

NO. 16-10856

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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ERIN LINCOLN, Individually and as Representative  
of the Estate of John Lincoln; Kathleen Lincoln, Individually and as  
Representative of the Estate of John Lincoln  
Plaintiffs-Appellants

v.

PATRICK TURNER  
Defendant-Appellee

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On Appeal from the United States District Court  
For the Northern District of Texas, Fort Worth Division

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**REPLY BRIEF FOR APPELLANT**

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ORAL ARGUMENT REQUESTED

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## Reply to Appellee's Factual Misrepresentations and Misapplication of Law

### A. Factual Misrepresentations

In filing his response to Erin Lincoln's appeal, Appellant Turner made a number of misrepresentations in order to paint a picture manipulated to try and obtain a specific result in this case. Turner states that "Erin told her father that he should not answer the ringing telephone because it would be a police officer (ROA. 228)." (Turner brief, p. 3, citing to Plaintiff's First Amended Complaint). However, what the amended complaint actually states is that "Erin was talking to her dad to keep him calm. Her dad hugged her and talked to her for a long time. They were talking in the kitchen when the phone rang and Erin knew it was the police. She told her dad not to answer it because it would just upset him. He answered and it was the police. The phone call upset him greatly." (ROA. 228). The context of the situation was that Erin was trying to help the situation by keeping her father calm, not that she was trying to evade the police. It further ignores the fact that Erin had already herself talked to officers by phone to let them know that she was not in harm's way and that her father would not harm her. (ROA. 228).

Turner states that "police officers did not know the exact degree to which John was a threat to his daughter, Erin." (Turner brief, p. 3). That is not true.

Erin's aunt had already explained to the police that John would not harm his daughter (ROA. 227) and Erin herself had been on the phone with officers and told them herself that she was not in harm's way. (ROA. 228).

Turner states that “[p]ursuant to SWAT protocol, Officer Turner handcuffed Erin, removed her from the home. (ROA. 588—89).” (Turner brief, p. 4). First, Turner's cited Answer states only that it is protocol to “secure the scene and any unknown persons.” (ROA. 588). It says nothing about a protocol requiring the handcuffing of an individual who is not suspected of any crime and who is not resisting or refusing instructions. While Turner's answer attempts to allege that Erin was “refusing to comply with the Officers” and “resisting violently,” (ROA. 588), those allegations conflict directly with Erin's allegations that “she was scared and crying but she was not threatening anyone or physically encountering anyone. She did not have a weapon and was not suspected of having a weapon or posing any physical threat. She was doing nothing other than lying on the ground and crying.....There was no verbal request by anyone to Erin asking her to comply with any command or offering her any assistance before she was handcuffed and roughly removed from the scene against her will.” (ROA. 237). Furthermore, it has been specifically pleaded that, at the time, Erin was terrified and “did not fight, struggle or resist.” (ROA. 229). Thus, the controlling facts for purposes of this review do not support the use of any force, and certainly not this amount of force,

against Erin Lincoln. Notably, nowhere does Turner address the alleged conduct of throwing Erin over his shoulder after she was handcuffed, hanging her roughly over a gate and throwing her to her feet. (ROA. 229).

Turner attempts to use Erin's request to her father not to answer the phone as support for his use of force (Turner's brief, pp. 3, 5, 10, 13). However, there is zero suggestion (and certainly it would defy logic) that Turner was aware that Erin had suggested to her father that he not answer at the time Turner encountered her. None of the Defendants in this case were aware of such information until this lawsuit was filed. So to try and use that as some alleged basis to handcuff her, throw her around and forcibly detain her is proof that Turner had no real justification for his actions. Turner attempts to aver that in assessing the "reasonableness" of Turner's actions, the Court should consider that "neither Erin or John cooperated with police officers' efforts to communicate with them." (Turner brief, p. 10). Yet at pp. 2—3 of his brief, Turner acknowledges that "Erin told the police that she was okay and that she was trying to calm her dad down." Nowhere can Turner support any allegation that he based his decision to use force on any knowledge of Erin's conduct inside the house. To try now and convince the Court that the reasonableness of his actions are based upon actions that he was unaware of at the time defies logic and the applicable standard of review.

Turner also attempts to convince the Court that “Erin claims only de minimis [sic] injuries consistent with a constitutional handcuffing.” (Turner brief, p. 6, 16). This allegation completely ignores Erin’s pleadings with respect to her injuries, including the fact that she already suffered from a severe anxiety disorder prior to this incident (ROA. 239) and that the actions of Turner in handcuffing her, throwing her around and restraining her in the back of a patrol car shocked and terrified her (ROA. 240), further traumatizing her (ROA. 240). “She has received counseling but continues to suffer sleeplessness, anxiety, depression, loss of appetite and severe social anxiety, cutting herself off from others and seeking isolation.” (ROA. 240). The fact that some of her terror was a result of watching her father shot and killed beside her and that some of her terror was a result of being handcuffed, dragged from the scene, manhandled and locked in a patrol car does not require the dismissal of the claims.

#### B. Misapplication of Law

In his brief, Turner cites to *United States v. Sokolow*, 490 U.S. 1, 9—10 (1989) for the proposition that even the seminal case regarding lawful investigatory detentions involves a series of acts, each of them perhaps innocent if viewed separately, but when taken together warranted further investigation. (Turner brief, p. 9). Such a representation mischaracterizes and misapplies the *Sokolow* decision. In *Sokolow*, a man was suspected of being a cocaine dealer and was, in fact,

arrested with 1,063 grams of cocaine in his luggage. 490 U.S. at 1. The conduct giving rise to reasonable suspicion of a crime included a laundry list of activity (such as traveling under an assumed name) that, all together, gave rise to suspicion of criminal activity (“there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot” (citations omitted)). *Id.* at 9. Turner cannot point to any activity on the part of Erin in which she herself was suspected of criminal activity. While Turner makes vague conclusions about alleged “criminal activity” (Turner brief, p. 11) and a “larger criminal enterprise,” (*Id.*), he can cite to no allegedly criminal conduct of which he was aware at the time he encountered Ms. Lincoln.

Turner also cited to *U.S. v. Sharpe*, 470 U.S. 675, 685 (1985) to support his requested dismissal. (Turner brief, p. 9). That case actually supports Erin Lincoln’s claim. The opinion reiterates that in evaluating the reasonableness of a detention, the Court must examine “whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* at 683. Thus, before even considering the “length” of the detention, Turner must first justify *any* detention based upon reasonable suspicion of criminal activity, which he cannot do. Each of the cases cited by Turner actually support Ms. Lincoln’s position that in her case,

there was no articulable, reasonable suspicion that she was engaged in criminal activity.

In his analysis of the excessive force claim, Turner ignores the factual allegations regarding his manhandling of Ms. Lincoln, including throwing her over his shoulder, throwing her over a fence throwing/dragging her to her feet on the other side of the fence before putting her in the back of a patrol car against her will. (ROA. 229). All claims that law enforcement officers have used "excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 395 (1989). To state a Fourth Amendment excessive force claim, Erin Lincoln has alleged: 1. a severe emotional injury 2. which resulted from a use of force that was clearly excessive, and 3. the excessiveness of which was clearly unreasonable." *Freeman v. Gore*, 483 F.3d 404, 416 (5th Cir. 2007). Whether Ms. Lincoln has alleged an excessive force claim against Officer Turner depends on whether or not she has pled a facially plausible claim that the force was objectively unreasonable under the circumstances. *See Banks v. Gammon*, 2010 WL 996743, at \*5 (N.D. Tex. Jan. 26, 2010). "Objective reasonableness is 'a pure question of law' that is considered after determining the relevant facts." *Id.* (quoting *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007)). To make this determination, courts "must balance the amount of force

used against the need for force." *Id.* (*quoting Ramirez v. Knoulton*, 542 F.3d 124, 129 (5th Cir. 2008)).

Here, Erin Lincoln has alleged a use of force which was clearly unreasonable. Officer Turner was aware that she was not a suspect in a crime and had committed no crime. She did not fight, struggle or resist in any way. She questioned why she was being taken into custody but was ignored. Despite that fact that he had no legal reason to detain Ms. Lincoln and no basis upon which to use any force at all, Turner handcuffed her and then violently threw her over his shoulder, took her through the back yard and threw her over the fence, after which he involuntarily placed her in the back of a patrol car. Officer Turner clearly used unreasonable force excessive to the need and in violation of the Fourth Amendment.

Turner's brief in this matter asks this Court to ignore the specific facts pleaded by Ms. Lincoln and affirm an opinion that is based upon a misunderstanding of the pleadings (where the district court stated that Ms. Lincoln had failed to plead "that Erin or her family had any contact with [Turner], physical or verbal." (ROA. 647—648)). Ms. Lincoln has clearly pleaded facts sufficient to sustain her cause of action against Turner and the order of the district court should be reversed and remanded.

IV. CONCLUSION AND PRAYER

THEREFORE, Erin Lincoln asks that the district court be reversed and all other additional relief as the Court deems just and proper.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that on this 17th day of November 2016, a true and correct copy of the above and foregoing document was served on the following attorneys of record via the court's electronic service and/or first class, regular mail:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I certify that the foregoing BRIEF OF APPELLANT, complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because this brief contains 2,148 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I certify that the foregoing BRIEF OF APPELLANT, complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for MAC in 14 point Times New Roman.

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