No. _____

In the Supreme Court of the United States

JEREMY CARROLL,
Petitioner

v.

ANDREW CARMAN AND KAREN CARMAN,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A jury found that a state trooper acted reasonably when, seeking to conduct a "knock and talk," he approached the back door of a residence because it appeared to be a customary entrance used by visitors. The questions presented are:

1. When a police officer approaches a residence to conduct a "knock and talk," does the Fourth Amendment require the officer to go to the "front door" even where it reasonably appears that some other entrance is also customarily used by visitors?

2. Did the Court of Appeals err in holding that such a rule was "clearly established" for purposes of qualified immunity?

PARTIES TO THE PROCEEDING

Petitioner is Jeremy Carroll, a Trooper with the Pennsylvania State Police.

Respondents are Andrew and Karen Carman.

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The opinion of the Court of Appeals is reported at 749 F.3d 192 and is appended to this petition at 1a. The decision of the District Court on summary judgment is not reported, but is appended at 20a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 2014. This petition is being filed within 90 days thereafter. The Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST., Amend. IV.

STATEMENT OF THE CASE

Petitioner Jeremy Carroll is a Trooper with the Pennsylvania State Police. Respondents Andrew and Karen Carman sued Trooper Carroll, claiming, *inter alia*, that he had unlawfully entered their property when he sought to speak with them while conducting an investigation; specifically, they complained that he had approached their residence via the back door rather than the front door. A jury, however, found that the back door reasonably appeared to be the customary entry for visitors arriving at the house by

car, and that Trooper Carroll therefore had not violated the Fourth Amendment. The Third Circuit overturned the verdict, holding that a "'knock and talk' encounter *must* begin at the front door," Pet. App. 10a (emphasis added); and that this rule was "clearly established" for purposes of qualified immunity.

1. On July 3, 2009, Trooper Carroll was ordered to search for a man named Michael Zita, a parolee who had stolen two loaded handguns and a car from New Jersey. Trooper Carroll was told that Zita might have fled to 101 Raspberry Path in Dingman's Ferry.[1] Around the same time, Trooper Brian Roberts[2] received a similar dispatch. Neither trooper knew the age or physical appearance of Zita, neither had previously been to the Raspberry Path address, and they had no warrant to search the house or to arrest Zita. Pet. App. 3a. Troopers Carroll and Roberts, traveling in separate vehicles, arrived at the house – the residence of the Carmans – around 2:30 in the afternoon. COA App. 61 (trial testimony of Trooper Roberts).[3]

The house at 101 Raspberry Path was located on a corner lot, with a street running along the front of the house and a street running along the left (as viewed from the front). No parking was permitted in front of the house; but numerous cars were parked in a graveled area along the left side of the property and

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[1] Dingman's Ferry is in Pike County, in the northeast corner of the Commonwealth near the Pennsylvania-New Jersey border.

[2] Trooper Roberts was not sued in this action.

[3] The Court of Appeals appendix will be cited as "COA App." followed by the page number.

adjoining the Carmans' back yard.[4] Pet. App. 4a. The back yard was not fenced in and contained no indication that it was closed off from visitors, but was open to public view and easily accessible to the public; anyone could cut across the back yard if they so desired. Pet. App. 15a, 29a; COA App. 50 (trial testimony of Ms. Carman). Upon arriving, the two troopers turned down the side street and parked in the next available spaces in the parking area. Pet. App. 4a.

At the back of the Carmans' house was a large deck, standing a foot or so off the ground and reached from the yard by two short sets of steps. The deck in turn led to an entrance to the house.[5] Pet. App. 15a. Due to the layout of the property and parking area, the entrance from the deck appeared to be a customary entryway used by visitors arriving by car, so the troopers headed in that direction.[6] Pet. App. 4a, 15a. As the troopers approached the house, they

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[4] While there was no barrier of any kind between the graveled parking area and the back yard, the record does not reflect whether the parking area was actually part of the Carmans' property.

[5] A photograph of the deck appears at Pet. App. 15a. In that photograph, there appears to be a gate closing off the stairs leading to the deck from the parking area. This gate, however, was not present on the day in question, but was only installed afterward. COA App. 93 (trial testimony of Trooper Carroll).

[6] The Court of Appeals repeatedly characterized the troopers as having "bypassed" the front door. Pet. App. 2a, 11a, 12a. But upon exiting their vehicles, the troopers were already in the back of the property, facing the back of the house. The Court of Appeals did not explain how their decision not to walk around the house amounted to "bypassing" the front door. *Cf.* Pet. App. 3a n. 2 (recognizing the obligation to construe the facts "in the light most favorable to Carroll").

noticed a small outbuilding at the rear of the property with an open door and illuminated interior light. There appeared to be someone inside the structure. Trooper Carroll walked over to the door and announced his presence. No one was there, however, so the troopers continued toward the house. Pet. App. 4a.

Just as the troopers stepped onto the deck, Mr. Carman came out of the house and aggressively approached the troopers. A small scuffle ensued. When things settled down, the troopers determined that Mr. Carman was not the armed suspect they were seeking, but that the Carmans did know Zita. With Ms. Carman's consent, the troopers searched the house for Zita, but found no one. Pet. App. 4a-5a.

After the search, the Carmans did not ask the troopers to leave. Rather, the troopers talked with the Carmans in their kitchen for 20 or 30 minutes. Mr. Carman apologized, shook Trooper Carroll's hand, and explained that he was under a lot of stress because the day before, the Carmans had attended the sentencing of the individual responsible for their daughter's death, COA App. 86-87 (trial testimony of Trooper Carroll); and at trial, Mr. Carman confirmed that he had not been upset because the troopers had approached his house via the back door. COA App. 35-36 (trial testimony of Mr. Carman). The troopers then left. Pet. App. 5a.

2. The Carmans brought this action against Trooper Carroll, claiming among other things that his entry onto their property had violated their rights under the Fourth Amendment.[7] Trooper Carroll

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[7] The Carmans also claimed that Trooper Carroll had unreasonably seized and used excessive force on Mr. Carman when they scuffled; and that Ms. Carman's consent to the search

conceded that he had no warrant for his entry and claimed no exigent circumstances, but justified his entry on the so-called "knock and talk" exception to the warrant requirement. The district court summarized that exception as follows:

> [O]fficers are allowed to knock on a resident's door or otherwise approach the residence seeking to speak to the inhabitants just as any private citizen may. . . . Officers should restrict their movements to walkways, driveways, porches and places where visitors could be expected to go.

Pet. App. 28a (internal quotation marks and citations omitted). The district court denied the Carmans' motion for summary judgment on this issue because,

> [b]ased on [Trooper Carroll's] observations and subsequent actions, we find that there exists a question of whether [his] actions were reasonable in attempting a "knock and talk." We find that this question should be answered by the jury.

Pet. App. 30a.

Prior to trial, the Carmans moved for judgment as a matter of law based upon the Court's then-recent decision in *Florida v. Jardines*, ___ U.S. ___, 133 S.Ct. 1409 (2013). The Carmans renewed their motion at the close of opening arguments and again at the close of the evidence. For his part, Trooper Carroll sought judgment as a matter of law based upon qualified immunity. All these motions were denied.

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of their home had not been voluntary. *See* Pet. App. 33a-38a. The jury found for Trooper Carroll on both claims. The Court of Appeals affirmed on the seizure/excessive force claim, Pet. App. 13a-14a; and the Carmans did not appeal on the consent-to-search claim.

Over the Carmans' objections, the district court instructed the jury on the "knock and talk" doctrine as follows:

> This doctrine allows officers without a warrant to knock on a resident's door or otherwise approach the residence seeking to speak to the inhabitants, just as any private citizen might. Officers should restrict their movements . . . to walkways, driveway, porches and places where visitors could be expected to go.

COA App. 156-57 (jury charge). After a two-day trial, the jury returned a verdict in Trooper Carroll's favor. No post-trial motions were filed.

3. The Court of Appeals reversed in relevant part, holding that the District Court should have granted the Carmans judgment as a matter of law on their unlawful entry claim.[8] Pet. App. 13a.

Invoking the Court's remark in *Jardines* that "'the knocker on the front door is treated as an invitation or license to attempt an entry,'" the Court of Appeals concluded that the front door is therefore the *only* permissible approach to a residence: "a 'knock and talk' encounter *must* begin at the front door because that is where police officers, like any other visitors, have an implied invitation to go." Pet. App. 10a (emphasis added).

While the Court of Appeals recognized that "there may be some instances in which the front door is not *the* entrance used by visitors," Pet. App. 9a n. 6 (emphasis added), the court did not allow for the

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[8] As discussed above, the court affirmed the judgment in favor of Trooper Carroll on the claim that he had unreasonably seized, and used excessive force on, Mr. Carman. Pet. App. 13a-14a.

possibility that a residence might have more than one entrance customarily used by visitors; nor did the court discuss the jury's finding that this was such a situation. Rather, the Court of Appeals' holding was categorical: "Carroll cannot avail himself of the 'knock and talk' exception … because he entered the back of the Carmans' property"; "[t]he 'knock and talk' exception requires that police officers begin their encounter at the front door"; "[b]ecause Carroll did not knock on the Carmans' front door, his intrusion cannot be justified as a 'knock and talk.' " Pet. App. 11a.

Finally, the Court of Appeals held that Trooper Carroll was not entitled to qualified immunity, relying on its decision in *Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir. 2003). Pet. App. 12a-13a. In *Marasco*, officers had first approached a front door and, getting no response, had then ventured (at least twice) into the back yard and garage; and the Court of Appeals held that the reasonableness of the officers' actions presented a question for a jury. *Id.*, 318 F.3d at 519-521. The Court of Appeals cited *Marasco* as establishing that " 'entry into the curtilage' could be justified only '*after not receiving an answer at the front door*.' " Pet. App. 12a, *quoting Marasco*, at 520 (emphasis added by the Court of Appeals).

REASONS FOR GRANTING THE WRIT

I. The Court Should Review The Court Of Appeals' Categorical "Front Door" Rule.

A. The Court of Appeals' categorical rule conflicts with the holdings of other federal and state appellate courts, including the Supreme Court of New Jersey.

The Court of Appeals held that an officer attempting a "knock and talk" must always approach a residence via the front door unless the front door "is not *the* entrance used by visitors." Pet. App. 9a & n. 6 (emphasis added). At least four other Courts of Appeals and two state supreme courts have held otherwise, recognizing that: a) a residence may have more than one entrance customarily used by uninvited visitors; b) a police officer may approach via *any* route that an uninvited visitor might reasonably be expected to use; and c) whether such an officer acted reasonably must be evaluated not under a categorical rule but in view of the totality of the circumstances confronting the officer.

In *U.S. v. James*, 40 F.3d 850 (7th Cir. 1994), *vacated on other grounds*, 516 U.S. 1022 (1995), an officer went to the rear side door of a duplex to conduct a "knock and talk," and observed contraband and the attempted destruction of evidence through a window; he then entered and searched the premises and made multiple arrests. *Id.* at 856-857. One of those arrested moved to suppress the evidence, arguing that it was tainted by the officer's entry upon the rear curtilage of the duplex. *Id.* at 861.

In affirming the district court's denial of the motion to suppress, the Seventh Circuit rejected a rigid rule that "police officers seeking to interview a person are always required to knock on the front door of a residence before they may approach any other public means of access to the dwelling." *Id.* at 862 n.4. Instead, the court looked to the reasonableness of the officer's actions in light of the facts confronting him: the passage to the rear door was not impeded by a gate or fence; both the paved walkway and rear door were accessible to the general public; and the rear door was commonly used for entering the dwelling from the nearby alley. *Id.* at 862. "[W]here the back door of a residence is readily accessible to the general public, the Fourth Amendment is not implicated when police officers approach that door in the reasonable belief that it is *a* principal means of access to the dwelling." *Id.* (emphasis added).

Other courts of appeals have likewise rejected categorical rules, examining instead the objective reasonableness of the officer's actions under the circumstances. For example, in *U.S. v. Titemore*, 437 F.3d 251 (2d Cir. 2006), the court held that no Fourth Amendment violation occurred when an officer walked across a lawn to a side porch, where the lawn and porch were not enclosed and the porch was "*a* primary entrance visible to and used by the public." *Id.*, at 259 (emphasis added). As the district court in that case said,

> the law does not require an officer to determine which door most closely approximates the Platonic form of "main entrance" and then, after successfully completing this metaphysical inquiry, approach only that door. An officer making a "knock and talk" visit may approach any part of

> the building where uninvited visitors could be expected.

U.S. v. Titemore, 335 F.Supp.2d 502, 505-506 (D.Vt. 2004). *Accord U.S. v. Thomas*, 430 F.3d 274 (6th Cir. 2006) (no violation of the Fourth Amendment when police officers, seeking to speak with the occupant, approached both the rear and front doors simultaneously); *U.S. v. Garcia*, 997 F.2d 1273, 1279-1280 (9th Cir. 1993) ("[i]f the front and back of a residence are readily accessible from a public place, … the Fourth Amendment is not implicated when officers go to the back door reasonably believing it is used as *a* principal entrance to the dwelling") (emphasis added).

Even where courts of appeals have held that an officer's entry was improper, the determination was based upon the reasonableness of the officers' actions under the circumstances – not a categorical "front door" rule. *See, e.g., U.S. v. Wells*, 648 F.3d 671, 680 (8th Cir. 2011) (officers' entry into defendant's back yard could not be justified as a "knock and talk" where officers approached home at 4:00 a.m., the back yard was fenced in and neither visible nor accessible from the street, and the officers made no attempt to raise defendant at the front door they walked past).

Police officers in New Jersey are in a particularly awkward position, since conduct held lawful by that State's highest court has now been declared unlawful by the Third Circuit. In *State of New Jersey v. Domicz*, 907 A.2d 395 (N.J. 2006), as in the case at bar, an officer approached a rear door because, based on "the location of cars in defendant's driveway, it appeared to [the officer] that the back door was used as *an* entrance to the home." *Id.* at 398 (emphasis added). Unlike the Third Circuit, the New Jersey Supreme Court held that "when a law enforcement

officer walks to a front *or back door* for the purpose of making contact with a resident and reasonably believes that the door is used by visitors, he is not unconstitutionally trespassing…." *Id.* at 405 (emphasis added). *Accord*, *Timble v. State of Indiana*, 842 N.E.2d 798, 801-802 (In. 2006) (no Fourth Amendment violation in approaching back door where "most" of the traffic entered that way; "[w]hich areas of a given piece of real estate may reasonably be viewed as open to the public is fact-specific").

Had this case arisen, then, in the Second, Sixth, Seventh, or Ninth Circuits, or in the state courts of New Jersey or Indiana, it would certainly have been decided differently. Although each of the above cases addresses a unique property layout and set of circumstances, that, of course, is precisely the point: the Third Circuit's rigid approach is unsuited to a complex world. The Court should review this case to resolve the conflict in Fourth Amendment jurisprudence the Third Circuit has created.

B. How a police officer may lawfully approach a residence to conduct a "knock and talk" is an important issue that daily confronts officers.

Law enforcement officers of all stripes approach residences every day to interview witnesses, suspects and victims, and otherwise to perform their duties. As the cases cited above illustrate, the legitimacy of these visits is frequently challenged in both criminal and civil cases; and in most courts is resolved by applying the Fourth Amendment standard of objective reasonableness to the facts of a particular case. However, the Third Circuit's categorical rule that for every residence there is one, and only one, permissible

approach has injected an element of uncertainty that threatens to hamper this basic police function.

With reasonableness excised from the analysis, police officers can no longer rely upon common sense and societal norms. When a residence has no clear "front door" or "main entrance," must the officer encircle the property to determine which entrance best fits the "Platonic form of 'main entrance'"? *Titemore*, 335 F.Supp.2d at 505-06. If the front door "appears" to be inaccessible, is that good enough or must the officer make certain of it? *See U.S. v. Shuck*, 713 F.3d 563, 565-568 (10th Cir. 2013) (no Fourth Amendment violation when officers approached the back door when a gate leading to the front door "appeared" to be locked). What if the officers reasonably but mistakenly believe that they *are* at the front door? *See U.S. v. Garcia*, 997 F.2d 1273, 1279 (9th Cir. 1993). If the Carmans had been visible to the officers through their sliding glass door, would the troopers have had to ignore them on their mandatory march to the front door? *See U.S. v. Cota-Lopez*, 104 Fed.Appx. 931, 933 (5th Cir. 2004) (officers could see resident inside screen door to garage). What if they had been sitting on their deck? At what point and in what instances may police officers deviate from the Court of Appeals' preprogrammed track to the "front door"?

The Court should review this case to provide guidance to law enforcement officers on the use of this routine, but vital, practice.

C. The Third Circuit's categorical rule is inconsistent with the governing principles of Fourth Amendment jurisprudence.

The Court of Appeals' categorical "front door" rule is grounded in misunderstandings, both of the "knock and talk" rule specifically, and of the more general Fourth Amendment principles which it reflects.

1. The Third Circuit reduces the "knock and talk" rule to a rigid caricature of itself.

First, the Court of Appeals confused a common shorthand for the "knock and talk" rule – "police may knock at the front door" – with the rule itself, which is broader and more nuanced. There is no question that knocking on a front door is the quintessential activity permitted by the rule. As the Court said in *Jardines*:

> the knocker on the front door is treated as an invitation or license to attempt an entry…. This implicit license typically permits the visitor to approach the home by the front path….

Id. at 1415. But there is no sound reason to suppose that the rule permits *only* this activity. Rather, the rule is rooted in "background social norms," *id.* at 1416, that permit an officer to approach whenever approaching is "no more than any private citizen might do." *Ibid* (internal quotation marks and citation omitted). And when, under the circumstances of a particular case, there reasonably appears to be an "implicit license [that] permits the visitor to approach the home" by some path other than, or in addition to, the front path, a police officer may do likewise.

Thus, a "knock and talk" does not offend the Fourth Amendment as long as a police officer uses a route that any uninvited visitor could reasonably be

expected to use. Such an entry neither infringes upon the owner's interest in freedom from physical intrusion, *see id.* at 1414, nor invades any reasonable expectation of privacy. *See Katz v. United States*, 389 U.S. 347 (1967). "It is not objectionable for an officer to come upon that part of the property which has been opened to public common use. The route any visitor to a residence would use is not private in the Fourth Amendment sense . . . ." 1 Wayne R. LaFave, *Search and Seizure: A Treaty on the Fourth Amendment* § 2.3(e), at 773-774 (5th ed. 2012 update) (internal quotation marks and citations omitted).

The question is not whether Trooper Carroll approached the front door or a door with a knocker, but rather whether he approached the house using a route that reasonably appeared to have been provided for visitors. A jury found that he had.

2. The Third Circuit's categorical rule strips reasonableness from the Fourth Amendment analysis.

Second, the Court of Appeal's categorical rule cannot be reconciled with the established principles that "[t]he touchstone of the Fourth Amendment is reasonableness," *Florida v. Jimeno*, 500 U.S. 248, 250 (1991), measured by the totality of the circumstances facing an officer; and that standards of reasonableness under the Fourth Amendment are not susceptible to "Procrustean application." *Ker v. California*, 374 U.S. 23, 33 (1963).

Thus, the Court has consistently resisted, in a wide variety of contexts, attempts to reduce the Fourth Amendment to "a neat set of legal rules." *Omelas v. U.S.*, 517 U.S. 690, 695 (1996) (internal quotation marks and citation omitted). *See, e.g.,*

Missouri v. McNeely, ___ U.S. ____, 133 S.Ct. 1552, 1561 (2013) (declining to adopt a categorical rule defining exigent circumstances); *Scott v. Harris*, 550 U.S. 372, 383 (2007)("[a]lthough respondent's attempt to craft an easy-to-apply legal test in the [excessive force] context is admirable, in the end we must still slosh our way through the factbound morass of 'reasonableness' "); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (voluntariness of consent to search not susceptible to "bright-line rules"); *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (declining to create a "rigid rule" that requires a knock and announce in every instance before entering a home); *Illinois v. Gates*, 462 U.S. 213, 244 (1983) (abandoning rigid test for determining whether an informant's tip establishes probable-cause).

Certainly there are issues, even in the Fourth Amendment context, that are amenable to bright-line rules. *See, e.g.*, *Riley v. California*, ___ U.S. ___, 134 S.Ct. 2473 (2014) (police may not routinely conduct a search-incident-to-arrest of the contents of a cell phone). But this is not one of them. Whether a given approach to a particular residence is one that could reasonably be expected to be taken by an uninvited visitor is, like the existence of probable cause or the existence of exigent circumstances, an inherently fact-specific inquiry.

For example, a house, as in this case, may have one entrance customarily used by visitors arriving by foot and another used by visitors arriving by car. The "front door" of a beach house typically faces the water, with its "back door" on the access road; visitors coming up from the beach would approach one way, while deliveries would arrive from the rear. At a lakeside home with a dock, any visitor arriving by boat – say, a fish and game officer – would approach

from that direction no matter which way the "front door" faced. Or a house may have no easily identifiable "front door." *See, e.g., Titemore*, 437 F.3d at 253; *Garcia*, 997 F.2d at 1279.

In short, the world in which law enforcement officers work – the real world – is under no obligation to conform to the Court of Appeals' neat categories. The Court of Appeals' rigid categorical rule does not square either with the realities of police work or with the governing principles of Fourth Amendment law long established by this Court. The Court should review and correct this error.

II. The Court Should Review The Court Of Appeals' Misapplication Of The "Clearly Established" Doctrine.

Even assuming that the Court of Appeals' categorical "front door" rule is a correct formulation of Fourth Amendment law, that court's further holding – that, for purposes of qualified immunity, this rule was "clearly established" at the time of the events in question – is gravely mistaken, and likewise deserves review. *See* Pet. App. 12a-13a.

"Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau v. Haugen*, 543 U.S. 194, 599 (2004) (citing *Saucier v. Katz*, 533 U.S. 194, 206 (2001)). The officer should not be subject to liability if the law at the time did not "clearly establish" that the officer's conduct would violate the Constitution. *Id.* "[T]he focus is on whether the officer had fair notice that her conduct was unlawful . . . ." *Id.* The Court has admonished that to be clearly established, "[t]he contours of [a]

right must be sufficiently clear that a reasonable [officer] would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

"[T]his inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.' " *Haugen*, 543 U.S. at 599 (quoting *Katz*, 533 U.S. at 201). The Court has " 'repeatedly told courts … not to define clearly established law at a high level of generality' … since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff v. Rickard*, ___ U.S. ___, 134 S.Ct. 2012, 2023 (2014) (quoting *Ashcroft v. al–Kidd*, 563 U.S. ___, 131 S.Ct. 2074, 2084 (2011)) (citation omitted). The Court has been particularly diligent about this requirement in Fourth Amendment cases, where the reasonableness of the actions uniquely depends upon the circumstances facing the officer. *See e.g. al-Kidd*, 131 S.Ct. at 2084; *Wilson v. Layne*, 526 U.S. 603, 615 (1999); *Anderson*, 483 U.S. at 639-40. Thus, to defeat qualified immunity any "existing precedent must have placed the statutory or constitutional question *beyond debate*." *al–Kidd*, 131 S.Ct. at 2083 (emphasis added).

In this case, no holding of this Court had established the categorical rule formulated by the Court of Appeals – *Jardines*, on which the Court of Appeals (mistakenly) relied to support its rule, was not decided until 2013 – and the Court of Appeals did not pretend otherwise. Nor did the Court of Appeals draw upon the decisions of other circuits since, as we have shown, no such support exists. Instead, the Court of Appeals relied entirely on its own earlier decision in *Estate of Smith v. Marasco*, 318 F.2d 496 (3d Cir. 2003). Pet. App. 12a-13a. But even here the court erred.

In *Marasco*, police officers knocked on a front door and, receiving no answer, entered the residence's back yard "at least twice," looked around and entered the garage. *Id.* at 521. The Court of Appeals held that "their entry into the curtilage after not receiving an answer at the front door might be reasonable," and that this question should be resolved by a jury. *Id.* at 520-521, *quoted in part* at Pet. App. 12a. But the *Marasco* court did not address, and under the circumstances of that case had no reason to address, whether this was the *only* circumstance that might justify an approach to the rear of a residence. To the contrary, *Marasco* elsewhere recognized the general rule that "[o]fficers are allowed to knock on a residence's door *or otherwise approach the residence* … just as any private citizen may." *Id.* at 519 (emphasis added).

A year before the "knock and talk" at issue, a different district court judge cited *Marasco* in the course of holding that a code enforcement officer did not violate the Fourth Amendment when he approached a "common entrance" on the *side* of an apartment building. *Lease v. Tyler*, 2008 WL 2673381, *6 (M.D. Pa. 2008). An officer should not be held to be "plainly incompetent" based upon a reading of *Marasco* that not even the courts recognized prior to this case. *Cf. Stanton v. Sims*, ___ U.S. ___, 134 S.Ct. 3, 7 (2013) (officer entitled to qualified immunity based upon, among other things, district court readings of the governing circuit decision).

Thus, nothing in *Marasco* gave "fair notice" that, henceforth, law enforcement officers would be required to approach the "front door," and only the "front door," regardless of circumstances. The Court should review the Court of Appeals' serious misunderstanding of qualified immunity.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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August 12, 2014

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APPENDIX

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-2371

ANDREW CARMAN and KAREN CARMAN,
Appellants

v.

JEREMY CARROLL

On Appeal From the United States District Court for the Middle District of Pennsylvania
(No. 3:10-cv-01013)
District Judge: Honorable James M. Munley

Argued: December 17, 2013

Before: MCKEE, *Chief Judge*, FUENTES, *Circuit Judge*, and SCHILLER, *District Judge*.[1]

(Opinion Filed: May 15, 2014)

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[1] Honorable Berle M. Schiller, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

FUENTES, *Circuit Judge*:

Responding to a police dispatch, Pennsylvania State Trooper Jeremy Carroll and another trooper proceeded to the home of Andrew and Karen Carman to search for a man who had stolen two loaded handguns and a car with New Jersey plates. Upon arriving at the Carmans' residence, the troopers bypassed the front door and went directly to the back of the house and onto a deck adjoining the kitchen. On the deck, a scuffle ensued between Carroll and Andrew Carman. This § 1983 action arises from Carroll's warrantless entry onto the Carmans' property. Carroll contends that he did not violate the Carmans' Fourth Amendment rights because he entered into their curtilage, the area immediately surrounding their home, while executing a legitimate "knock and talk" encounter. Because Carroll

proceeded directly through the back of the Carmans' property and did not begin his visit at the front door, the "knock and talk" exception to the warrant requirement does not apply. Therefore, we reverse the District Court's denial of the Carmans' motion for judgment as a matter of law on their unlawful entry claim. We affirm the jury verdict regarding the Carmans' unlawful seizure claim because there was sufficient support for the jury's finding that Carroll acted reasonably.[2] Accordingly, we affirm in part and reverse in part the judgment of the District Court.

I.

A.

In July 2009, Pennsylvania State Police Troopers Jeremy Carroll and Brian Roberts were dispatched to the Carmans' residence to search for a man named Michael Zita and a car bearing New Jersey license plates. The troopers were told that Zita had stolen the car, was armed with two loaded handguns, and might have fled to the Carmans' residence. Neither Roberts nor Carroll had been to the Carmans' property before, and neither knew what Zita looked like. The troopers did not have a warrant to search the Carmans' property nor did they have a warrant to arrest Zita.

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[2] In reviewing a jury verdict, "[w]e are not free to weigh the evidence or to pass on the credibility of witnesses," but rather "[o]ur function is to determine only whether there is evidence upon which the jury could properly return a verdict, viewing the evidence most favorably to . . . the non-movant, and giving [the non-movant] the benefit of all reasonable inferences." *Kinnel v. Mid-Atlantic Mausoleums, Inc.*, 850 F.2d 958, 961-62 (3d Cir. 1988). Therefore, we construe the facts in the light most favorable to Carroll, the non-movant.

The Carmans' house sits on a corner lot. The main street runs along the front of the house and a side street runs along the left of the house, as viewed from the front. A clearly marked path leads to the front door. *See* Pl.'s Exs. 22, 26.[3] There is no other marked path to the Carmans' house. A stone parking area is located on the left side of the house, *see* Pl.'s Ex. 25, and a shed and carport, which the parties refer to as a "garage," are located in the Carmans' backyard.

The Carmans also have a back deck that adjoins their kitchen area. *See* Pl.'s Ex. 18, 21. Two sets of stairs lead up to the deck, and a sliding glass door by the deck leads to the kitchen. *See id.* However, the Carmans testified that visitors use the front entrance when they come to visit.

When the troopers arrived at the Carmans' home, Andrew and Karen Carman were sitting in their kitchen with Karen Carman's sister; they were the only people present at the home. Because there was no parking in front of the Carmans' house, the troopers drove down the side street, passed numerous cars parked along the side of the Carmans' house, and parked their cars at the first available spot, at "the far rear of the property." App. 79. The troopers then got out of their cars, entered the Carmans' backyard, and headed toward the garage. Carroll purportedly took this route because he saw a light on in the garage and thought someone might be there. He "poked [his] head in" the garage "and said, Pennsylvania State Police," but "there was nobody in there." App. 80.

Carroll thought the sliding door attached to the back deck of the house "looked like a customary entryway." App. 92. Thus, after searching the garage

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[3] For ease of reference, various photographs introduced at trial are appended to this Opinion.

and finding no one there, he and Roberts continued walking through the backyard and proceeded to the back deck. As the troopers stepped onto the deck, Andrew Carman came out of the house. Carman was belligerent and aggressively approached the troopers, asking, "Who the fuck are you?" App. 63, 80-81. Given Carman's behavior, Carroll thought the man he was speaking with might be Zita. Carroll informed him that they were looking for Zita and asked Carman to identify himself. Carman refused to divulge his identity, made a quick turn away from the troopers, and appeared to reach for his waist, bringing his hands outside the troopers' view. Still unsure of Carman's identity, Carroll feared that Carman might be reaching for a weapon. He, therefore, momentarily grabbed Carman's right arm. Upon seeing that Carman was unarmed, he let go. Carman twisted and fell off the deck.

Karen Carman subsequently exited her house and came onto the deck with her sister. The two women were screaming when they approached Roberts. Consequently, Roberts ordered them to stand back and drew his Taser. Karen Carman asked the troopers what was going on, and Carroll explained that they were looking for Zita and asked her if they could search the house for him. She gave her consent and everyone went into the house.

The troopers searched the Carmans' house and did not find Zita. The stolen vehicle was not at the Carmans' residence, and the Carmans were not charged with any crimes.

B.

Andrew and Karen Carman brought this case pursuant to 42 U.S.C. § 1983, alleging that Carroll

violated their Fourth Amendment rights. In particular, the Carmans' two-count complaint alleged that Carroll's warrantless entry into their backyard, garage, back deck, and home constituted an unlawful search and that Carroll unreasonably seized Andrew Carman. Before trial, the Carmans advised the District Court of the Supreme Court's recent decision in *Florida v. Jardines*, 133 S. Ct. 1409 (2013), and asserted that they should be entitled to a directed verdict at trial based on that case. They also submitted a proposed jury instruction regarding the "knock and talk" exception to the warrant requirement; their instruction cited heavily to *Jardines*.

The District Court conducted a two-day jury trial. After opening arguments, the Carmans moved for a directed verdict, effectively a judgment as a matter of law, on their unlawful entry claim.[4] At the close of Carroll's testimony, the Carmans renewed their request for judgment as a matter of law on the unlawful entry claim and also moved for judgment as a matter of law on their unreasonable seizure claim. Carroll moved for judgment as a matter of law on the Carmans' unlawful entry claim on the ground that he was entitled to qualified immunity. The District Court denied all of the motions without explanation.

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[4] As a result of the 1991 Amendment to Federal Rule of Civil Procedure 50(a), the term "directed verdict" has been abandoned and replaced with the term "judgment as a matter of law." Therefore, we construe the parties' motions for a directed verdict as motions for judgment as a matter of law under Rule 50(a). *See Wittekamp v. Gulf & W., Inc.*, 991 F.2d 1137, 1141 n.6 (3d Cir. 1993) ("The parties' briefs have referred to the motion as seeking a directed verdict, but the motion more appropriately is termed a motion for judgment as a matter of law because the 1991 revision to Rule 50(a) abandoned the term 'directed verdict.' ").

The District Court also rejected the Carmans' proposed jury instruction regarding the "knock and talk" exception. Over the Carmans' objections, the District Court charged the jury with a different instruction; the District Court's instruction cited language from our decision in *Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir. 2003), but did not cite *Jardines*.

Ultimately, the jury returned a verdict finding in Carroll's favor on both claims. Judgment was entered on April 10, 2013. This appeal followed.[5]

II.

On appeal, the Carmans argue that the District Court erred in denying their motions for judgment as a matter of law on their Fourth Amendment unlawful entry and unreasonable seizure claims. The Carmans also argue that the District Court provided an erroneous jury instruction regarding the "knock and talk" exception to the warrant requirement.

A.

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[5] We have jurisdiction over this case under 28 U.S.C. § 1291. We exercise plenary review over a district court's denial of judgment as a matter of law. *Moyer v. United Dominion Indus., Inc.*, 473 F.3d 532, 545 n.8 (3d Cir. 2007). Such a motion "should be granted only if, viewing the evidence in the light most favorable to the nonmoving party, there is no question of material fact for the jury and any verdict other than the one directed would be erroneous under the governing law." *Brownstein v. Lindsay*, 742 F.3d 55, 63 (3d Cir. 2014) (quoting *Beck v. City of Pittsburgh*, 89 F.3d 966, 971 (3d Cir. 1996)) (internal quotation marks omitted).

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. Under the Fourth Amendment, a search occurs when the government: (1) physically intrudes on constitutionally protected areas, *see Jardines*, 133 S. Ct. at 1414, or (2) invades "a subjective expectation of privacy that society recognizes as reasonable," *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967)). *Accord Jardines*, 133 S. Ct. at 1417 ("The *Katz* reasonable-expectations test 'has been *added to,* not *substituted for,*' the traditional property-based understanding of the Fourth Amendment . . . ." (quoting *United States v. Jones*, 132 S. Ct. 945, 952 (2012))).

"It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980) (internal quotation marks omitted). This rule is "subject only to a few specifically established and well-delineated exceptions." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (quoting *Katz*, 389 U.S. at 357). We "regard the area 'immediately surrounding and associated with the home'—what our cases call the curtilage—as 'part of the home itself for Fourth Amendment purposes.' " *Jardines*, 133 S. Ct. at 1414 (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)); *see also Marasco*, 318 F.3d at 518 ("Fourth Amendment protections extend not only to a person's home, but also to the curtilage surrounding the property."). Thus, we presume a warrantless search of curtilage to be unreasonable.

B.

From the moment that Carroll entered the Carmans' backyard, he was in the curtilage surrounding their house. It is undisputed that Carroll entered into the Carmans' curtilage without a warrant, without consent, and without exigent circumstances. Carroll argues that he nonetheless did not violate the Fourth Amendment because he entered the Carmans' property while conducting a "knock and talk." As he correctly points out, a "knock and talk" encounter is a permitted exception to the warrant requirement. Accordingly, we assess whether this exception applies to this case.

Under the "knock and talk" exception, "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.' " *Jardines*, 133 S. Ct. at 1416 (quoting *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011)); *see also Marasco*, 318 F.3d at 519 ("Officers are allowed to knock on a residence's door or otherwise approach the residence seeking to speak to the inhabitants just as any private citizen may."). Needless to say, government officers cannot benefit from the "knock and talk" exception simply because they knock on a door. For purposes of the Fourth Amendment, a "knock and talk" is a brief, consensual encounter that begins at the entrance used by visitors, which in most circumstances is the front door.[6] A "knock and talk" encounter must satisfy three requirements.

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[6] We recognize that there may be some instances in which the front door is not the entrance used by visitors. Despite Carroll's argument to the contrary, this is not one such instance.

First, a police officer, like any visitor, must "knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *See Jardines*, 133 S. Ct. at 1415.

Second, the purpose of a "knock and talk" must be to interview the occupants of a home, not to conduct a search. *See id.* at 1416 n.4 ("[I]t is not a Fourth Amendment search to approach the home in order to speak with the occupant, *because all are invited to do that*. . . . But no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search."); *Marasco*, 318 F.3d at 520 (noting that the "knock and talk" exception may apply "[w]here officers are pursuing a lawful objective, *unconnected to any search* for the fruits and instrumentalities of criminal activity" (emphasis added)). In *Jardines*, for example, the officer's entry into the curtilage violated the Fourth Amendment because his "behavior objectively reveal[ed] a purpose to conduct a search, which is not what anyone would think he had license to do." 133 S. Ct. at 1417.

Third, a "knock and talk" encounter must begin at the front door because that is where police officers, like any other visitors, have an implied invitation to go. It is well settled that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." *Id.* at 1415 (quoting *Breard v. Alexandria,* 341 U.S. 622, 626 (1951)) (internal quotation marks omitted). This implied invitation "typically permits the visitor to approach the home by the front path . . . . Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." *Id.* at 1415.

Although officers have a right to knock at the front door while executing a "knock and talk," this right does not "necessarily extend[] to the officers the right to enter [elsewhere] into the curtilage." *Marasco*, 318 F.3d at 520. In *Marasco*, we recognized that an officer's entry into other parts of the curtilage "*after not receiving an answer at the front door* might be reasonable" in limited situations. *Id.* (emphasis added). However, we rejected the "sweeping proposition" that "officers may proceed to the back of a home when they do not receive an answer at the front door any time they have a legitimate purpose for approaching the house in the first place." *Id.* at 519-20.

In this case, Carroll cannot avail himself of the "knock and talk" exception to the warrant requirement because he entered the back of the Carmans' property without approaching the front door first. Carroll contends that the layout of the Carmans' property "made the back door the most expedient and direct access to the house from where the troopers had to park." Carroll Br. at 18. While it may have been more convenient for the troopers to cut through the backyard and knock on the back door, the Fourth Amendment is not grounded in expediency. The "knock and talk" exception requires that police officers begin their encounter at the front door, where they have an implied invitation to go. This exception does not license officers to bypass the front door and enter other parts of the curtilage based on where they park their cars. Because Carroll did not knock on the Carmans' front door, but instead proceeded directly through the back of their property, his intrusion cannot be justified as a "knock and talk." Accordingly, Carroll's warrantless entry into the Carmans'

curtilage violated the Fourth Amendment as a matter of law.

C.

Under the qualified immunity doctrine, government officials are shielded from civil liability for conduct that does not violate clearly established constitutional or statutory rights of which a reasonable person would have known. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citing *Harlow v. Fitzgerald*, 475 U.S. 800, 818 (1982)). Therefore, in determining whether Carroll is entitled to qualified immunity for violating the Carmans' Fourth Amendment rights, we must decide whether these rights were "clearly established at the time of [Carroll's] alleged misconduct. Qualified immunity is applicable unless [his] conduct violated a clearly established constitutional right." *See id.* at 232 (internal citations and quotation marks omitted).

"An individual's Fourth Amendment interest in the curtilage of his home has been well settled for over a century." *Marasco*, 318 F.3d at 521 n.13. Over a decade ago, in *Marasco*, we made clear that an officer's right to knock at the front door while conducting a "knock and talk" does not carry a concomitant right to enter other parts of the curtilage. We established that "entry into the curtilage *after not receiving an answer at the front door* might be" justified under the "knock and talk" exception in limited situations. *Id.* at 520 (emphasis added). Because Carroll bypassed the front door completely, he exceeded the boundaries of the "knock and talk" exception. Based on *Marasco*, which pre-dated Carroll's conduct, it was clearly established that the

trooper's warrantless entry into the Carmans' curtilage violated their Fourth Amendment rights.

Therefore, we reverse the District Court's denial of the Carmans' motion for judgment as a matter of law with respect to their unlawful entry claim.[7]

D.

We next address Andrew Carman's unreasonable seizure claim. It is undisputed that Carroll seized Carman when he grabbed Carman's arm. Thus, the relevant question is whether there was a "minimum quantum of evidence from which the jury could have rationally reached [its] verdict" that the seizure was reasonable. *See Dutton v. Wolpoff & Abramson*, 5 F.3d 649, 653 (3d Cir. 1993) (internal quotation marks omitted).

"[S]ubject only to a few well-defined exceptions, warrantless . . . seizures are *per se* unreasonable under the Fourth Amendment." *United States v. Williams*, 413 F.3d 347, 351 (3d Cir. 2005) (citing *United States v. Ross*, 466 U.S. 798, 824-25 (1982)). However, "an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Id.* (quoting *Illinois v. Wardlow,* 528 U.S. 119, 123 (2000)) (internal quotation marks omitted); *see also Adams v. Williams*, 407 U.S. 143, 146 (1972) ("A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily

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[7] Because we hold that Carroll's warrantless entry violated the Fourth Amendment, entitling the Carmans to judgment as a matter of law, we do not address the Carmans' challenge to the District Court's jury instructions.

while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."). This right to conduct an "investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Connor*, 490 U.S. 386, 396 (1989).

Based on the facts presented at trial, there was a "minimum quantum of evidence" from which a jury could rationally conclude that Carroll's conduct was reasonable. Carroll testified that he was unsure of Carman's identity at the time, did not know whether he was dealing with Zita, and did not know why this unidentified man approached him and Roberts with such hostility. Thus, a jury could rationally find that Carroll had reasonable suspicion to momentarily question Carman to ascertain his identity. Moreover, based on Carroll's testimony that he thought Carman might be an armed car thief and feared that the man was reaching for a weapon, a jury could rationally find that Carroll was justified in momentarily grabbing Carman's arm to effectuate a stop. Because the facts provide a minimum amount of evidence to support the jury's finding that Carroll acted reasonably, we affirm the jury verdict on the unreasonable seizure claim.

III.

For the foregoing reasons, we affirm in part and reverse in part the judgment of the District Court. As to the unlawful entry claim, we reverse the District Court's denial of the Carmans' motion for judgment as a matter of law. We remand the case with the direction that judgment be entered in the Carmans' favor and that a new trial be ordered with respect to damages. As to the unreasonable seizure claim, we

affirm the jury verdict and the District Court's denial of judgment as a matter of law.

EXHIBITS TO OPINION

PLAINTIFF'S EXHIBIT 18

PLAINTIFF'S EXHIBIT 21

PLAINTIFF'S EXHIBIT
32

PLAINTIFF'S
EXHIBIT
25

PLAINTIFF'S EXHIBIT 26

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ANDREW CARMAN and KAREN CARMAN, Plaintiffs	:	No. 3:10cv1013
	:	(Judge Munley)
v.	:	
JEREMY CARROLL, Defendant	:	

MEMORANDUM

Before the court are the parties' cross-motions for summary judgment. (Docs. 20, 24). Having been briefed, the motions are ripe for disposition.

Background

Plaintiffs Andrew and Karen Carman (hereafter "plaintiffs") resided at101 Raspberry Path, Dingman's Ferry, Pennsylvania. (Doc. 21, Pls. Statem. of Mat. Facts (hereafter "Pls. Facts") ¶ 1). On July 3, 2009,plaintiffs were sitting in their kitchen with Jacqueline Vergottini, Karen Carman's sister. (*Id.* ¶ 4). Ms. Vergottini glanced out the window and noticed police officers near plaintiffs' shed.[1] (*Id.* ¶ 25). Mr. Carman also looked out the window and saw two officers, Pennsylvania State Troopers Defendant Jeremy Carroll and Brian Roberts. (*Id.* ¶ 26).

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[1] Both parties refer to the structure in plaintiffs' back yard as either a shed or garage.

The troopers were dispatched to the Carman residence to look for an individual named Michael Zita, a felon parolee who had stolen a 2002Chrysler Convertible and two loaded firearms. (*Id.* ¶¶ 10, 13; Doc. 25, Def. Statem. of Mat. Facts (hereafter "Def. Facts") ¶ 1). The police believed that Zita may have been on his way, to or was at, the Carman residence.(Def. Facts ¶ 2). The troopers did not have a search warrant for Carmans' property or an arrest warrant for Zita. (Pls. Facts ¶ 22). Upon arriving at the Carman residence, the officers looked to see if the stolen vehicle was parked outside their home. (Def. Facts ¶¶ 1, 3). It was not. (*Id.*) The Carmans' home is located on a corner property with a road in front of and on the left side of their house. (Doc. 26, Ex. 4, Def. Carroll Tr. at 17).Defendant and Trooper Roberts parked their respective cars on the side of the property and proceeded to walked across plaintiffs' back yard where there was an open garage. (Def. Facts ¶¶ 3-4). Defendant described the garage as a structure open in the front, back and partially on the sides that had several cars in it. (*Id.* ¶ 4; Doc. 26, Def. Ex. 6). Without going inside, the Troopers looked into the garage, but did not see the stolen vehicle.[2] (*Id.* ¶ 4). They then proceeded up to the back deck attached to the Carman residence. (*Id.* ¶ 6). Mr. Carman walked onto the deck to see what the officers wanted. The parties largely dispute the events that occurred after Mr. Carman went outside.

Plaintiffs claim that Mr. Carman asked if he could help the officers.(Pls. Facts ¶ 28). The Troopers asked Mr. Carman, "Where is he?" referencing the whereabouts of Michael Zita. (*Id.* ¶ 29). After Mr.

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[2] Based on the facts, it appears that the plaintiffs only noticed the officers after they looked into the garage.

Carman learned who they were looking for, he explained that he went to school with Michael Zita twenty-five or thirty years ago. (*Id.* ¶ 32). Defendant asked him if he could take a look around and Mr. Carman refused. (*Id.* ¶ 33-34).After Mr. Carman told defendant that Michael Zita was not on the property, defendant told him to sit down. (*Id.* ¶ 40). Mr. Carman told the officers he did not have to sit down. (*Id.* ¶ 41). The officers threatened to arrest Mr. Carman. (*Id.* ¶ 42). Mr. Carman asked if they had a search warrant, which they did not. (*Id.* ¶¶ 44-46). He told the officers that if they wanted to search his home they would need a search warrant. (*Id.* ¶ 46). Mr. Carman started to walk back to his home when Defendant Carroll pushed him up against the sliding glass door and tackled him down the stairs, off the deck. (*Id.* ¶¶ 49-50).Mrs. Carman and Ms. Vergottini said that they saw Defendant Carroll slam Mr. Carman against the sliding glass door. (*Id.* ¶ 51). When they went outside Defendant Carroll was sitting on top of Mr. Carman and pushing his head into the ground. (*Id.* ¶¶ 53-54). The women yelled at defendant to get off Mr. Carman. (*Id.* ¶ 58). Mr. Carman yelled to call 911.(*Id.* ¶ 61). At some point, Ms. Vergottini did call 911. (*Id.* ¶ 62). The 911operator informed her that police were already at the residence, however Ms. Vergottini explained that they were beating up her brother-in-law. (*Id.*¶ 64). When Mr. Carman got up he had blood on his face and his shoulder was injured. (*Id.* ¶ 60).

Defendant provides a different account of what happened after Mr. Carman went outside onto the deck. Defendant explained that both he and Trooper Roberts went onto the back deck of the house and were going to knock on the back door. (Def. Facts ¶ 6). Mr. Carman exited the house and said "Who the fuck are you?" (Doc. 29, Def. Resp. to Pls. Statem. of Mat.

Facts ¶ 28). Defendant explained who the troopers were and that they were looking for Michael Zita. (*Id.* ¶ 29). Mr. Carman refused to identify himself and was belligerent. (*Id.* ¶ 49). When Mr. Carman turned to go back into the house, he put his hands "down his front" and out of view of the officers. (Doc. 28, Def. Br. in Supp. of Def. Mot. for Partial Summ. J.at 2). Defendant then grabbed Mr. Carman by the shoulder/forearm and Mr. Carman suddenly whirled around, lost his balance and fell down two steps onto the ground. (*Id.*).

Both parties agree that Mrs. Carman and Ms. Vergottini were yelling at the officers and Trooper Roberts told them to back off or he would use his taser. (Pls. Facts ¶ 59; Def. Facts ¶ 10). After Mr. Carman got up, defendant explains that everyone was standing on the deck talking. (Def. Facts ¶¶ 11-12). The officers informed the plaintiffs and Ms. Vergottini that they were looking for Michael Zita. (Pls. Facts ¶ 66; Def. Facts ¶ 12). Mrs. Carman explained to Defendant Carroll that she had not seen Michael Zita for ten years and he was not on the property. (Pls. Facts ¶¶ 67-68).Plaintiffs claim defendant then told Mrs. Carman that he wanted to search their home. (*Id.* ¶ 69). After learning why the officers were there, defendant asserts that Mrs. Carman invited everyone inside the house.(Def. Facts ¶¶ 12, 13; Doc. 32, Pls. Reply Br. at 9).

Mrs. Carman claims that she felt compelled to give the officers permission to search their home. (Pls. Facts ¶ 70). She explained that she allowed the search because "[b]asically we weren't hiding anything. And I just wanted them to leave at that point." (Def. Facts ¶ 14). The officers searched the house with their guns drawn. (Pls. Facts ¶¶ 72-73).Michael Zita was not in the house. (*Id.* ¶ 74). After the search, the officers

spoke with plaintiffs and Ms. Vergottini in plaintiffs' kitchen. (*Id.* ¶ 75). The plaintiffs were not charged with any crimes. (*Id.* ¶ 76).

On May 11, 2010, plaintiffs filed a complaint against Defendant Jeremy Carroll pursuant to 42 U.S.C. § 1983. (Doc. 1). Count I of the complaint alleges that defendant's conduct constituted illegal entry on to their property and into their home in violation of the Fourth and Fourteenth Amendments. (*Id.*) Count II of the complaint alleges that defendant's conduct, including his use of force, constituted an unreasonable seizure of Plaintiff Andrew Carman in violation of the Fourth and Fourteenth Amendments. (*Id.*) Defendant filed an answer on July 13, 2010. At the close of discovery both parties moved for summary judgment.(Docs. 20, 24). Plaintiffs moved for summary judgment on all of their claims. Defendant moved for partial summary judgment on Count I of the complaint alleging illegal entry.

Jurisdiction

As this case is brought pursuant to 42 U.S.C. § 1983 for constitutional violations, we have jurisdiction under 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

Legal Standard

Before the court are the plaintiffs' and defendant's motions for summary judgment. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See *Knabe v. Boury*, 114 F.3d 407, 410 n.4 (3d Cir. 1997) (citing FED. R. CIV. P. 56(c)). "[T]his standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

When considering a motion for summary judgment, the court must examine the facts in the light most favorable to the party opposing the motion. *Int'l Raw Materials, Ltd. v. Stauffer Chem. Co.*, 898 F.2d 946, 949(3d Cir. 1990). The burden is on the moving party to demonstrate that the evidence is such that a reasonable jury could not return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248. A fact is material if it might affect the outcome of the suit under the governing law. *Id.* Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial. *Celotex v. Catrett*, 477U.S. 317, 322 (1986). Once the moving party satisfies its burden, the burden shifts to the non-moving party, who must go beyond its pleadings, and designate specific facts by the use of affidavits, depositions, admissions, or answers to interrogatories showing that there is a genuine issue for trial. *Id.* at 324.

Discussion

The parties filed cross-motions for summary judgment. Plaintiffs bring both counts in the complaint pursuant to 42 U.S.C. § 1983 (hereafter "Section 1983"). Section 1983 does not, by its own terms, create substantive rights. Rather, it provides remedies for deprivations of rights established elsewhere in the Constitution or federal law. *Kneipp v. Tedder*, 95 F.3d 1199, 1204 (3d Cir. 1996). In pertinent part, Section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress . . . .

42 U.S.C. § 1983. Thus, to establish a claim under Section 1983, two criteria must be met. First, the conduct complained of must have been committed by a person acting under color of state law. Second, the conduct must deprive the plaintiff of rights secured under the Constitution or federal law. *Sameric Corp. of Del., Inc. v. City of Phila.*, 142 F.3d 582, 590 (3d Cir. 1998).

In the instant case, the parties do not dispute whether the defendant acted under color of state law during the alleged violations. They only move for summary judgment as to whether there was an illegal entry and whether defendant unreasonably seized Mr. Carman with unreasonable force. We will address the two counts in the complaint, in turn.

A. Illegal Entry

Both parties move for summary judgment on plaintiffs' claim that defendant illegally searched plaintiffs' garage and home. Plaintiffs also argue that defendant illegally entered on to the curtilage of their property. The court will address each area of plaintiffs' property–the curtilage, the garage and the house–separately.

1. Curtilage

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. AMEND. IV. It is well-established that the Fourth Amendment protections extend not only to a person's home, but also to the curtilage surrounding the property. *United States v. Dunn*, 480 U.S. 294, 301 (1987); *Estate of Smith v. Marasco*, 318 F.3d 497, 518 (3dCir. 2003). "Curtilage" is defined as "the area immediately adjacent to[one's] home in which he has a legitimate expectation of privacy." *United States v. Bansal*, 663 F.3d 634, 663 (3d Cir. 2011) (citations omitted).

In the instant case, plaintiffs argue that they are entitled to summary judgment because defendant's entry onto the curtilage of their property violated their Fourth Amendment rights. Defendant does not dispute that the area that he and Trooper Roberts entered was "curtilage" protected under the Fourth Amendment. He contends that under the investigative technique, "knock and talk," the officers were allowed to knock on a resident's door or otherwise approach the residence to speak with the inhabitants.

The Third Circuit has adopted the "knock and talk" exception to the warrant requirement. *Estate of Smith*, 318 F.3d at 521. This technique provides that "officers are allowed to knock on a residence's door or otherwise approach the residence seeking to speak to the inhabitants just as any private citizen may." *Id.* at 519. Officers should restrict their movements to walkways, driveways, porches and places where visitors could be expected to go. *Id.* (quoting Wayne R. LaFave, *1 Search and Seizure: A Treatise on the Fourth Amendment* § 2.3(f) (3d ed. & Supp.2003)). Any observations made by the officers during their lawful entry under this technique do not violate the Fourth Amendment. *Id.* However,"[t]he flip side of this is that citizens are free not to cooperate with a 'knock and talk' investigation, and, absent a warrant, police cannot detain them, demand entry into their homes, or otherwise compel their cooperation unless an exception to the warrant requirement applies." *United States v. Butler*, 405 F. App'x 652, 656-57 (3d Cir. 2010).

The "knock and talk" procedure is appropriate in a limited number of circumstances where the police did not observe any criminal activity before approaching the dwelling and did not know that the occupants were armed. *United States v. Coles*, 437 F.3d 361, 368 n.12 (quoting *United States v. Jones* 239 F.3d 716, 721 (3d Cir. 2001)). The "knock and talk" strategy is used when officers seek to obtain the inhabitant's consent to search or when officers reasonably suspect criminal activity. *Jones*, 239 F.3d at 720; *see also United States v. Claus*, No. 11-1412, 2012 WL 120081, at *3 (3d Cir. Jan. 17, 2012) (explaining that the purposes of the "knock and talk" procedure is to speak with occupants or ask for consent to search).

Some courts have extended this investigative tactic beyond the front door of the home and to other areas of the property under a limited number of circumstances. These situations often involve a failed attempt to either approach the front door because of an obstruction or a failed attempt to receive an answer at the front door. *See Estate of Smith*, 318 F.3d at 519 (gathering cases where courts found it was lawful for officers to move away from the front door). The Third Circuit explained,

> Where officers are pursuing a lawful objective, unconnected to any search for the fruits and instrumentalities of criminal activity, their entry into the curtilage after not receiving an answer at the front door might be reasonable as entry into the curtilage may provide the only practicable way of attempting to contact the resident . . . where the front door was inaccessible. Similarly, officers reasonably may believe, based on the facts available to them, that the person they seek to interview may be located elsewhere on property within the curtilage . . . and . . . an officer's brief entry into the curtilage to test this belief might be justified.

Id. at 520; *see also United States v. Hammett*, 236 F.3d 1054, 1060 (9th Cir. 2001) ("an officer may, in good faith, move away from the front door when seeking to contact the occupants of a residence.").

In the instant case, defendant contends that he was lawfully present on plaintiffs' property attempting a "knock and talk." Defendant and Trooper Roberts approached plaintiffs' residence to investigate the whereabouts of Michael Zita, an armed felon. Plaintiffs' back yard was not fenced in, and there was no indication that it was closed off from the general public. Plaintiffs assert that the

defendant did not enter the property through a route which any visitor or delivery person would use or into an area where the general public had a right to be. Defendant accessed the back yard of the property and went onto the back deck of their home.

The cases addressing lawful "knock and talk" procedures involved police officers approaching, or at least attempting to approach, the front door of a person's home. *See Estate of Smith*, 318 F.3d at 519. However, in adopting the "knock and talk" procedure in Estate of Smith, the Third Circuit explained that where an officer reasonably believes, based on the facts available to him, that the occupant the officer wishes to speak with may be located elsewhere on the property within the curtilage, they may enter into the curtilage to test that belief. *Id.* at 520. Based on defendant's observations prior to entering the curtilage and subsequent actions, we find that the there exists a question of whether the defendant's actions were reasonable in attempting a "knock and talk." We find that this question would be appropriately determined by the jury.

During defendant's deposition, he explained that he and Trooper Roberts "parked our patrol vehicles and went to the rear of the residence where we parked. We had to park at the rear because there were [sic] cars all along the side. Exited our patrol vehicles and entered the yard." (Doc. 30, Ex. D., Trooper Carroll's Tr. at 16). He could not remember if he and Trooper Roberts parked their cars on the side of the road or if there was a driveway. (*Id.* at 18). Defendant explained "[t]here was an open garage or shed there with some sort of light on, looked like somebody was in it. We were just going to ask them if they saw Michael Zita." (*Id.* at 17).They walked to the garage and defendant "just peeked in, said

Pennsylvania State Police." (*Id.* at 19). He did not receive a response and determined no one was there. (*Id.)* The troopers then turned to go towards the rear of the residence, walking through the Carmans' back yard and onto the deck.[3]

We find that in light of these circumstances, it may have been reasonable for defendant to go into plaintiffs' back yard after he thought someone might be present on the curtilage of the property, rather than going to the front door of the residence. It also may have been justified for defendant to turn from the garage and proceed to the nearest entrance of plaintiffs' residence, the back door, after the defendant looked into the garage and did not see anyone. While plaintiffs deny that the officers entered the property by a route which a visitor or delivery person would use, we simply do not know enough about the property to make such a conclusion that defendant's actions were unreasonable and thus unlawful. Therefore, we will deny plaintiffs' motion for summary judgment as to defendant's entrance onto the curtilage in violation of the Fourth Amendment.

2. Garage

Both parties move for summary judgment on plaintiffs' claim that defendant illegally searched plaintiffs' garage. The parties do not dispute the facts as to how defendant came on to plaintiffs' property or his observation of the inside of the garage. Defendant

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[3] At Trooper Roberts' deposition, he recalled, "The [garage] doors were open on it and a light on. Went to the opening of the garage, looked in, I didn't see anybody in there." (Doc. 30, Ex. E, Trooper Robert's Tr. at 9).

again relies on the "knock and talk" exception to justify his presence in plaintiffs' back yard. He essentially argues that the inside of the garage was in his plain view.

A police officer may make a warrantless observation of objects in a home's curtilage within his plain view. *Dunn*, 480 U.S. at 304. The "plain view" exception to the warrant requirement is usually applied in situations where the police officer did not violate the Fourth Amendment in arriving at the place where evidence was viewed and the evidence was immediately apparent. *See United States v. Stabile*, 633 F.3d 219, 241 (3d Cir. 2011).In *Minnesota v. Dickerson*, the Supreme Court explained,

> Under that [plain view] doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant.

508 U.S. 366, 375 (1993).

In the instant case, defendant explains that he and Trooper Roberts were legitimately on the property investigating the whereabouts of Michael Zita. He was attempting to conduct a "knock and talk" and did not violate the Fourth Amendment by observing the inside of the garage while lawfully present on the property. Defendant claims that these observations were in his plain view and therefore did not constitute a search.

Pursuant to our finding above, defendant's use of the "knock and talk" technique involves a question as to whether defendant reasonably believed, based on the facts, that a person he wished to speak with was located elsewhere on the property within the curtilage and if it was reasonable to enter the curtilage to test

that belief. As the application of the plain view doctrine rests on that preceding question of whether defendant was lawfully present, we will deny the parties' motion for summary judgment as to defendant's observations of the inside of the garage.

3. House

Both parties move for summary judgment on plaintiffs' claim that defendant did not obtain valid consent before searching the plaintiffs' home. Plaintiffs argue Mrs. Carman's consent was not freely or voluntarily obtained. Defendant contends Mrs. Carman invited the troopers into the house and unequivocally granted permission to search the house. Because the parties largely dispute the events and circumstances surrounding Mrs. Carman's consent, we will deny the parties' motions for summary judgment.

It is well-settled that the government may conduct a search without a warrant or probable cause if an individual consents to the search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227-28 (1973). "[W]hether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Id.* at 227. In such an examination, the court should consider coercive questions and the possible vulnerable subjective state of person who consents. *Id.* at 229. The court must also consider the setting in which consent was obtained, including verbal and non-verbal actions. *United States v. Price*, 558 F.3d 270, 278 (3d Cir. 2009) (quoting *United States v. Givan*, 320 F.3d 452, 459 (3d Cir. 2003)).Attention should be given to the consenting individual's age, intelligence and

educational background. *Schneckloth*, 412 U.S. at 226. Knowledge of one's right to refuse consent to search is but one factor to be taken into account and is not dispositive of the issue of valid consent. *United States v. Kim*, 27 F.3d 947, 955 (3d Cir. 1994).

In the instant case, the parties dispute the facts the led up to Mrs. Carman's consent to search plaintiffs' home.[4] In determining whether the consent was voluntarily, we must examine the totality of the circumstances. The setting in which Mrs. Carman granted the officers consent was after the commotion between the officers, plaintiffs and Ms. Verrgottini. Both plaintiffs and defendant cite to these portions of Mrs. Carman's testimony:

> Q. Who was it that indicated to the troopers they could go inside and search the house?
>
> A. I did.
>
> Q. Why did you allow them to do that?
>
> A. Basically, we weren't hiding anything. And I just wanted them to leave at that point.

(Doc. 26, Ex. A, Karen Carman Tr. at 36).

> Q. Prior to the officer going in your house to search, was everything calmed down and basically under control?
>
> A. I wouldn't say calmed down but I said — in my mind, if I let them go in and search for [Michael Zita] everything — like I said, would just leave. I kind of felt like I had to do that, you know, I had to let them go in or nothing was going to calm down basically.

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[4] Defendant discusses "apparent authority" to grant permission to search the premises. (Doc. 31, Def. Br. in Supp. at 7-8). However, authority to grant consent is not at issue in this case. Plaintiffs' do not dispute that Mrs. Carman had the authority, but that her consent was not freely obtained.

(*Id.* at 47- 48).

While the parties agree to Mrs. Carman's description of how she provided consent, they disagree as to the events that occurred prior to Mrs. Carman's granting such permission. Plaintiffs claim that Mrs. Carman saw defendant push Mr. Carman up against the sliding glass door. (Pls. Facts¶ 51). However, defendant contends that defendant went to grab Mr. Carman and he ended up off of the deck and on the ground. (Def. Facts ¶8). Plaintiffs claim defendant was sitting on top of Mr. Carman on the ground and defendant contends he was standing next to Mr. Carman telling him to get up. (Pls. Facts ¶ 54; Def. Br. in Supp. of Partial Summ. J.at 2). The parties also somewhat dispute the nature and extent of Mr. Carman's injuries.

The parties' accounts also differ as to what prompted Mrs. Carman's consent to search. Plaintiffs argue that defendant said he wanted to search the house. (Pls. Facts ¶ 69). Defendant argues that after Mr. Carman gained control of himself and everyone was on the back deck talking, Mrs. Carman invited the troopers inside the house. (Def. Facts ¶¶12-13). The officers did not threaten Mrs. Carman and Mr. Carman did not object to Mrs. Carman granting the officers permission to search. Defendant also indicates that Mrs. Carman stated during her deposition that she did not remember if the officers asked her to search her house.(Doc. 26, Ex. A. Karen Carman's Tr. at 49). The parties also disagree on whether the situation had "calmed down," somehow creating a break in time from the confusion in plaintiffs' initial encounter with the officers to the plaintiffs' understanding of why the officers were at the residence.

As this court considers the totality of the circumstances to determine whether consent was freely and voluntarily given, there still exists questions of fact as to whether there was a coercive environment that would have made Mrs. Carman's consent involuntary. Therefore, we will deny the parties' motions for summary judgment.

B. Unreasonable Seizure and Force

Plaintiffs move for summary judgment on Count II of the complaint alleging unreasonable seizure and unreasonable force with regard to Mr. Carman. We find that these claims involve disputed fact and summary judgment is not appropriate.

Under the Fourth Amendment, an individual is "seized" when an officer restrains a person by either means of physical force or a show of authority, thereby restraining their liberty. *Terry v. Ohio*, 392 U.S. 1, 19n.16 (1968). "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *California v. Hodari D.*, 499 U.S. 621, 627-28 (1991). "When a police officer has a 'reasonable, articulable suspicion that criminal activity is afoot,' he or she may conduct a 'brief, investigatory stop.' " *United States v. Whitfield*, 634 F.3d 741, 744 (3d Cir. 2010) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)). "Reasonable suspicion" requires less than probable cause, but must rise to a minimal level of objective justification for the stop, considered under the totality of the circumstances. *Id.*

"The use of excessive force is itself an unlawful 'seizure' under the Fourth Amendment." *Couden v.*

Duffy, 446 F.3d 483, 496 (3d Cir. 2006) (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)). The use of excessive force during a seizure should be analyzed under the Fourth Amendment and its "reasonableness" standard. *Graham*, 490 U.S. at 395. Such an inquiry "requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.*

The Supreme Court enumerated a number of factors to use in making an objective determination of whether the force was reasonable, including severity of the crime, whether the suspect poses an immediate threat to the safety of the officer or others and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *Id.* at 396.The Third Circuit has also articulated additional factors including, "the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time." *Sharrar v. Felsing*, 128 F.3d 810, 822 (3d Cir. 1997).

In the present case, the parties disagree as to the facts regarding the alleged seizure and force used by defendant on Mr. Carman. Plaintiffs claim that when Mr. Carman exited his residence he did not pose an immediate threat to the safety of the officers and was not fleeing or resisting an arrest. Plaintiffs claim that Mr. Carman answered all of defendant's questions and explained that Michael Zita was not on the property. Mr. Carman told the officers that they would need a search warrant and turned to return to his home. Defendant grabbed Mr. Carman's arm and tackled him off of the deck. After Mr. Carman was able to get up, defendant continued to ask him

questions. Therefore, plaintiffs argue that Mr. Carman was not free to leave and was thus illegally seized.

To the contrary, defendant claims that when the officers went up onto the back deck to knock on the door, Mr. Carman exited the residence, was belligerent and refused to identify himself. Mr. Carman then turned around to go back to the house and he put his hands "down his front" and out of view of the officers behind him. Defendant then grabbed Mr. Carman by the shoulder and Mr. Carman whirled around, lost his balance and fell down two steps off of the deck.

Because of the disputed facts, we will deny plaintiffs' motion for summary judgment as it relates to the unreasonable seizure and unreasonable force.

Conclusion

For the reasons stated above, the plaintiffs' motion for summary judgment (Doc. 20) and defendant's motion for partial summary judgment (Doc. 24) will be denied. An appropriate order follows.