Thomas Olson v City of Hooper Bay, et al, Case No. S-13455

Reply Brief

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IN THE SUPREME COURT OF THE STATE OF ALASKA

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THOMAS OLSON,

Appellant,

vs.

CITY OF HOOPER BAY,
OFFICER DIMITRI OAKS,
OFFICER CHARLES SIMON, and
OFFICER NATHAN JOSEPH,

Appellees.

Supreme Court No. S-13455

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State of Alaska

Trial Court Case No. 4BE-07-26 CI

APPEAL FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT AT BETHEL
THE HONORABLE LEONARD R. DEVANEY PRESIDING

REPLY BRIEF OF APPELLANT THOMAS OLSON

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Clerk of the Court

By: Rob Saviquet
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I. INTRODUCTION

Appellees Hooper Bay, Officers Oaks, Simon and Joseph (hereinafter 'Hooper Bay') make two errors in their opposition brief: they do not construe disputed facts in a light most favorable to Mr. Olson and they ignore well-established law holding that officers may not repeatedly tase a non-combative, but non-compliant, suspect. Case law and the Hooper Bay police officers' common sense put them on notice that they could not repeatedly tase Mr. Olson when he was non-combative. Accordingly, this Court should reverse the superior court's order granting summary judgment.

II. Appellees do not construe the facts in a light most favorable to Appellant.

Summary Judgment is appropriate only when there are no genuine issues of material fact; in reviewing an order granting summary judgment this Court draws "all reasonable inferences in favor of the nonmoving party."[1] Here, the superior court did not construe evidence in Mr. Olson's favor when it found that Mr. Olson posed a threat to officer safety *before* the officers initially discharged their tasers.[2] [Exc. 354].

The superior court found that the officers "knew [of Mr. Olson's] aggressive past history with police," citing Officer Joseph's testimony and Officer Oaks' testimony. [Exc. 353]. Yet, Sgt. Joseph also testified that he was not aware of any

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[1] *Valdez Fisheries Dev. v. Alyeska Pipeline*, 45 P.3d 657, 664 (Alaska 2002).

[2] Appellant's opening brief at part V. B. 1.

assaultive, uncooperative or police combative behavior involving Mr. Olson within the last ten years. [Exc. 265 at 9:4-18]. And Officer Oaks was only aware of a disorderly conduct charge. [Exc. 295 at 59:7-11]. Indeed, Mr. Olson's criminal history consists of a suicide attempt in 1994 when he was 17 years old, a furnishing alcohol to a minor charge in 1998 and a disorderly conduct charge in 2006 when he refused to turn loud music down and gave an officer "the middle finger." [Exc. 43, Exc. 44, Exc. 45-46].

Contrary to applicable law, Hooper Bay characterizes the events of this case in the very best possible light to itself. It claims that Mr. Olson was so intoxicated that he was "unconscious" when officers entered his home, and alleges that the officers clearly announced their intention to perform sobriety tests when they handcuffed Mr. Olson.[3] In fact, the officers arrived at approximately 4:00 a.m., when Mr. Olson was *sleeping*, as are most people at this time of the morning, not "unconscious." [Exc. 112 at 11:9-12]. And the officers asked Mr. Olson to do "a test;" he was not made aware that the officers were there to investigate his sobriety. [Exc. 133 at 22:15-17].

Hooper Bay fails to note that Mr. Olson complied with the officers' requests to allow them to handcuff his hands behind his back and to walk with them toward the exit. That he loudly argued with them and claimed they violated his rights does not detract from the fact that he complied with their instructions.

[3] Appellees' Brief at 5, 6.

And his response to the confusing intrusion may be just how any reasonable person would respond under these circumstances. It was only when the officers pulled Mr. Olson to the floor when they slipped on the black trash bag that he became confused and fearful, and began kicking at the officers. [Exc. 106, ¶ 24]. Officer Oaks' testimony that Mr. Olson started kicking as they walked toward the exit is illogical and disputed by even his own supervising officer. [Exc. 117 at 30:3-4, 32:7-8]. According to Sgt. Joseph, Mr. Olson started to kick only after they pulled him to the ground. [Exc. 117 at 30:3-4, 32:7-8]. At this point, Sgt. Joseph grabbed Mr. Olson and flipped him over to keep him from kicking further, apparently without any problem. [Exc. 117 at 32:23-25].

Hooper Bay argues that "[i]t was a balancing act for the officers just to walk on the floor near the stairs, it was so slick."[4] Yet, no one disputes that the reason they fell was due to one or both of them simply slipping on a black plastic trash bag. [Exc. 133 at 24:6]. It was an unfortunate misstep rather than a matter of balance. The trash bag was near the middle of the room and was up to six feet from the stairway. [Exc. 132 at 19:18-23; Exc. 133 at 23:24-25 to 24:1]. There was a wall at the top of the stairway. [Exc. 113 at 16:13-18]. There was a floor to ceiling pole near the <u>center</u> of the room, not at the top of the stairs as asserted by Hooper Bay.

[4] Appellees' Brief at 8.

Hooper Bay claims that Mr. Olson kept "fighting after tasing,"[3] however; his hands were cuffed behind his back throughout the incident. [Exc. 180, ¶ 56]. It claims that he was kicking so much that the officers could not lift him up off the floor.[4] Yet, as stated above, Sgt. Joseph without assistance was able to grab Mr. Olson and flip him over to keep him from kicking further, apparently without any problem. [Exc. 117 at 32:23-25]. And Sgt. Joseph without assistance was able to prevent from kicking by simply holding legs together so that he couldn't kick. [Exc. 99] Officer Oaks testified that if the officers did not have tasers that night, he "would have tried to pin [Mr. Olson] to the floor so he . . . wouldn't kick anymore." [Exc. 135 at 32:15-25]. Had he done so that night, Mr. Olson would have sustained no injuries.

Throughout the altercation, Mr. Olson was concerned about the welfare of his children. For example, at one point he pleaded, "Aka, look, I just -- no, don't, please. You go -- no, I got my kids, my baby's crying. Look, I'm going to come (indiscernible). No, Aka, look. I'm not drunk (indiscernible). Look, please, look, my son's right there." [Exc. 42 at 4:44 to 4:57].

Hooper Bay's self-serving claim that Mr. Olson continued to resist or to represent a threat of harm to the officers as he laid flat on his stomach, on the floor, with his hands cuffed

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[3] Id. at 10.
[4] Id.

behind his back defies logic and physics.[1] It is nothing more than an attempt to explain away the officers' unreasonable, punitive, repeated tasering of a helpless man, outnumbered two to one.

Contrary to Hooper Bay's representation, Mr. Olson's brother, , did not "scheme" with one of Mr. Olson's children. Though it is difficult to discern whether stated "Pliars. Pliars" or "Liars. Liars." [Exc. 42 at 17:01-09], a close review of the audio recording shows that several times Peter tried to de-escalate the scene. For example, in the exchange below, reminded the officers of their role, the impropriety of the actions, and Mr. Olson's lack of resistance:

> MR. THOMAS OLSON: Please. Seriously. Please. Please.
> **MR.** : Yeah. Hey. Boya.
> *[Child screaming]*.
> MR. THOMAS OLSON: You're scaring my kids. *[Screaming]*.
> *[Dispatch: (Indiscernible).]*
> MR. THOMAS OLSON: You're scaring my kids.
> *[Child screaming]*.
> OFFICER: Let's go.
> MR. THOMAS OLSON: You're scaring my kids. You're scaring my boys. You're scaring my boys. *[Yelling]*.
> **MR.** : Charles. Hey. You guys are supposed to be police officers.
> OFFICER: That's right we are.
> **MR.** : Police officers, yes, but what are you guys doing right now to these kids?
> OFFICER: Stand up.
> OFFICER OAKS: It's not us doing it to the kids.
> **MR.** : Yes, you guys are. Boya, is trying to calm down (indiscernible).
> OFFICER: Boya, stop resisting.
> **MR.** : He ain't resisting, Charles.
> OFFICER: Stand up. Stop resisting.
> **MR.** : That ain't resisting.

[1] Id. at 11.

[EXC. 42 at 17:34-18:16]. Later, he told Mr. Olson's emotionally distressed child, "Don't worry, Kobe, calm down. . . . Kobe, you want to watch cartoons?" [Exc. 42 at 24:18-28].

In attempting to excuse the officers in this matter, Hooper Bay would have this Court believe that the altercation was a long "drawn-out struggle."[8] Yet, it concedes that, in fact, the tasing altercation lasted only <u>five</u> minutes, seven seconds.[9] And it concedes that in that short time, its officers tased Mr. Olson from 15 to 18 times.[10] [Exc. 180, ¶ 56]. Medical records show 22 burn marks. [Exc. 200] Frighteningly, Hooper Bay takes pride in the fact that the officers were able to contain themselves and refrain from tasing Mr. Olson for the first five minutes of the altercation where Mr. Olson complied with officers' requests but argued belligerently.[11] Belligerance is not a crime or a reason to tase. And, though the fall on the trash bag was as much as six feet from the stairway and the floor to ceiling pole even further than that, Hooper Bay prides itself that its officers "avoided further injury" at the top of the stairs. There is not one scintilla of evidence that its officers tased Mr. Olson because they feared they would somehow fall down the stairs.

Hooper Bay's pride is misplaced. Its officers tased a handcuffed man 15 to 18 times in the span of five minutes merely because he was loud and belligerent and refused to stand up. There is no evidence that Mr. Olson ever advanced toward the

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[8] Id. at 9.
[9] Id. at 12.
[10] Id.
[11] Id. at 14.

officers at any time during the entire altercation. His actions were always defensive. When Mr. Olson kicked at the officers, it was driven by a desire to protect himself rather than to hurt the officers. [Exc. 106, ¶ 24].

Hooper Bay claims that five minutes is a "long, dangerous time frame for officers to be grappling with a suspect."[12] The Hooper Bay officers were not a SWAT team engaged in a deadly battle with a shooter or a terrorist. The officers were at the Olson residence for nothing more than a welfare check and those charges were later dismissed.[13] There was no urgency or imminent danger. There was no catastrophe they needed to prevent. There was simply no reason to grapple with Mr. Olson in the first place.

Hooper Bay claims that Mr. Olson was kicking and therefore, the tasing was justified. However, Michael Lyman, Ph.D., a professor of criminal justice, opined that "[a] subject's ability to kick, or move at all, is inconsistent with the very nature of the Taser as a control device. This is because as an electronic control weapon, the Taser is designed to immobilize the muscle groups of the person being tased to the extent that they collapse. Given the excessive number of Taserings in this case, it is questionable if not completely doubtful that [Mr. Olson] would be physically able to kick after being tased." [Exc. 179, ¶ 51]. He further opined that "[a] seated subject and attempting

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[12] Id. at 39.

[13] Sgt. Joseph apparently had no involvement in the dismissal. [Exc. 116 at 27:1-3]

to kick is notably different than (sic) one who is standing and attempting to do so. But even then, it is my opinion that if the standing subject is handcuffed, even his ability to deliver kicks that would realistically pose a threat to two officers is questionable." [Exc. 179, ¶ 52]. Indeed, because Mr. Olson was seated, clinging to a pole, the officers need only have stepped away from Mr. Olson to avoid any harm.

The officers should have taken time to explain to Mr. Olson why he was being arrested and to allow Mr. Olson to process the explanation. They should have taken time to calm Mr. Olson's hysterical, screaming children. Sgt. Joseph testified that they could just have removed the children from the home. [Exc. 155 at 23:19-20]. He testified that he knew the location of the children's mother. [Exc. 115 at 25:8-9]. They should have taken a deep breath to reflect on why they were present in the Olson home in order to act reasonably. Mr. Lyman opined that "there was no effort on [the officers'] part to communicate why they were there and to calm the situation before it got out of hand." [Exc. 178, ¶ 47]. Mr. Olson affied that he "wished the officers had talked to [him] more so that [he] could have understood what was going on." [Exc. 106, ¶ 25]. Hooper Bay's claim that the officers "calmly" instructed Mr. Olson to comply before tasing him is not borne out by a review of the audio tape. Clearly, the officers' agitation and out of control tasing belie any claim of calmness. [Exc. 42].

Contrary to the facts set forth above, the superior court found that Mr. Olson "actively resisted arrest and that the situation before force was applied was rapidly escalating out of control." [Exc. 353]. However, Hooper Bay ignores the superior court's factual findings as to the subsequent tases and urges this Court to make all factual inferences in Hooper Bay's favor. The superior court correctly found that subsequent tases, done *after* the initial discharges for supposed officer safety reasons, were not objectively reasonable. [Exc. 355].

More significantly, Hooper Bay asserts that Mr. Olson "kept fighting" and was continually resisting while he was tased 15 to 18 times.[14] However, the superior court found the opposite, that "most [tases] occur[ed] when the Plaintiff was seated with the Plaintiff's legs wrapped around a ceiling to floor pole in the house and at least some while he was prone on the ground on his stomach." [Exc. 354]. Ample evidence in the record supports this finding. [Exc. 106 at ¶24], [Exc. 106 at ¶23], and [Exc. 124 at 50:24-25; 51:1-13].

Hooper Bay further asserts that the audio recording is proof that Mr. Olson never ceased struggling while he was tased.[15] But Mr. Olson was seated, with his hands cuffed behind his back, clinging to a pole. The struggle, as Hooper Bay labels it, amounted to loud, belligerent shouting. Hooper Bay also admits that while Mr. Olson was being tased, an officer "struggled with

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[14] Appellees' Brief at 10-11.
[15] Id. at 36.

'Peter on the couch."[16] Much of the noise on the audio recording is Sgt. Joseph's successful control of legs. And Hooper Bay admits that the tases caused Mr. Olson pain, that they caused him to be disoriented, to make involuntary muscle movements, and that they caused him to cry out. [Exc. 292, p. 49 and Exc. 293, p.50]. Because all these sounds are audible on the recording of the arrest, it is impossible to glean from the recording whether Mr. Olson was struggling with officers during the repeated tasings or simply reacting to the pain of the tasering. In fact, because tases disable a suspect, and can cause involuntary muscle movements, it is likely that he was not struggling during this time. [Exc. 179, ¶ 52].

Hooper Bay returns throughout its brief to the theme that the tases were "necessary because [Mr. Olson] continued to actively resist and fight the officers."[17] Even the officers' testimony belies that: Mr. Olson was ordered to "stand up... just comply," indicating that he was not being aggressive when on the ground.[18] Hooper Bay also disregards the superior court's finding that Mr. Olson was tased "15 to 18 times."[19] In short, construing the evidence in a light most favorable to Mr. Olson, the superior

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[16] Id. at 9.
[17] Id. at 12.
[18] Id. at 11.
[19] Hooper Bay argues that this finding was clearly erroneous because it was based on the opinion of an expert who "did not know what a Taser stun felt like" and had "never personally been present when anyone was shot with a Taser." App. Brief at 13. But the 15 to 18 number was based on testimony from the officers, not knowledge that could only be gleaned from actually being present when someone is shot with a Taser. [Exc. 180]. The superior court's finding were not clearly erroneous.

court correctly found that Mr. Olson was repeatedly tased when he was not actively resisting. The superior court correctly found, and Hooper Bay ignores, that there was a genuine issue of material fact as to whether the tases constituted excessive force.[10] [Exc. 355].

III. The Hooper Bay police officers were on notice that they could not tase Mr. Olson when he was being non-combative and when he was prone on his stomach.

Because Hooper Bay construes all disputed facts in its favor, its brief does not address the legal issue at the heart of this case: was the superior court correct in holding that the officers did not have clear notice that tasing a suspect in order to get him to comply with orders is improper?

A. Case law distinguishes between repeated tases for compliance purposes and repeated tases to calm a combative, aggressive suspect.

Hooper Bay relies on authorities that address the use of a taser on a combative, aggressive suspect. For example, the Hooper Bay police department's own regulations authorize taser use in the event of "immediate threat of death or great bodily harm" or when there is a "substantial physical struggle." [Exc. 63 at no. 2]. They do not address the use of a taser for the sole purpose of getting a suspect to comply.

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[10] Hooper Bay contradicts itself when it asserts, on page 29 of its opposition brief, that appellant "bald[ly] assert[s], [and the superior court never found], nor was there admissible evidence, that [Mr. Olson] had 'ceased struggling or resisting' during any of the Taser deployments." As discussed above, and as cited by Hooper Bay in the very next sentence, "the Superior Court found [that] the Plaintiff actively resisted arrest and that the situation *before force was applied* was rapidly escalating out of control." (emphasis added).

The case law Hooper Bay relies on is similarly limited to cases in which a suspect is aggressive or tases are necessary to calm a tense situation. In *Devoe v. Rebant*, the federal court for the Eastern District of Michigan found that officers acted reasonably by tasing a suspect once who would not get into a police vehicle.[21] The court found that any other action "would have escalated the situation into a physical struggle in which Mr. DeVoe or the officers could have been seriously injured."[22] And in *Willkomen v. Mayer*, the federal court for the Western District of Wisconsin found that officers properly tased a suspect three times when he actively resisted arrest.[23] The court found that plaintiff made three separate acts resisting arrest, and that each tase was reasonable as a reaction to each act.[24]

Courts have generally held that the use of a taser against a suspect who resists arrest does not constitute excessive force.[25] But courts have also held that the use of a taser on a suspect solely for the purpose of getting him to comply with officer orders is excessive.[26] The contours of this holding were sufficiently clear at the time Hooper Bay police officers tased Mr. Olson 15-18 times to put them on notice that they could not use their taser for compliance purposes only.[27]

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[21] 2006 WL 334297 at *6 (2006)(unreported).
[22] Id.
[23] 2006 WL 582044 at *3 (2006)(unreported).
[24] Id.
[25] See, e.g., *Smith v. City of Hemet*, 394 F.3d 689, 696 (9th Cir. 2005).
[26] Id. at 702.
[27] See, e.g., *Beaver v. City of Federal Way*, 507 F.Supp.2d 1137, 1148-9 (W.D. Wash. 2007)(finding that *Smith v. City of Hemet* and

The only cases to the contrary hold that an officer may make *limited* tases of a suspect when there is no threat of injury (or the threat is unknown) and the tases are done solely for compliance purposes. These cases hold that officers may tase a suspect no more than once in order to gain compliance. In *Schumacher v. Halverson*, the federal court for the district of Minnesota found that an officer's use of a taser for compliance purposes "was measured, proportionate, and objectively reasonable."[28] The officer in that case tased a DUI arrestee *once* because he had latched himself on to an outdoor poll and refused to release his grab.[29] The court found it relevant that the officer was alone and that he did not know whether the suspect was armed.[30] Similarly, in *Willkomen v. Mayer*, mentioned above, a federal court found that the three tases did not constitute excessive force, but each one was related to a separate incident of non-compliance. First, the officer tased the suspect as he resisted arrest by not allowing the officer to handcuff him.[31] Second, when the suspect was in the police vehicle, he "moved around, yelled, banged his hands on the back window... and repositioned his handcuffed hands to the front of his body."[32] Officers took him out of the car, repositioned his handcuffs, and

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Harveston v. Cunningham, 216 Fed.Appx. 682 (9th Cir. 2007), "support the proposition that police officers may not use force when, as here, a suspect is not a threat, even if the suspect is not fully complying with the officer's commands") and

[28] 467 F.Supp.2d 939, 951 (2006).

[29] Id. at 943-4.

[30] Id. at 951.

[31] *Willkomen* at *3.

[32] Id.

tased the suspect when he actively prevented the officers from putting him back in the car.[33] Third, the suspect repositioned his handcuffs again, officers had to take him back out of the car and use their taser a final time to properly handcuff the suspect.[34]

B. At a very minimum some of the 15-18 tases in this case were done solely for the purpose of getting Mr. Olson to comply with officer orders.

As discussed above, at a very minimum some of the taser strikes after Mr. Olson and the officers fell were inflicted solely to get Mr. Olson to stand up. Neither party has been able to find, any case in which a court has held that officers receive immunity for *repeatedly* tasing a suspect solely to gain compliance with an officer's order (when there is no threat of death or serious physical injury). In *Graham v. Connor*, the United States Supreme Court identified three factors courts should consider in determining excessive force claims: "the severity of the crime at issue, whether the suspect 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."[35] In this case, the officers were present at the Olson residence to conduct a welfare check and when they arrived everyone was asleep except for the child they awakened. Once inside, when the officers tased Mr. Olson multiple times to get him to stand up, he was not "*actively* resisting arrest" nor

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[33] Id.
[34] Id.
[35] 490 U.S. 386, 396 (1989).

advancing on them such that he was an "*immediate* threat;" thus, the use of force was excessive. The officers were on notice that tasing him more than once to gain his compliance was improper.

C. At least some of the tases while Mr. Olson was lying prone on his stomach were punitive and excessive.

The superior court found that the officers' initial tases were reasonable, in part because officers perceived Mr. Olson to be kicking at them. But the officers unleashed a barrage of 15-18 tases; not all of which were related to officer safety. The tases were most clearly excessive when Mr. Olson was on his stomach, with his hands handcuffed behind his back. Mr. Olson was tased two to four times while in this position. [Exc. 297].

While lying prone on his stomach Mr. Olson posed no threat to the officers. He could not kick or bite them. At this point in the confrontation, the officers were no longer on the floor next to Mr. Olson. [Id.] Thus, the two to four tases while he was in this position could not have been done for officer safety purposes. It's doubtful whether a suspect lying prone on his stomach with his hands handcuffed behind his back can even stand up, so the tases could not have been for compliance purposes either. They were punitive then. The officers attempted to inflict pain on Mr. Olson as a result of officer frustration. *Hemet*, *Graham*, and *Beaver* all put officers on notice that they could not use force against Mr. Olson while he was in this position. There is no case law to the contrary.

D. It should have been obvious to the officers that 15 to 18 tases were excessive.

In *Sheldon v. City of Ambler*, this court noted that "[o]ne should not let the lack of explicit law in an area be a substitute for the reasonable officer's common sense."[16] In that case the officer's "use of a bear hug" to subdue a resisting suspect was not "so egregious, so excessive" that the officer should have known it was unreasonable, without clear notice."[17]

In this case, however, there is explicit law proscribing the officers' conduct. But also common sense should have dictated to the Hooper Bay police officers that 15 to 18 tases were unreasonable. When Mr. Olson did not, or could not, get to his feet after he was tased five times, what reason could the officers have had for continuing to tase him? And when he did not get to his feet after ten tases? The officers had no basis for believing that continued tasing would achieve any legitimate law enforcement objective, except perhaps to so thoroughly injure Mr. Olson that he could not move. The officers knew that taser applications were a use of force, and they knew that the applications caused injury to the victim. [Exc. 250]. Michael Lyman opined that that the use of the taser in this case was "so constant and continual that there is no way [the officers] would not know that 15 deployments of a Taser against a handcuffed subject [was] extreme and excessive." [Exc. 181]. A reasonable officer's common sense in this situation would lead him to conclude that the tases amounted to excessive force.

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[16] 178 P.3d 459, 467 (2008).

[17] Id.

IV. CONCLUSION

Mr. Olson was tased 15 to 18 times; most of these tases occurred when he was sitting with his legs wrapped around a poll or lying on his stomach with his hands handcuffed behind his back. Common sense, the officers' own use of force regulations, and case law all dictate that such use of force was excessive. The contours of this law were so clear that the officers were on notice that their actions were unreasonable. Accordingly, Mr. Olson respectfully requests that this court reverse the superior court's order.