 F.2d 1271 (7th Cir. 1988), and *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988) (en banc)).

In *Drewitt v. Pratt*, 999 F.2d 774 (4th Cir. 1993), an off-duty police officer, working as a security guard, observed a car being driven in a reckless manner and ran after the car with his service revolver drawn. The officer was not in a police uniform and did not display any police identification. When the car stopped, the officer crossed in front of it to approach the driver's side, but the driver moved the car forward in the direction of the officer. The officer fired his weapon at the car and then, as the officer began to fall, the gun accidentally discharged, with both bullets hitting the plaintiff. In affirming the dismissal of the claims against the officer, this Court noted that while the officer may have violated Virginia law and police procedures in not displaying his badge, those actions were immaterial to the decision to use force. *Id.* at 779.

In *Elliot v. Leavitt*, 99 F.3d 640 (4th Cir. 1996), this Court again considered conduct leading up to the discharge of police weapons. In *Elliot*, the officers arrested an individual for drunk driving and handcuffed him after conducting a cursory search for weapons. As he sat in the police car, the suspect grabbed control of a small handgun and pointed it at the officers. In response, the officers fired twenty-two bullets at the suspect and killed him. The decedent's personal

representative contended that the officers' cursory search of the suspect created a dangerous situation that could have been avoided. This Court disagreed, holding that the conduct of the officers prior to the moment the force was used was irrelevant to the inquiry into the reasonableness of the officers' actions. *Id*. at 643.

The Fifth Circuit also has repeatedly ruled that violations of police procedures and standards that lead up to a particular use of force are immaterial and irrelevant to the determination of objective reasonableness. For example, in *Young v. Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985), the Court concluded that the creation of a situation that enhances the risk of a fatal accident does not constitute the unreasonable use of excessive force. *See also Fraire v. Arlington*, 957 F.2d 1268, 1275-76 (5th Cir. 1992) (plainclothes police officer not liable even though he made a number of tactical errors and failed to follow correct procedures which possibly affected the outcome of the incident).

Although the cases cited above involved intentional shootings, the same analysis should apply to an unintentional and accidental shooting. It would be illogical for an officer's accidental and unintentional shooting of a suspect to impose more responsibility and blame than his intentional shooting.

In this case, the actions leading up to the accidental discharge are not material to the inquiry. Detective Harris approached a stolen car with his weapon

drawn and reached for the door handle. Before he could actually open the door, he heard the car engine rev and the gun discharged. At best, Detective Harris may have been negligent or careless in some manner, but Mr. Guerra cannot establish that Detective Harris' actions were objectively unreasonable under constitutional standards at the time the gun accidentally and unintentionally discharged.

Moreover, it is objectively reasonable for a police officer to pursue and approach a stolen car with his gun drawn. *See United States v. Taylor*, 857 F.2d 210, 213 (4th Cir. 1988) (blocking automobile with police vehicles and officers' drawn weapons were permissible police conduct when felony was suspected). And as already noted, the failure to present a police badge is simply not relevant.

In this case, Detective Harris had probable cause to believe the driver in the car had stolen the vehicle. Additionally, the suspect was driving the car in a reckless manner. Thus, Detective Harris had probable cause to stop the car. Detective Harris had the authority under the law to draw his weapon as he approached the stolen car to make the arrest. Accordingly, Detective Harris' actions leading up to the accidental and unintentional discharge of his weapon were objectively reasonable under the law.

II. In the absence of individual liability, the County has no liability under 42 U.S.C. § 1983 for its alleged failure to train.

Although he has not established a constitutional violation, nevertheless, Mr. Guerra seeks to hold Montgomery County liable under 42 U.S.C. § 1983 for unconstitutional customs and practices in the area of police training. In *City of Canton v. Harris*, 489 U.S. 378 (1989), the Supreme Court recognized that the "inadequacy of police training may serve as a basis for Section 1983 liability," but liability arises only "where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388. The failure to train must "reflect a deliberate or conscious choice" by the governmental entity. *Id.* at 389. A mere allegation of inadequate training is insufficient.

For liability to arise, the inadequate training must represent government policy and the inadequacy of the training must be so "obvious" that the governmental policy makers "can reasonably be said to have been deliberately indifferent" to the need for better training. *Id.* at 390. A plaintiff must prove that a "specific deficiency exists," and that the deficiency is the probable cause of the constitutional tort. *Spell v. McDaniel*, 824 F.2d 1380, 1390 (4th Cir. 1987). Moreover, evidence that one police officer violated someone's constitutional rights one time is not sufficient to raise an issue of fact regarding whether the police department's training was insufficient. *Orpiano v. Johnson*, 632 F.2d 1096, 1101 (4th Cir. 1980).

Before a court can address the question of municipal liability, however, there must be a violation of the plaintiff's constitutional rights. In *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), the Supreme Court held that there was no basis for municipal liability against the city and the police commission where a jury found that a police officer had not inflicted constitutional injury on the plaintiff. Recognizing this principle, this Court has held that a municipality "necessarily is not liable for any alleged injuries" where "no constitutional violation occurred." *S.P. v. City of Takoma Park*, 134 F.3d 260, 274 (4th Cir. 1998). *See also Altman v. City of High Point,* 330 F.3d 194, 207 n. 10 (4th Cir. 2003) (municipality cannot be liable in the absence of a constitutional violation by one of its agents); *Belcher v. Oliver*, 898 F.2d 32, 36 (4th Cir. 1990) (failure to train claim unavailing where there is no underlying constitutional infraction). Inasmuch as Detective Harris did not violate Mr. Guerra's constitutional rights, there is no municipal liability for failure to train.

Notwithstanding the fact that there is no constitutional violation, even if there were, the training in this case in no way rises to the level of "deliberate indifference" needed to establish a failure to train claim. Under *City of Canton*, such a claim may be made either by showing a failure to train in a specific area where there is the obvious need for training or by showing a pattern of

unconstitutional conduct so pervasive as to imply actual or constructive knowledge on the part of the policy makers, whose deliberate indifference would be attributable to the municipality. In this case, Mr. Guerra cannot support a claim under either approach.

Mr. Guerra tries to create a dispute based on the unsupported and contradictory opinion of his expert, Charles J. Key, Sr., a retired Baltimore City policy lieutenant, who reviewed the County's training in this matter. Mr. Key opined that the County's training was not sufficient and that the insufficiency of training was the proximate cause of the accidental shooting. But under *City of Canton*, the fact that there could have been more or better training is not sufficient to state a claim for deliberate indifference in training. *Id*. at 390-91. Federal courts will not become involved "in an endless exercise of second-guessing municipal employee training programs." *Id*. Moreover, Mr. Key is not intimately familiar with the specialized units such as auto theft units and other plainclothes units that use vehicle blocks. Although he may be generally familiar with vehicle blocks, in preparation for his opinion on training issues, Mr. Key contacted the Baltimore County Police Department to learn about vehicle takedown procedures in plainclothes units because he did not have sufficient knowledge about such takedowns. (J.A. 204-09)

Throughout his testimony, Mr. Key erroneously relied on and referred to the County's training for uniformed patrol officers and the tactics those officers are to follow when making a felony stop of a vehicle with a marked police car, not the tactics to be followed by plainclothes officers. Because of the specialized nature of their work, plainclothes officers are trained to use a "dynamic stop," which has the element of surprise. They are not required to utilize the "position and call" method used by patrol officers, although they can do so. (J.A. 48, 338)

Further, while Mr. Key opined that the County's training is grossly insufficient, he could not point to any prior instance in which similar problems were encountered by the officers and a weapon was accidently discharged. Nor could he point to a pattern or widespread problem with dynamic vehicle takedowns and the unintentional discharge of a weapon. This is because there were no widespread problems that would have led any County official to be aware of dangers or risks resulting from insufficient training that could lead to the unintentional discharge of a weapon.

Next, Mr. Key contended that the County's training regarding trigger finger placement was insufficient. But Mr. Key's deposition testimony and his written opinion are contradictory. On the one hand, although he believed there was not sufficient reinforcement and documentation, Mr. Key testified that the County

addressed the subjects that needed to be taught and that the County provided training on finger placement, which Detective Harris received. (J.A. 207, 240-250, 253-54) While Mr. Key disputed the sufficiency of the training on firearms and finger placement, he acknowledged that training was given, and that at the very least, Captain Tracy, one of the major trainers in the area of the undercover vehicle takedowns, repeatedly told the officers during training to keep the finger off the trigger and on the slide of the gun. (J.A. 246-49) Mr. Key stated that repetition was important, and reminding the officer of the finger placement should be done whenever possible. He said it has to be practiced also. (J.A. 240-41) He noted that the officers were told in classroom training that they should not have their finger on the trigger unless they are prepared to shoot. In fact, this training was given in recruit training, several of the FATS training plans, the firearms training program, and the simunitions training (when officers are moving with a weapon). Mr. Key's concern was that there was not enough reinforcement in particular situations. (J.A. 241-43, 245)

Acknowledging that stress plays a factor in a situation like this one, Mr. Key stated that, in high-stress situations, "officers may frequently not know where their finger is." (J.A. 238) "It's entirely possible for his finger to get on the trigger without him knowing the finger's there." (J.A. 239)

In contrast to that deposition testimony, Mr. Key also stated that the officers did not have any training on when they should put their finger on the trigger. But the evidence establishes that officers received training on this issue: they put their fingers on the trigger when they are ready to shoot. Captain Tracy testified that officers are told repeatedly throughout the training that they are to keep their finger off the trigger unless ready to shoot. Also, the officers assigned to the auto theft unit participated in various practicals where they were to pull their weapons and make decisions to shoot or not to shoot. In all of these practicals, the officers critiqued one another on how they handled their weapons, including the location of the trigger finger. (J.A. 197-202)

Mr. Key claims that the County's training documentation was insufficient and then makes the huge leap, unsupported by the facts in the record, that if there had been documented training, i.e., if the County had put down on paper how many times these officers were told about the trigger finger placement, then Mr. Guerra would not have been shot. The record establishes, however, that the County trained its officers, including Detective Harris, in the areas of vehicle takedowns and trigger finger placement. Even if the County did not document the exact number of times that the officers were told about trigger finger placement or did not train on it in every training class, there is no connection between the alleged failure to

write something down on a piece of paper to Detective Harris' weapon accidentally discharging.

In short, Mr. Guerra failed to produce evidence of any pattern of abusive conduct or even that the auto theft unit had a problem with unintentional discharges to put the County on notice of some problem that needed to be corrected. Accordingly, even if there were an underlying constitutional violation, Mr. Guerra failed to establish that the County was liable under a failure-to-train theory. The district court, therefore, correctly entered summary judgment in favor of the County.

CONCLUSION

The district court correctly granted summary judgment in this case because it is undisputed that Detective Harris accidentally shot Mr. Guerra. Accordingly, there was no constitutional violation and no basis to hold the County liable. This Court should affirm the district court's decision.

Respectfully submitted,

Charles W. Thompson, Jr.
County Attorney

Sharon V. Burrell
Principal Counsel for Self-Insurance Appeals

Patricia P. Via
Associate County Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of May, 2004, two copies of the foregoing Brief of Appellees were mailed, postage prepaid, first-class, to:

Jonathan C. Dailey, Esquire
Dailey & Associates, Chtd.
2900 M Street, NW, Suite 200
Washington, D.C. 20007

_____

Sharon V. Burrell
Principal Counsel for Self-Insurance Appeals