

## **APPENDIX**

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App. 1

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**APPENDIX A**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**No. 16-11244**

**[Filed January 24, 2018]**

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ERIC C. DARDEN, as Administrator of the	)
Estate of Jermaine Darden and on behalf	)
of the statutory beneficiaries of the Estate	)
of Jermaine Darden (which are Donneika	)
Goodacre-Darden, surviving mother of	)
Jermaine Darden, Charles H. Darden,	)
surviving father of Jermaine Darden),	)
	)
Plaintiff–Appellant,	)
	)
v.	)
	)
CITY OF FORT WORTH, TEXAS;	)
W. F. SNOW; J. ROMERO,	)
	)
Defendants–Appellees.	)

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Appeal from the United States District Court  
for the Northern District of Texas

**ON PETITION FOR REHEARING**

Before KING, PRADO, and SOUTHWICK, Circuit  
Judges.

App. 2

EDWARD C. PRADO, Circuit Judge:

Treating Defendants–Appellees’ petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The petition for rehearing en banc is also DENIED. The prior opinion, *Darden v. City of Fort Worth, Tex.*, 866 F.3d 698 (5th Cir. 2017), is withdrawn, and the following opinion is substituted:

Fort Worth Police Officers W.F. Snow and Javier Romero arrested Jermaine Darden, a black man who was obese, while executing a no-knock warrant at a private residence. In arresting Darden, the officers allegedly threw him to the ground, tased him twice, choked him, punched and kicked him in the face, pushed him into a face-down position, pressed his face into the ground, and pulled his hands behind his back to handcuff him. Darden suffered a heart attack and died during the arrest. The administrator of Darden’s estate subsequently brought this 42 U.S.C. § 1983 case against Officers Snow and Romero and the City of Fort Worth (the “City”). The district court granted summary judgment in favor of the officers and the City and dismissed all claims. We REVERSE in part, VACATE in part, and REMAND.

## **I. BACKGROUND**

In 2013, the Fort Worth Police Department investigated claims that cocaine was being sold from a private residence. A magistrate judge issued a warrant that allowed the officers to enter the residence without first knocking and announcing themselves. On May 16, 2013, a large team of heavily armed police officers executed the warrant. Officer Snow was assigned to the

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entry team, which was tasked with breaking down the front door, entering the residence, and securing the premises. Officer Romero drove the van that transported the team to the residence. He was also assigned to stand guard near the front door while other officers entered the residence and arrested the people inside. Two other members of the team wore cameras on their helmets, which captured on video some but not all of the events that transpired as the warrant was executed.

When the police first arrived at the house, the entry team broke down the front door with a battering ram, yelled that they were police, and ordered everyone to get down. A large man, later identified as Darden, was kneeling on the seat of a couch near the door when the officers first entered, and he immediately raised his hands in the air. Darden weighed approximately 340 pounds. Several other people were sitting and standing in a nearby dining room. As Officer Snow entered the residence, he reached out and ripped the shirt off Darden's back, apparently in an attempt to get Darden from the couch to the ground. The videos do not show what happened during the twenty-five seconds that followed, and there is conflicting testimony about what transpired.<sup>1</sup> According to witnesses for the plaintiff, Darden "had no time to react" before "[h]e was thrown on the ground" by the officers. Witnesses also testified that Darden never made any threatening gestures and did not resist arrest.

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<sup>1</sup> In one video, the officer wearing the camera went into one of the bedrooms at the rear of the residence. In the second video, the officer wearing the second camera went into the dining room and ordered people to get on the ground.

#### App. 4

After approximately twenty-five seconds, it became apparent that some sort of incident was occurring in the front room. One of the videos shows Darden lying on the ground face up. An officer in the front room yelled, “Roll over on your face,” at which point, Darden appeared to follow directions and rolled over onto his stomach. The video then pans away from the scene and does not turn back for approximately fifteen seconds. The second video shows that Officer Romero then ran into the house to assist. However, in that video, much of the interaction between Darden and the officers is totally obscured by the couch. Although not captured by the video, eyewitnesses testified that Officer Romero proceeded to choke Darden and to repeatedly punch and kick Darden in the face.<sup>2</sup>

At one point, Darden’s body appeared to come up off the ground for a moment, but it is not clear from the video footage whether he came up of his own volition or was pulled up by police. The officers then backed away, and Officer Snow used a Taser on Darden. Shortly thereafter, Darden rolled over onto his stomach and appeared to push himself up on his hands. He was immediately pushed back down into the ground by police. Throughout these events, other people in the house repeatedly yelled, “He’s got asthma,” and “He can’t breathe.” Eyewitnesses also testified that Darden himself told the officers he could not breathe.<sup>3</sup>

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<sup>2</sup> In fact, Officer Romero himself testified that he punched Darden in the face and explained that he had been trained to do so when arrestees were resisting arrest.

<sup>3</sup> Eyewitnesses testified that Darden pushed himself up on his hands because he was trying to get into a position where he could breathe.

## App. 5

A few seconds later, the videos briefly show Darden on his knees, with his hands in the air, before Officer Snow tased him a second time.<sup>4</sup> Darden fell to the ground and rolled onto his back, where he lay face up for a few seconds. Officer Romero then pushed Darden over onto his stomach and pressed his face into the ground. As Officer Romero tried to pull Darden's left arm behind his back, Darden seemed to pull his arm away. The officers then pushed Darden back into the ground, and one officer appeared to put him in a choke hold.

At that point, other people in the residence were still yelling that Darden could not breathe. Nevertheless, several officers continued to push Darden's body into the ground face down, pressed his face and neck into the floor, and pulled his arms behind his back so that Officer Romero could handcuff him. As Officer Romero finished securing the handcuffs, Darden's body went limp. The officers then pulled Darden's debilitated body up into a sitting position and left him there. Darden appeared to be unconscious, and his head hung down on his chest. It was subsequently determined that Darden had suffered a heart attack and died.

The administrator of Darden's estate brought suit under 42 U.S.C. § 1983, claiming that Officers Snow and Romero used excessive force in arresting Darden and that the City was liable for failing to adequately train the officers. All of the defendants filed motions for summary judgment, and the district court granted their motions and dismissed the case. The district court

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<sup>4</sup> Officer Snow claims that he had no further contact with Darden after discharging the Taser the second time.

determined that the officers had not violated clearly established law and were thus entitled to qualified immunity. In addition, the district court stated that the plaintiff had failed to show that Darden's death resulted only from the officers' use of force. Because it held that the officers had not violated Darden's constitutional rights, the district court likewise dismissed the municipal liability claims. This appeal followed.

## II. DISCUSSION

"We review a summary judgment *de novo*, 'using the same standard as that employed by the district court under Rule 56.'" *Newman v. Guedry*, 703 F.3d 757, 761 (5th Cir. 2012) (quoting *Kerstetter v. Pac. Sci. Co.*, 210 F.3d 431, 435 (5th Cir. 2000)). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

### A. Officers Snow and Romero

The Supreme Court has "mandated a two-step sequence for resolving government officials' qualified immunity claims." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). We must determine (1) "whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right" and (2) "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* "A right may be clearly established without 'a case directly on point,' but 'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Hanks v. Rogers*, 853 F.3d 738, 746–47 (5th Cir. 2017) (quoting

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*White v. Pauly*, 137 S. Ct. 548, 551 (2017)). In the excessive force context, a constitutional violation is clearly established if no reasonable officer could believe the act was lawful. *See Manis v. Lawson*, 585 F.3d 839, 846 (5th Cir. 2009). Courts are “permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” *Pearson*, 555 U.S. at 236. However, deciding the two prongs in order “is often beneficial.” *Id.*

Once an official pleads qualified immunity, “the burden then shifts to the plaintiff, who must rebut the defense by establishing a genuine fact issue as to whether the official’s allegedly wrongful conduct violated clearly established law.” *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). Still, at the summary judgment stage, we must “view the facts in the light most favorable to . . . the nonmoving party.” *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1769 (2015). “The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

“To prevail on an excessive-force claim, [a plaintiff] must show ‘(1) injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable.’” *Cooper v. Brown*, 844 F.3d 517, 522 (5th Cir. 2016) (quoting *Elizondo v. Green*, 671 F.3d 506, 510 (5th Cir. 2012)). “Our precedents recognize that inquiries regarding whether a use of force was ‘clearly excessive’ or ‘clearly unreasonable . . . are often

intertwined,’ and we consider those questions together below.” *Hanks*, 853 F.3d at 744 (omission in original) (quoting *Poole v. City of Shreveport*, 691 F.3d 624, 628 (5th Cir. 2012)).

### ***1. Injury and Causation***

The district court held that the “plaintiff could not establish an excessive force claim because he cannot show that Darden’s death ‘resulted directly and only from the use of force that was clearly excessive to the need.’” *See Knight v. Caldwell*, 970 F.2d 1430, 1432 n.3 (5th Cir. 1992). According to the plaintiff’s medical expert, “Darden died as a result of the application of restraint (physical struggle, 4 taser dart strikes,[<sup>5</sup>] prone position with the weight of police officers on top of Mr. Darden) and consequential hypoxia[<sup>6</sup>] and increased cardiac demand.” But the medical expert went on to explain that “[t]he application of restraint [was] a contributing causal factor along with natural disease.” The other contributing factors were focal coronary artery disease, “which can increase the likelihood of developing an arrhythmia during a struggle,” and chronic lung disease, which “can impede air exchange causing hypoxia (low oxygen) and increase the risk of cardiac arrhythmia during exertion such as a struggle.” Thus, the district court’s conclusion that the injury did not result directly and only from the use

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<sup>5</sup> When a Taser’s trigger is pulled, a set of two dart-like probes is discharged. Thus, although Darden was tased only twice, four probes made contact with his body.

<sup>6</sup> “Hypoxia means a shortage of oxygen in the blood,” and it can “be induced by compressing the lungs, which the weight of several persons on one’s back can do.” *Richman v. Sheahan*, 512 F.3d 876, 880 (7th Cir. 2008).

## App. 9

of force was essentially based on the fact that Darden had preexisting medical conditions that increased his risk of death during the incident.

The district court erred in reaching this conclusion. According to the eggshell skull rule, “a tortfeasor takes his victim as he finds him.” *Dunn v. Denk*, 54 F.3d 248, 251 (5th Cir. 1995), *rev’d on other grounds* 79 F.3d 401 (5th Cir. 1996) (en banc); *see also Koch v. United States*, 857 F.3d 267, 274 (5th Cir. 2017). The eggshell skull rule is applicable in § 1983 excessive force cases. *See Dunn*, 54 F.3d at 251. Darden’s preexisting medical conditions increased his risk of death during a struggle, and in that way, they contributed to his death. However, the evidence suggests that Darden would not have suffered a heart attack and died if the officers had not tased him, forced him onto his stomach, and applied pressure to his back. Indeed, the medical expert ultimately concluded that “Darden’s manner of death should not have been ruled as Natural.” Accordingly, the plaintiff can show that the use of force was the direct and only cause of Darden’s death.

### ***2. Clearly Excessive and Clearly Unreasonable Use of Force***

“Excessive force claims are necessarily fact-intensive; whether the force used is ‘excessive’ or ‘unreasonable’ depends on ‘the facts and circumstances of each particular case.’” *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). In making this determination, a court should consider the totality of the circumstances, “including 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.” *Graham*, 490 U.S. at 396. “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.* “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” *Id.* at 396–97.

***a. Severity of the crime***

The magistrate judge who issued the warrant determined that there was probable cause to believe that suspects at the residence were dealing drugs. These types of drug crimes are certainly serious offenses. *See Orr v. Copeland*, 844 F.3d 484, 493 (5th Cir. 2016) (noting that an officer “had reason to suspect that [a driver] was involved in serious drug crimes” when the driver “had a white residue on his face at the time of the traffic stop” and the officer “observed drug paraphernalia—plastic baggies—hidden in the backseat of [the driver’s] car”). Thus, the severity of the crime at issue weighs in favor of the officers.

***b. Immediate safety threat***

There is a genuine factual dispute over whether Darden posed an immediate safety threat to the officers. There were certainly inherent dangers associated with executing a narcotics warrant, and the officers were aware that lookouts were positioned in the house across the street. Still, Darden “was not suspected of committing a violent offense,” *Cooper*, 844

F.3d at 522, and testimony suggests that Darden did not threaten the officers in any way when they entered the residence. Eyewitnesses testified that Darden put his hands in the air, and indeed, the video shows Darden raising his hands when the officers enter the home. Witnesses also testified that Darden made no threatening gestures and did not resist arrest. Therefore, a jury could conclude that no reasonable officer would have perceived Darden as posing an immediate threat to the officers' safety. *See Hanks*, 853 F.3d at 743, 746; *Ramirez v. Martinez*, 716 F.3d 369, 378 (5th Cir. 2013); *Dewille*, 567 F.3d at 167.

***c. Resisting arrest***

The district court's analysis largely turned on an assessment that Darden was actively resisting arrest when Officers Snow and Romero used force on him. "Officers may consider a suspect's refusal to comply with instructions . . . in assessing whether physical force is needed to effectuate the suspect's compliance." *Dewille*, 567 F.3d at 167. "However, officers must assess not only the need for force, but also 'the relationship between the need and the amount of force used.'" *Id.* (quoting *Gomez v. Chandler*, 163 F.3d 921, 923 (5th Cir. 1999)). According to the district court, "[t]he video makes clear that Darden did not get on the ground as ordered by the officers and that the taser was employed to assist them in getting Darden to the ground."

"When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007). Thus, in *Scott*, the

Supreme Court held that because the nonmovant's version of events was "so utterly discredited" by a videotape "that no reasonable jury could have believed him," the court of appeals "should have viewed the facts in the light depicted by the videotape." *Id.* at 380–81. Yet the standard imposed by the Supreme Court is a demanding one: a court should not discount the nonmoving party's story unless the video evidence provides so much clarity that a reasonable jury could not believe his account. *See Ramirez*, 716 F.3d at 374.

In the instant case, the videos do not meet that difficult standard because they do not show whether Darden got onto the ground when he was commanded to do so. After the officers entered the house and ripped off Darden's shirt, the next shot of Darden shows him lying on the ground approximately twenty-five seconds later. Neither video shows what transpired between those two events. Nor do the videos make clear how Darden transitioned from kneeling on the couch to lying on the floor. The parties offer conflicting accounts of Darden's actions during those twenty-five seconds: witnesses for the plaintiff claim that Darden was compliant with the officers' commands and was thrown to the ground by police, whereas Officer Snow claims that Darden was attempting to stand up and was resisting the officers' attempts to get him on the ground. In contrast to *Scott*, however, the videos do not favor one account over the other and do not provide the clarity necessary to resolve the factual dispute presented by the parties' conflicting accounts.

Based on the evidence in the record, a jury could conclude that no reasonable officer on the scene would have thought that Darden was resisting arrest. The

videos show that Darden raised his hands when the officers entered the residence, and it appears that he rolled over onto his face at one point after the officers instructed him to do so. Moreover, eyewitnesses testified that Darden was thrown to the ground before he could react, that he complied with the officers' commands, and that he did not resist arrest. From the video recordings, it appears that Darden later pushed himself up on his hands, and eventually onto his knees, and he seemed to pull his arm away from the officers when they were trying to handcuff him. But those events occurred while other people in the house were loudly and repeatedly yelling that Darden had asthma and was trying to breathe. In addition, Darden allegedly told the officers he could not breathe.

Snow argues that the officers "had no way of knowing in that tense, uncertain, and rapidly evolving situation" if it was "true or false" that Darden was struggling to breathe. He contends that "a police officer need not credit everything a suspect tells him." See *Rodriguez v. Farrell*, 294 F.3d 1276, 1278 (11th Cir. 2002). However, the issue of whether reasonable officers in this situation would have credited the warnings from Darden and the other suspects is a factual question that must be decided by a jury. As the Supreme Court has made clear, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter." *Liberty Lobby*, 477 U.S. at 249. Rather, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. A jury could conclude that all reasonable officers on the scene would have believed that Darden

was merely trying to get into a position where he could breathe and was not resisting arrest.<sup>7</sup>

***d. Officer Snow's use of force***

At this juncture, we must analyze the officers' actions separately. In cases where the defendants have not acted in unison, "qualified immunity claims should be addressed separately for each individual defendant." *Kitchen v. Dall. Cty.*, 759 F.3d 468, 480 (5th Cir. 2014) (quoting *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 253 (5th Cir. 2005)), *abrogated on other grounds by Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015); *Meadours v. Ermel*, 483 F.3d 417, 421 (5th Cir. 2007).

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<sup>7</sup> Officer Snow also contends that the "testimony of Plaintiff's own witnesses fully undermines his claim." First, he argues that one of the eyewitnesses, Donna Randle, "acknowledge[d] that it would have appeared to officers that Jermaine Darden was resisting them." Randle was asked by defense counsel, "On the date of the incident in question, is it your position that the police thought Jermaine was fighting them, but really he was trying to get into a better position, so he could breathe easier?" Randle responded, "Yes." This was both a leading and compound question, so it is difficult to determine what Randle meant. Even if Officer Snow has accurately characterized Randle's testimony, however, Officer Snow has cited no authority to support his contention that a witness's speculation about what officers would have perceived can be used to fully discredit the plaintiff's version of events at the summary judgment stage.

Officer Snow also asserts that "Clifton Crippen testified that Darden was struggling against the officers trying to get on his side." But throughout his testimony, Crippen made clear that Darden was simply trying to breathe and that others in the residence had repeatedly informed the officers that Darden was trying to breathe. Accordingly, the testimony of the plaintiff's witnesses does not necessarily undermine the plaintiff's version of events.

First, we consider whether a jury could conclude that Officer Snow used excessive force when he allegedly threw Darden to the ground and tased him. We have previously suggested that a constitutional violation occurs when an officer tases, strikes, or violently slams an arrestee who is not actively resisting arrest. *See Ramirez*, 716 F.3d at 377–78; *Newman*, 703 F.3d at 762–63; *Bush v. Strain*, 513 F.3d 492, 501 (5th Cir. 2008). Thus, if a jury finds that Darden was not actively resisting arrest, then a jury could likewise conclude that Officer Snow used excessive force by throwing Darden to the ground and tasing him twice. The facts the plaintiff has alleged therefore make out a violation of a constitutional right.

Furthermore, the right at issue was clearly established at the time of Officer Snow’s alleged misconduct. Our case law makes clear that when an arrestee is not actively resisting arrest the degree of force an officer can employ is reduced. *See Cooper*, 844 F.3d at 524; *Newman*, 703 F.3d at 763; *Bush*, 513 F.3d at 502; *see also Graham*, 490 U.S. at 396 (including whether an arrestee “is actively resisting arrest” among factors to consider in determining whether a particular use of force is unreasonable). For instance, we held in *Bush* that it was objectively unreasonable for an officer to slam an arrestee’s face into a vehicle when the arrestee “was not resisting arrest or attempting to flee.” 513 F.3d at 502. Similarly, in *Newman* we found that it was objectively unreasonable for officers to tase and strike an arrestee with a nightstick without resorting to less violent means when the arrestee’s “behavior did not rise to the level of ‘active resistance.’” 703 F.3d at 763.

In the present case, eyewitnesses claim that Darden put his hands in the air when the officers entered the residence, complied with the officers' commands, and did not resist arrest. Yet Officer Snow allegedly threw Darden to the ground and twice shocked him with a Taser while he was being beaten by Officer Romero. In light of our prior case law, Officer Snow should have known that he could not use that amount of force on an individual who was not resisting arrest.

It is worth pointing out that a jury may ultimately conclude that Darden did not comply with the officers' commands and was actively resisting arrest. Under those facts, Officer Snow's decisions to force Darden to the ground and tase him might have been reasonable. *See Carroll v. Ellington*, 800 F.3d 154, 174–75 (5th Cir. 2015) (declining “to reach the close constitutional question” of whether “an officer’s application of a Taser to an unarmed, seated suspect who fail[ed] to comply with an order to get on the ground” was excessive force). However, on the record before us, there are genuine disputes of material fact as to whether Darden was actively resisting arrest and whether the force Officer Snow used was clearly excessive and clearly unreasonable. Thus, we hold that Officer Snow was not entitled to qualified immunity, and the district court erred in granting his motion for summary judgment.

***e. Officer Romero’s use of force***

Next, we must determine whether a jury could find that Officer Romero used excessive force when he allegedly choked, kicked, and punched Darden and forced Darden into a prone position to handcuff him behind his back. As an initial matter, we note that this was not a situation where an officer arrived at the

scene with little or no information and had to make a split-second decision. Rather, Officer Romero acknowledges that he stood at his post near the front door for a while and observed the interaction between Darden and Officer Snow before running into the house to assist. In other words, Officer Romero saw whether Darden was resisting and saw how much force had already been used on Darden. He needed to take those perceptions into account in assessing how much additional force, if any, was necessary. *See Lytle v. Bexar Cty.*, 560 F.3d 404, 413 (5th Cir. 2009) (“[A]n exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased.”).

As stated, we have found that a police officer uses excessive force when the officer strikes, punches, or violently slams a suspect who is not resisting arrest. *See Newman*, 703 F.3d at 762–63; *Bush*, 513 F.3d at 501–02; *see also Griggs v. Brewer*, 841 F.3d 308, 315–16 (5th Cir. 2016) (suggesting that “punching or otherwise gratuitously harming a restrained suspect constitutes excessive force” but finding no excessive force violation because arrestee actively resisted). Thus, if a jury finds that no reasonable officer on the scene would have perceived Darden to be actively resisting arrest, then a jury could also conclude that Officer Romero used excessive force by choking Darden and repeatedly punching and kicking him in the face.<sup>8</sup>

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<sup>8</sup> We also find relevant, but not dispositive, the fact that Officer Romero’s alleged conduct appears to have violated Fort Worth Police Department policies requiring officers to exercise “[e]xtreme caution” when arresting “a prisoner that is obese . . . since cuffing behind the back and laying the prisoner in a prone position could lead to positional asphyxia” (otherwise known as hypoxia). Fort

Darden's right to be free from such force was also clearly established at the time of Officer Romero's alleged misconduct. The law is clear that the degree of force an officer can reasonably employ is reduced when an arrestee is not actively resisting. *See Cooper*, 844 F.3d at 524; *Newman*, 703 F.3d at 763; *Bush*, 513 F.3d at 502; *see also Graham*, 490 U.S. at 396. Moreover, at the time of the alleged misconduct it was clearly established that violently slamming or striking a suspect who is not actively resisting arrest constitutes excessive use of force. *See Newman*, 703 F.3d at 762–63; *Bush*, 513 F.3d at 501–02.

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Worth, Tex., Police Department General Orders § 314.04(D). While we certainly do not suggest that the violation of police department policies is sufficient to make out a constitutional violation, we have found their existence and corresponding notice to officers relevant in analyzing the reasonableness of a particular use of force under the totality of the circumstances. *See Gutierrez v. City of San Antonio*, 139 F.3d 441, 448–449 (5th Cir. 1998). In *Gutierrez*, we found a genuine dispute of material fact as to whether officers acted reasonably by “hog-tying” an arrestee who eventually died because evidence suggested that the San Antonio Police Department may have prohibited the practice or had notice of its potential dangers through a law enforcement study it possessed. *Id.* at 448–49. We described this factual dispute as “important because it may be difficult to conclude that the officers acted reasonably if they performed an action that had been banned by their department or of whose dangers in these circumstances they had been warned.” *Id.* at 449; *see also Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (noting that the information an officer possesses when acting can affect the objective legal reasonableness of the officer's conduct in the Fourth Amendment search context); *Tennessee v. Garner*, 471 U.S. 1, 18–19 (1985) (looking to policies adopted by police departments to inform its analysis on the reasonableness of using deadly force to prevent the escape of unarmed suspected felons).

In the case at bar, eyewitnesses testified that Officer Romero choked, punched, and kicked Darden, even though Darden was purportedly complying with the officers' orders and not resisting arrest. Officer Romero also forced Darden—an obese man—onto his stomach, pushed his face into the floor, and pulled Darden's hands behind his back. All the while, other people in the residence were repeatedly yelling that Darden could not breathe. If the plaintiff's version of events is true, Officer Romero's actions were plainly in conflict with our case law at the time of the alleged misconduct. *See Newman*, 703 F.3d 763–64; *Bush*, 513 F.3d at 501–02.

Furthermore, “‘in an obvious case,’ the *Graham* excessive-force factors themselves ‘can clearly establish the answer, even without a body of relevant case law.’” *Newman*, 703 F.3d at 764 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)). As is analyzed above, a jury could conclude that no reasonable officer would have perceived Darden as posing an immediate threat to the officers' safety or thought that he was resisting arrest. Therefore, viewing the facts in the light most favorable to Darden, Officer Romero's actions—choking, punching, and kicking Darden—were objectively unreasonable in light of clearly established law at the time of the incident. Accordingly, we hold that a reasonable jury could conclude that Officer Romero used excessive force. Officer Romero was not entitled to qualified immunity, and the district court erred in granting his motion for summary judgment.

## **B. The City of Fort Worth**

In the proceedings below, the plaintiff also brought claims against the City, including a claim that the City

had failed to properly train its officers. The district court did not reach the merits of the plaintiff's municipal liability claims. Because it held that the officers did not violate Darden's constitutional rights, the district court likewise held that the City could not be liable and granted the City's motion for summary judgment. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point."). As discussed above, we hold that the plaintiff has adequately alleged facts that make out violations of a clearly established constitutional right. Therefore, we vacate the district court's dismissal of the claims against the City and remand the case for further consideration of municipal liability. We express no opinion on the merits of that claim.

### III. CONCLUSION

For the foregoing reasons, we REVERSE the district court's dismissal of the claims against Snow and Romero, VACATE the dismissal of the claims against the City, and REMAND the case for further proceedings consistent with this opinion.

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**APPENDIX B**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**No. 16-11244**

**[Filed August 9, 2017]**

ERIC C. DARDEN, as Administrator of the	)
Estate of Jermaine Darden and on behalf	)
of the statutory beneficiaries of the Estate	)
of Jermaine Darden (which are Donneika	)
Goodacre-Darden, surviving mother of	)
Jermaine Darden, Charles H. Darden,	)
surviving father of Jermaine Darden),	)
	)
Plaintiff–Appellant,	)
	)
v.	)
	)
CITY OF FORT WORTH, TEXAS;	)
W. F. SNOW; J. ROMERO,	)
	)
Defendants–Appellees.	)
	)

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Appeal from the United States District Court  
for the Northern District of Texas

Before KING, PRADO, and SOUTHWICK, Circuit  
Judges.

EDWARD C. PRADO, Circuit Judge:

Fort Worth Police Officers W.F. Snow and Javier Romero arrested Jermaine Darden, a black man who was obese, while executing a no-knock warrant at a private residence. In arresting Darden, the officers allegedly threw him to the ground, tased him twice, choked him, punched and kicked him in the face, pushed him into a face-down position, pressed his face into the ground, and pulled his hands behind his back to handcuff him. Darden suffered a heart attack and died during the arrest. The administrator of Darden's estate subsequently brought this 42 U.S.C. § 1983 case against Officers Snow and Romero and the City of Fort Worth (the "City"). The district court granted summary judgment in favor of the officers and the City and dismissed all claims. We REVERSE in part, VACATE in part, and REMAND.

## **I. BACKGROUND**

In 2013, the Fort Worth Police Department investigated claims that cocaine was being sold from a private residence. A magistrate judge issued a warrant that allowed the officers to enter the residence without first knocking and announcing themselves. On May 16, 2013, a large team of heavily armed police officers executed the warrant. Officer Snow was assigned to the entry team, which was tasked with breaking down the front door, entering the residence, and securing the premises. Officer Romero drove the van that transported the team to the residence. He was also assigned to stand guard near the front door while other officers entered the residence and arrested the people inside. Two other members of the team wore cameras on their helmets, which captured on video some but not

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all of the events that transpired as the warrant was executed.

When the police first arrived at the house, the entry team broke down the front door with a battering ram, yelled that they were police, and ordered everyone to get down. A large man, later identified as Darden, was kneeling on the seat of a couch near the door when the officers first entered, and he immediately raised his hands in the air. Darden weighed approximately 340 pounds. Several other people were sitting and standing in a nearby dining room. As Officer Snow entered the residence, he reached out and ripped the shirt off Darden's back, apparently in an attempt to get Darden from the couch to the ground. The videos do not show what happened during the twenty-five seconds that followed, and there is conflicting testimony about what transpired.<sup>1</sup> According to witnesses for the plaintiff, Darden "had no time to react" before "[h]e was thrown on the ground" by the officers. Witnesses also testified that Darden never made any threatening gestures and did not resist arrest.

After approximately twenty-five seconds, it became apparent that some sort of incident was occurring in the front room. One of the videos shows Darden lying on the ground face up. An officer in the front room yelled, "Roll over on your face," at which point, Darden appeared to follow directions and rolled over onto his stomach. The video then pans away from the scene and does not turn back for approximately fifteen seconds.

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<sup>1</sup> In one video, the officer wearing the camera went into one of the bedrooms at the rear of the residence. In the second video, the officer wearing the second camera went into the dining room and ordered people to get on the ground.

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The second video shows that Officer Romero then ran into the house to assist. However, in that video, much of the interaction between Darden and the officers is totally obscured by the couch. Although not captured by the video, eyewitnesses testified that Officer Romero proceeded to choke Darden and to repeatedly punch and kick Darden in the face.<sup>2</sup>

At one point, Darden's body appeared to come up off the ground for a moment, but it is not clear from the video footage whether he came up of his own volition or was pulled up by police. The officers then backed away, and Officer Snow used a Taser on Darden. Shortly thereafter, Darden rolled over onto his stomach and appeared to push himself up on his hands. He was immediately pushed back down into the ground by police. Throughout these events, other people in the house repeatedly yelled, "He's got asthma," and "He can't breathe." Eyewitnesses also testified that Darden himself told the officers he could not breathe.<sup>3</sup>

A few seconds later, the videos briefly show Darden on his knees, with his hands in the air, before Officer Snow tased him a second time.<sup>4</sup> Darden fell to the ground and rolled onto his back, where he lay face up for a few seconds. Officer Romero then pushed Darden

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<sup>2</sup> In fact, Officer Romero himself testified that he punched Darden in the face and explained that he had been trained to do so when arrestees were resisting arrest.

<sup>3</sup> Eyewitnesses testified that Darden pushed himself up on his hands because he was trying to get into a position where he could breathe.

<sup>4</sup> Officer Snow claims that he had no further contact with Darden after discharging the Taser the second time.

over onto his stomach and pressed his face into the ground. As Officer Romero tried to pull Darden's left arm behind his back, Darden seemed to pull his arm away. The officers then pushed Darden back into the ground, and one officer appeared to put him in a choke hold.

At that point, other people in the residence were still yelling that Darden could not breathe. Nevertheless, several officers continued to push Darden's body into the ground face down, pressed his face and neck into the floor, and pulled his arms behind his back so that Officer Romero could handcuff him. As Officer Romero finished securing the handcuffs, Darden's body went limp. The officers then pulled Darden's debilitated body up into a sitting position and left him there. Darden appeared to be unconscious, and his head hung down on his chest. It was subsequently determined that Darden had suffered a heart attack and died.

The administrator of Darden's estate brought suit under 42 U.S.C. § 1983, claiming that Officers Snow and Romero used excessive force in arresting Darden and that the City was liable for failing to adequately train the officers. All of the defendants filed motions for summary judgment, and the district court granted their motions and dismissed the case. The district court determined that the officers had not violated clearly established law and were thus entitled to qualified immunity. In addition, the district court stated that the plaintiff had failed to show that Darden's death resulted only from the officers' use of force. Because it held that the officers had not violated Darden's constitutional rights, the district court likewise

dismissed the municipal liability claims. This appeal followed.

## II. DISCUSSION

“We review a summary judgment *de novo*, ‘using the same standard as that employed by the district court under Rule 56.’” *Newman v. Guedry*, 703 F.3d 757, 761 (5th Cir. 2012) (quoting *Kerstetter v. Pac. Sci. Co.*, 210 F.3d 431, 435 (5th Cir. 2000)). Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

### A. Officers Snow and Romero

The Supreme Court has “mandated a two-step sequence for resolving government officials’ qualified immunity claims.” *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). We must determine (1) “whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right” and (2) “whether the right at issue was ‘clearly established’ at the time of defendant’s alleged misconduct.” *Id.* “A right may be clearly established without ‘a case directly on point,’ but ‘existing precedent must have placed the statutory or constitutional question beyond debate.’” *Hanks v. Rogers*, 853 F.3d 738, 746–47 (5th Cir. 2017) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017)). Courts are “permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” *Pearson*, 555 U.S. at 236. However, deciding the two prongs in order “is often beneficial.” *Id.*

Once an official pleads qualified immunity, “the burden then shifts to the plaintiff, who must rebut the defense by establishing a genuine fact issue as to whether the official’s allegedly wrongful conduct violated clearly established law.” *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). Still, at the summary judgment stage, we must “view the facts in the light most favorable to . . . the nonmoving party.” *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1769 (2015). “The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

“To prevail on an excessive-force claim, [a plaintiff] must show ‘(1) injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable.’” *Cooper v. Brown*, 844 F.3d 517, 522 (5th Cir. 2016) (quoting *Elizondo v. Green*, 671 F.3d 506, 510 (5th Cir. 2012)). “Our precedents recognize that inquiries regarding whether a use of force was ‘clearly excessive’ or ‘clearly unreasonable . . . are often intertwined,’ and we consider those questions together below.” *Hanks*, 853 F.3d at 744 (omission in original) (quoting *Poole v. City of Shreveport*, 691 F.3d 624, 628 (5th Cir. 2012)).

### **1. Injury and Causation**

The district court held that the “plaintiff could not establish an excessive force claim because he cannot show that Darden’s death ‘resulted directly and only from the use of force that was clearly excessive to the need.’” See *Knight v. Caldwell*, 970 F.2d 1430, 1432 n.3 (5th Cir. 1992). According to the plaintiff’s medical

expert, “Darden died as a result of the application of restraint (physical struggle, 4 taser dart strikes,<sup>[5]</sup> prone position with the weight of police officers on top of Mr. Darden) and consequential hypoxia<sup>[6]</sup> and increased cardiac demand.” But the medical expert went on to explain that “[t]he application of restraint [was] a contributing causal factor along with natural disease.” The other contributing factors were focal coronary artery disease, “which can increase the likelihood of developing an arrhythmia during a struggle,” and chronic lung disease, which “can impede air exchange causing hypoxia (low oxygen) and increase the risk of cardiac arrhythmia during exertion such as a struggle.” Thus, the district court’s conclusion that the injury did not result directly and only from the use of force was essentially based on the fact that Darden had preexisting medical conditions that increased his risk of death during the incident.

The district court erred in reaching this conclusion. According to the “eggshell skull” rule, “[t]he tortfeasor takes his victim as he finds him.” *Richman*, 512 F.3d at 884; accord *Koch v. United States*, 857 F.3d 267, 274 (5th Cir. 2017). As our fellow circuits have noted, the eggshell skull rule “like most principles of the common law of torts is applicable to a constitutional tort case brought under 42 U.S.C. § 1983.” *Richman*, 512 F.3d at

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<sup>5</sup> When a Taser’s trigger is pulled, a set of two dart-like probes is discharged. Thus, although Darden was tased only twice, four probes made contact with his body.

<sup>6</sup> “Hypoxia means a shortage of oxygen in the blood,” and it can “be induced by compressing the lungs, which the weight of several persons on one’s back can do.” *Richman v. Sheahan*, 512 F.3d 876, 880 (7th Cir. 2008).

884 (cataloging cases). Darden's preexisting medical conditions increased his risk of death during a struggle, and in that way, they contributed to his death. However, the evidence suggests that Darden would not have suffered a heart attack and died if the officers had not tased him, forced him onto his stomach, and applied pressure to his back. Indeed, the medical expert ultimately concluded that "Darden's manner of death should not have been ruled as Natural." Accordingly, the plaintiff can show that the use of force was the direct and only cause of Darden's death.

***2. Clearly Excessive and Clearly Unreasonable Use of Force***

"Excessive force claims are necessarily fact-intensive; whether the force used is 'excessive' or 'unreasonable' depends on 'the facts and circumstances of each particular case.'" *Dewille v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). In making this determination, a court should consider the totality of the circumstances, "including 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." *Graham*, 490 U.S. at 396. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly

evolving—about the amount of force that is necessary in a particular situation.” *Id.* at 396–97.

***a. Severity of the crime***

The magistrate judge who issued the warrant determined that there was probable cause to believe that suspects at the residence were dealing drugs. These types of drug crimes are certainly serious offenses. *See Orr v. Copeland*, 844 F.3d 484, 493 (5th Cir. 2016) (noting that an officer “had reason to suspect that [a driver] was involved in serious drug crimes” when the driver “had a white residue on his face at the time of the traffic stop” and the officer “observed drug paraphernalia—plastic baggies—hidden in the backseat of [the driver’s] car”). Thus, the severity of the crime at issue weighs in favor of the officers.

***b. Immediate safety threat***

There is a genuine factual dispute over whether Darden posed an immediate safety threat to the officers. There were certainly inherent dangers associated with executing a narcotics warrant, and the officers were aware that lookouts were positioned in the house across the street. Still, Darden “was not suspected of committing a violent offense,” *Cooper*, 844 F.3d at 522, and testimony suggests that Darden did not threaten the officers in any way when they entered the residence. Eyewitnesses testified that Darden put his hands in the air, and indeed, the video shows Darden raising his hands when the officers enter the home. Witnesses also testified that Darden made no threatening gestures and did not resist arrest. Therefore, a jury could conclude that no reasonable officer would have perceived Darden as posing an

immediate threat to the officers' safety. *See Hanks*, 853 F.3d at 743, 746; *Ramirez v. Martinez*, 716 F.3d 369, 378 (5th Cir. 2013); *Dewille*, 567 F.3d at 167.

***c. Resisting arrest***

The district court's analysis largely turned on an assessment that Darden was actively resisting arrest when Officers Snow and Romero used force on him. "Officers may consider a suspect's refusal to comply with instructions . . . in assessing whether physical force is needed to effectuate the suspect's compliance." *Dewille*, 567 F.3d at 167. "However, officers must assess not only the need for force, but also 'the relationship between the need and the amount of force used.'" *Id.* (quoting *Gomez v. Chandler*, 163 F.3d 921, 923 (5th Cir. 1999)). According to the district court, "[t]he video makes clear that Darden did not get on the ground as ordered by the officers and that the taser was employed to assist them in getting Darden to the ground."

"When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007). Thus, in *Scott*, the Supreme Court held that because the nonmovant's version of events was "so utterly discredited" by a videotape "that no reasonable jury could have believed him," the court of appeals "should have viewed the facts in the light depicted by the videotape." *Id.* at 380–81. Yet the standard imposed by the Supreme Court is a demanding one: a court should not discount the nonmoving party's story unless the video evidence

provides so much clarity that a reasonable jury could not believe his account. *See Ramirez*, 716 F.3d at 374.

In the instant case, the videos do not meet that difficult standard because they do not show whether Darden got onto the ground when he was commanded to do so. After the officers entered the house and ripped off Darden's shirt, the next shot of Darden shows him lying on the ground approximately twenty-five seconds later. Neither video shows what transpired between those two events. Nor do the videos make clear how Darden transitioned from kneeling on the couch to lying on the floor. The parties offer conflicting accounts of Darden's actions during those twenty-five seconds: witnesses for the plaintiff claim that Darden was compliant with the officers' commands and was thrown to the ground by police, whereas Officer Snow claims that Darden was attempting to stand up and was resisting the officers' attempts to get him on the ground. In contrast to *Scott*, however, the videos do not favor one account over the other and do not provide the clarity necessary to resolve the factual dispute presented by the parties' conflicting accounts.

Based on the evidence in the record, a jury could conclude that no reasonable officer on the scene would have thought that Darden was resisting arrest. The videos show that Darden raised his hands when the officers entered the residence, and it appears that he rolled over onto his face at one point after the officers instructed him to do so. Moreover, eyewitnesses testified that Darden was thrown to the ground before he could react, that he complied with the officers' commands, and that he did not resist arrest. From the video recordings, it appears that Darden later pushed

himself up on his hands, and eventually onto his knees, and he seemed to pull his arm away from the officers when they were trying to handcuff him. But those events occurred while other people in the house were loudly and repeatedly yelling that Darden had asthma and was trying to breathe. In addition, Darden allegedly told the officers he could not breathe.

Snow argues that the officers “had no way of knowing in that tense, uncertain, and rapidly evolving situation” if it was “true or false” that Darden was struggling to breathe. He contends that “a police officer need not credit everything a suspect tells him.” *See Rodriguez v. Farrell*, 294 F.3d 1276, 1278 (11th Cir. 2002)). However, the issue of whether reasonable officers in this situation would have credited the warnings from Darden and the other suspects is a factual question that must be decided by a jury. As the Supreme Court has made clear, “at the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter.” *Liberty Lobby*, 477 U.S. at 249. Rather, “[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Id.* at 255. A jury could conclude that all reasonable officers on the scene would have believed that Darden was merely trying to get into a position where he could breathe and was not resisting arrest.<sup>7</sup>

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<sup>7</sup> Officer Snow also contends that the “testimony of Plaintiff’s own witnesses fully undermines his claim.” First, he argues that one of the eyewitnesses, Donna Randle, “acknowledge[d] that it would have appeared to officers that Jermaine Darden was resisting them.” Randle was asked by defense counsel, “On the date of the incident in question, is it your position that the police thought Jermaine was fighting them, but really he was trying to get into a

***d. Officer Snow's use of force***

At this juncture, we must analyze the officers' actions separately. In cases where the defendants have not acted in unison, "qualified immunity claims should be addressed separately for each individual defendant." *Kitchen v. Dallas County*, 759 F.3d 468, 480 (5th Cir. 2014) (quoting *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 253 (5th Cir. 2005)), *abrogated on other grounds by Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015); *Meadours v. Ermel*, 483 F.3d 417, 421 (5th Cir. 2007).

First, we consider whether a jury could conclude that Officer Snow used excessive force when he allegedly threw Darden to the ground and tased him. We have repeatedly suggested that a constitutional violation occurs when an officer tases an arrestee who is not actively resisting arrest. *See Clark v. Massengill*, 641 F. App'x 418, 420 (5th Cir. 2016); *Ramirez*, 716 F.3d at 378–79; *Anderson v. McCaleb*, 480 F. App'x 768,

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better position, so he could breathe easier?" Randle responded, "Yes." This was both a leading and compound question, so it is difficult to determine what Randle meant. Even if Officer Snow has accurately characterized Randle's testimony, however, Officer Snow has cited no authority to support his contention that a witness's speculation about what officers would have perceived can be used to fully discredit the plaintiff's version of events at the summary judgment stage.

Officer Snow also asserts that "Clifton Crippen testified that Darden was struggling against the officers trying to get on his side." But throughout his testimony, Crippen made clear that Darden was simply trying to breathe and that others in the residence had repeatedly informed the officers that Darden was trying to breathe. Accordingly, the testimony of the plaintiff's witnesses does not necessarily undermine the plaintiff's version of events.

773 (5th Cir. 2012) (per curiam); *Autin v. City of Baytown*, 174 F. App'x 183, 185 (5th Cir. 2005) (per curiam). Thus, if a jury finds that Darden was not actively resisting arrest, then a jury could likewise conclude that Officer Snow used excessive force by throwing Darden to the ground and tasing him twice. The facts the plaintiff has alleged make out a violation of a constitutional right.

Furthermore, the right at issue was clearly established at the time of Officer Snow's alleged misconduct. As early as 2005, we held that tasing a suspect who is "not resisting arrest" constitutes excessive force. *Autin*, 174 F. App'x at 185. In *Autin*, a police officer tased a suspect whose "back was to him, he gave her no notice of his intention to do so, and he continued to tase her repeatedly, even after she was subdued on the ground." *Id.* Based on these alleged facts, we held that the officer's "use of force was both excessive to the need and objectively unreasonable." *Id.* In another case, *McCaleb*, a police officer repeatedly shocked a suspect with a Taser while the suspect was "on the ground, no longer resisting arrest, and being beaten" by another officer. 480 F. App'x at 772. We concluded that the officer "should have known that he could not continue to shock [the suspect] with the taser after he was no longer resisting arrest." *Id.* at 773. Similarly, in the present case, eyewitnesses claim that Darden put his hands in the air when the officers entered the residence, complied with the officers' commands, and did not resist arrest. Yet Officer Snow allegedly threw Darden to the ground and twice shocked him with a Taser while he was being beaten by Officer Romero. In light of our prior case law, Officer Snow should have known that he could not use that

amount of force on an individual who was not resisting arrest.

It is worth pointing out that a jury may ultimately conclude that Darden did not comply with the officers' commands and was actively resisting arrest. Under those facts, Officer Snow's decisions to force Darden to the ground and tase him might have been reasonable. *See Carroll v. Ellington*, 800 F.3d 154, 174–75 (5th Cir. 2015) (declining “to reach the close constitutional question” of whether “an officer’s application of a Taser to an unarmed, seated suspect who fail[ed] to comply with an order to get on the ground” was excessive force). However, on the record before us, there are genuine disputes of material fact as to whether Darden was actively resisting arrest and whether the force Officer Snow used was clearly excessive and clearly unreasonable. “Summary judgment is inappropriate to resolve such disputes.” *McCaleb*, 480 F. App’x at 773. Thus, we hold that Officer Snow was not entitled to qualified immunity, and the district court erred in granting his motion for summary judgment.

***e. Officer Romero’s use of force***

Next, we must determine whether a jury could find that Officer Romero used excessive force when he allegedly choked, kicked, and punched Darden and forced Darden into a prone position to handcuff him behind his back. As an initial matter, we note that this was not a situation where an officer arrived at the scene with little or no information and had to make a split-second decision. Rather, Officer Romero acknowledges that he stood at his post near the front door for a while and observed the interaction between Darden and Officer Snow before running into the house

to assist. In other words, Officer Romero saw whether Darden was resisting and saw how much force had already been used on Darden. He needed to take those perceptions into account in assessing how much additional force, if any, was necessary. *See Lytle v. Bexar County*, 560 F.3d 404, 413 (5th Cir. 2009) (“[A]n exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased.”).

We have consistently held that a police officer uses excessive force when the officer chokes, punches, or kicks a suspect who is not resisting arrest. *See, e.g., Aguilar v. Robertson*, 512 F. App’x 444, 450 (5th Cir. 2013) (per curiam); *McCaleb*, 480 F. App’x at 773; *Sullivan v. Allred*, 297 F. App’x 339, 342 (5th Cir. 2008) (per curiam); *Estate of Sorrells v. City of Dallas*, 45 F. App’x 325 (5th Cir. 2002) (per curiam). Accordingly, if a jury finds that no reasonable officer on the scene would have perceived Darden to be actively resisting arrest, then a jury could also conclude that Officer Romero used excessive force by choking Darden and repeatedly punching and kicking him in the face.

Moreover, it was apparent that Darden was obese, which should have prompted Officer Romero to exercise greater care in arresting him. The Fort Worth Police Department’s general orders require officers to exercise “[e]xtreme caution” when arresting “a prisoner that is obese . . . since cuffing behind the back and laying the prisoner in a prone position could lead to positional asphyxia” (otherwise known as hypoxia). Fort Worth, Tex., Police Department General Orders § 314.04(D); *see also Richman*, 512 F.3d at 880. Despite this policy, however, Officer Romero pushed Darden into a prone

position, pressed his face into the floor, and pulled his arms behind his back to handcuff him. As the plaintiff's medical expert explained, "Darden died as a result of the application of restraint . . . and consequential hypoxia." Officer Romero's actions were unambiguously in conflict with the police department's policy, which cautioned against employing the exact tactics that Officer Romero used to arrest Darden. Therefore, a jury could find that the force was clearly excessive and clearly unreasonable.

Darden's right to be free from such force was clearly established at the time of Officer Romero's alleged misconduct. "[T]he law is clear that once the plaintiff stops resisting or is in [the officer's] control, the permissible degree of force lessens." *Aguilar*, 512 F. App'x at 450; see also *McCaleb*, 480 F. App'x at 773 (holding that a police officer "should have known that he could not beat [the suspect] after he stopped resisting arrest"). For example, in *Aguilar*, the plaintiff claimed that a police officer "tackled him off [his] motorcycle onto the ground, used his firearm to hit and poke [the plaintiff] in the head and visor, and kicked him in the leg." 512 F. App'x at 450. Because the officer allegedly took those actions while the plaintiff "was stopped, not ignoring commands, and was not resisting arrest," we held that the plaintiff had adequately alleged a violation of a constitutional right. *Id.*

In addition, a decision by one of our sister circuits suggests that police officers must exercise greater caution when arresting obese individuals. In *Richman*, the Seventh Circuit held that deputy sheriffs were not entitled to qualified immunity after they forced a morbidly obese man who was actively resisting arrest

into a face-down position on the floor and then placed their weight on his back in order to handcuff him, even as he screamed that he could not breathe. 512 F.3d at 880. The man died in the struggle. *Id.* “The autopsy report stated that he had died as a result of coronary artery disease to which ‘restraint hypoxia,’ or, as more commonly termed, ‘positional asphyxia,’ due to his morbid obesity had contributed.” *Id.* The court explained that “the obese are especially susceptible to hypoxia, and shortage of oxygen can and apparently in this case did precipitate a fatal heart attack.” *Id.* Thus, “police are warned not to sit on the back of a person they are trying to restrain, especially if he is obese.” *Id.* Because “a reasonably trained police officer would know that compressing the lungs of a morbidly obese person can kill the person,” the court concluded that a “reasonable jury could find that the deputies used excessive force.” *Id.* at 883.

In the case at bar, eyewitnesses testified that Officer Romero choked, punched, and kicked Darden, even though Darden was purportedly complying with the officers’ orders and not resisting arrest. Officer Romero also forced Darden—an obese man—onto his stomach, pushed his face into the floor, and pulled Darden’s hands behind his back. All the while, other people in the residence were repeatedly yelling that Darden could not breathe. If the plaintiff’s version of events is true, Officer Romero’s actions were plainly in conflict with our case law, the police department’s own policies, and the Seventh Circuit’s persuasive guidance in *Richman*. Thus, we hold that a reasonable jury could conclude that Officer Romero used excessive force. Officer Romero was not entitled to qualified immunity,

and the district court erred in granting his motion for summary judgment.

### **B. The City of Fort Worth**

In the proceedings below, the plaintiff also brought claims against the City, including a claim that the City had failed to properly train its officers. The district court did not reach the merits of the plaintiff's municipal liability claims. Because it held that the officers did not violate Darden's constitutional rights, the district court likewise held that the City could not be liable and granted the City's motion for summary judgment. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point."). As discussed above, we hold that the plaintiff has adequately alleged facts that make out violations of a clearly established constitutional right. Therefore, we vacate the district court's dismissal of the claims against the City and remand the case for further consideration of municipal liability. We express no opinion on the merits of that claim.

### **III. CONCLUSION**

For the foregoing reasons, we REVERSE the district court's dismissal of the claims against Snow and Romero, VACATE the dismissal of the claims against the City, and REMAND the case for further proceedings consistent with this opinion.

KING, Circuit Judge, specially concurring:

I agree with the panel majority that, on this record, the decision to grant qualified immunity to Officers Snow and Romero (and judgment for the City) was, at the very least, premature. Accordingly, I concur in the judgment.

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**APPENDIX C**

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**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

**NO. 4:15-CV-221-A**

**[Filed August 10, 2016]**

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ERIC C. DARDEN, AS ADMINISTRATOR	)
OF THE ESTATE OF JERMAINE DARDEN,	)
	)
Plaintiff,	)
	)
VS.	)
	)
THE CITY OF FORT WORTH, TEXAS,	)
ET AL.,	)
	)
Defendants.	)

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**MEMORANDUM OPINION AND ORDER**

Came on for consideration the motions of defendants, City of Fort Worth ("City"), W.F. Snow ("Snow"), and J. Romero ("Romero"), for summary judgment. The court, having considered the motions, the response of plaintiff, Eric C. Darden, as Administrator of the Estate of Jermaine Darden, the record, the summary judgment evidence, and applicable authorities, finds that the motions should be granted.

I.

Plaintiff's Claims

The operative pleading is plaintiff's third amended complaint filed May 11, 2016. Doc.<sup>1</sup> 66. Plaintiff's claims arise out of the execution of a no knock search warrant on May 16, 2013, carried out by City's police officers, including Snow and Romero. At some time during the execution of the warrant, Jermaine Darden ("Darden") died. Plaintiff asserts claims against Snow and Romero based on the alleged use by them of excessive force. Plaintiff asserts a claim against City based on failure to train its police officers and a negligence claim based on the contention that Snow's use of a taser caused Darden's death.

II.

Grounds of the Motions

Defendants Snow and Romero maintain that they are each entitled to qualified immunity. Further, they did not use excessive force when restraining Darden. Defendant City urges that plaintiff cannot demonstrate that City had a policy, practice or custom that caused Darden a deprivation of federal constitutional rights; the City's training policy is adequate; the City's police officers are adequately supervised; and, City is entitled to sovereign immunity as to plaintiff's state law claims.

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<sup>1</sup> The "Doc." reference is to the number of the item on the docket in this action.

III.

Applicable Legal Principles

A. Summary Judgment

Rule 56(a) of the Federal Rules of Civil Procedure provides that the court shall grant summary judgment on a claim or defense if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The movant bears the initial burden of pointing out to the court that there is no genuine dispute as to any material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 325 (1986). The movant can discharge this burden by pointing out the absence of evidence supporting one or more essential elements of the nonmoving party's claim, "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323. Once the movant has carried its burden under Rule 56(a), the nonmoving party must identify evidence in the record that creates a genuine dispute as to each of the challenged elements of its case. Id. at 324; see also Fed. R. Civ. P. 56 (c) ("A party asserting that a fact . . . is genuinely disputed must support the assertion by citing to particular parts of materials in the record . . ."). If the evidence identified could not lead a rational trier of fact to find in favor of the nonmoving party as to each essential element of the nonmoving party's case, there is no genuine dispute for trial and summary judgment is appropriate. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 597 (1986). In Mississippi Prot. &

Advocacy Sys., Inc. v. Cotten, the Fifth circuit explained:

Where the record, including affidavits, interrogatories, admissions, and depositions could not, as a whole, lead a rational trier of fact to find for the nonmoving party, there is no issue for trial.

929 F.2d 1054, 1058 (5th Cir. 1991).

The standard for granting a motion for summary judgment is the same as the standard for rendering judgment as a matter of law.<sup>2</sup> Celotex Corp., 477 U.S. at 323. If the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. Matsushita, 475 U.S. at 597; see also Mississippi Prot. & Advocacy Sys., 929 F.2d at 1058.

#### B. Qualified Immunity

Qualified immunity insulates a government official from civil damages liability when the official's actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). For a right to be "clearly established," the right's contours must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). Individual liability thus turns on

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<sup>2</sup> In Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc), the Fifth Circuit explained the standard to be applied in determining whether the court should enter judgment on motions for directed verdict or for judgment notwithstanding the verdict.

the objective legal reasonableness of the defendant's actions assessed in light of clearly established law at the time. Hunter v. Bryant, 502 U.S. 224, 228 (1991); Anderson, 483 U.S. at 639-40. In Harlow, the court explained that a key question is "whether that law was clearly established at the time an action occurred" because "[i]f the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." 457 U.S. at 818. In assessing whether the law was clearly established at the time, the court is to consider all relevant legal authority, whether cited by the parties or not. Elder v. Holloway, 510 U.S. 510, 512 (1994). If public officials of reasonable competence could differ on the lawfulness of defendant's actions, the defendant is entitled to qualified immunity. Mullenix v. Luna, 136 S. Ct. 305, 308 (2015); Malley v. Briggs, 475 U.S. 335, 341 (1986); Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir. 1992). "[A]n allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner." Malley, 475 U.S. at 341.

In analyzing whether an individual defendant is entitled to qualified immunity, the court considers whether plaintiff has alleged any violation of a clearly established right, and, if so, whether the individual defendant's conduct was objectively reasonable. Siegert v. Gilley, 500 U.S. 226, 231 (1991); Duckett v. City of Cedar Park, 950 F.2d 272, 276-80 (5th Cir. 1992). In so doing, the court should not assume that plaintiff has stated a claim, i.e., asserted a violation of a constitutional right. Siegert, 500 U.S. at 232. Rather,

the court must be certain that, if the facts alleged by plaintiff are true, a violation has clearly occurred. Connelly v. Comptroller, 876 F.2d 1209, 1212 (5th Cir. 1989). A mistake in judgment does not cause an officer to lose his qualified immunity defense. In Hunter, the Supreme Court explained:

The qualified immunity standard “gives ample room for mistaken judgments” by protecting “all but the plainly incompetent or those who knowingly violate the law.” Malley, [475 U.S.] at 343. . . . This accommodation for reasonable error exists because “officials should not err always on the side of caution” because they fear being sued.

. . .

502 U.S. at 229.

When a defendant relies on qualified immunity, the burden is on the plaintiff to negate the defense. Kovacic v. Villarreal, 628 F.3d 209, 211 (5<sup>th</sup> Cir. 2010); Foster v. City of Lake Jackson, 28 F.3d 425, 428 (5<sup>th</sup> Cir. 1994).

### C. Municipal Liability

The law is clearly established that the doctrine of respondent superior does not apply to § 1983 actions. Monell v. New York City Dep’t of Soc. Servs., 436 U.S. 658, 691 (1978); Williams v. Luna, 909 F.2d 121, 123 (5th Cir. 1990). Rather, the misconduct of a subordinate must be affirmatively linked to the action or inaction of the supervisor. Southard v. Texas Bd. of Crim. Justice, 114 F.3d 539, 550 (5th Cir. 1997). A supervisor may be liable under § 1983 if he, by action or inaction, demonstrates deliberate indifference to a plaintiff’s constitutionally protected rights. Id. at 551.

“‘[D]eliberate indifference’ is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.” Board of Comm’rs of Bryan Cty. v. Brown, 520 U.S. 397, 410 (1997). Neither a supervisory official nor a governmental entity can be held liable for failing to adopt policies to prevent constitutional violations. See, e.g., Vela v. White, 703 F.2d 147, 153 (5th Cir. 1983); Reimer v. Smith, 663 F.2d 1316, 1323 (5th Cir. 1981); Wanger v. Bonner, 621 F.2d 675, 680 (5th Cir. 1980). Moreover, a plaintiff must allege more than an isolated incident of purported harm to establish a claim against such person or entity. Fraire, 957 F.2d at 1278; McConney v. City of Houston, 863 F.2d 1180, 1184 (5th Cir. 1989); Languirand v. Hayden, 717 F.2d 220, 227-28 (5th Cir. 1983). Without a pattern or practice of recurring constitutional violations, neither negligence nor gross negligence suffices as a basis for liability. Stokes v. Bullins, 844 F.2d 269, 274 (5th Cir. 1988). There must be a link between the policy and the particular constitutional violation alleged. City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985).

A governmental entity can be subjected to monetary damages or injunctive relief only if one of its official policies caused a person to be deprived of a federally protected right. Monell, 436 U.S. at 694. It cannot be held liable under a theory of respondeat superior or vicarious liability. Id. Instead, liability may be imposed against a local government entity under § 1983 only “if the governmental body itself subjects a person to a deprivation of rights or causes a person to be subjected to such deprivation.” Connick v. Thompson, 563 U.S. 51, 131 S. Ct. 1350, 1359 (2011) (quoting Monell, 436 U.S. at 692) (internal quotation marks omitted) . To

hold an entity liable under § 1983 thus requires plaintiff to “initially allege that an official policy or custom was a cause in fact of the deprivation of rights inflicted.” Spiller v. City of Texas City, Police Dept., 130 F.3d 162, 167 (5th Cir. 1997) (internal quotation marks and citation omitted). Therefore, liability against local government defendants pursuant to § 1983 requires proof of a policymaker, an official policy, and a violation of constitutional rights whose “moving force” is the policy or custom. Piotrowski v. City of Houston, 237 F.3d 567, 578 (5th Cir. 2001).

The Fifth Circuit has been explicit in its definition of an “official policy” that can lead to liability on the part of a governmental entity, giving the following explanation in an opinion issued en banc in response to a motion for rehearing in Bennett v. City of Slidell:

1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality’s lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority.

Actions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy as above defined.

735 F.2d 861, 862 (5th Cir. 1984) (per curiam).

D. Excessive Force

The elements of an excessive force claims are (1) an injury, (2) that resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness was clearly unreasonable. Freeman v. Gore, 483 F.3d 404, 416 (5<sup>th</sup> Cir. 2007). A use of deadly force is presumptively reasonable when an officer has reason to believe that the suspect poses a threat of serious harm to the officer or to others. Mace v. City of Palestine, 333 F.3d 621, 624 (5<sup>th</sup> Cir. 2003). The reasonableness is to be determined from the perspective of the officer on the scene and not with “the 20-20 vision of hindsight.” Id. at 625 (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)). Further, that the officer himself may have created the situation does not change the analysis. In other words, that the officer could have handled the situation better does not affect his entitlement to qualified immunity. Young v. City of Killeen, 775 F.2d 1349, 1352-53 (5<sup>th</sup> Cir. 1985). See also City & Cty. Of San Francisco v. Sheehan, 135 S. Ct. 1765, 1777 (2015) (failure to follow training does not itself negate entitlement to qualified immunity).

IV.

Analysis

A. The Summary Judgment Evidence

Plaintiff filed objections<sup>3</sup> to the summary judgment evidence of each of the defendants. Plaintiff appears to object primarily to the legal conclusions of certain affiants. As is the court's custom, the court is not striking any evidence, but rather giving the summary judgment evidence whatever weight it may deserve.

B. Undisputed Facts

During the last week of March 2013, City, through the narcotics unit of its police department, received information that cocaine was being sold at 3232 Thannisch Avenue, Fort Worth. Officers conducted surveillance and utilized a confidential informant who made several purchases at the residence. The sellers included a black male in his early 30's, 6', 300 pounds, heavy set, now known to be Darden. On May 16, 2013, the confidential informant made a purchase from Darden that field-tested positive for cocaine. City sought and obtained a search warrant for the residence. The magistrate who issued the warrant found sufficient reason to believe that to knock and announce their purpose by the officers executing the warrant would be futile, dangerous, and otherwise inhibit effective investigation.

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<sup>3</sup> Plaintiff's amended objections and appendix in support are subject to being stricken as the appendix is not properly bound, does not contain index tabs, and is not highlighted as required by the court's August 31, 2015, order.

On May 16, 2013, City utilized its zero tolerance unit to make a dynamic entry into the residence. Among other items, officers seized 2.4 grams of cocaine, 1.8 grams of heroin, and 3.125 ounces of marijuana. Orlando Cook was arrested on the scene and later pleaded guilty to possession of a controlled substance. Officers believed that some of the drugs belonged to Darden.

Officers who executed the warrant were wearing clearly marked police uniforms. Two of the officers had helmet cameras that recorded the execution of the warrant. The videos reflect that upon entry into the front of the house, officers first encountered Darden, who was on his stomach on a couch. Officers identified themselves as police and ordered all occupants of the house to get on the ground, where they would pose less danger to the officers. Darden did not get on the ground. Snow tried to pull Darden to the ground. When Snow pulled on Darden's shirt, it ripped. Snow struggled with Darden for approximately 45 seconds and then fired his taser into Darden's back. Darden briefly went down, but raised up again and Snow fired his taser a second time, approximately 16 seconds after the first shot. After firing the taser a second time, Snow stood back, holding the taser in case it was needed again. Other officers, including Romero, tried to handcuff Darden but without success. Approximately one minute and 54 seconds after entering the house and encountering Darden, officers were able to get handcuffs on him. They sat him up and called for medical personnel to assess him. At some point during the execution of the warrant, Darden died. From the video, it appears that he was unresponsive at the time officers moved him to a seated position after

handcuffing him. His unresponsive state was not recognized and emergency resuscitative efforts were not started in time to have any effect.

At the time of execution of the warrant, Romero had been a City police officer for seven years and Snow had been a City police officer for just over nine years.

The cause of Darden's death was sudden cardiac death associated with hypertensive atherosclerotic cardiovascular disease and application of restraint and secondary causes were obesity<sup>4</sup>, hepatic steatosis, and chronic thyroiditis. Darden had multiple risk factors for sudden cardiac death and the severity of his cardiac disease alone made him susceptible to sudden cardiac death at any time, with or without physical exertion.

C. Snow and Romero

Snow and Romero allege that they are entitled to qualified immunity; thus, the burden is on plaintiff to show that their conduct violated a clearly established constitutional right of Darden. In this, plaintiff cannot succeed. He cannot show that either Snow or Romero was plainly incompetent or knowingly violated the law. Rather, the summary judgment evidence establishes that Snow and Romero participated in the execution of a search warrant, which entitled them to detain the occupants of the residence. Muehler v. Mena, 544 U.S. 93, 98-99 (2005). Use of handcuffs to effectuate the detention was reasonable. Id. Telling the occupants of the house to get on the ground was reasonable. Carroll v. Ellington, 800 F.3d 154, 174-75 (5<sup>th</sup> Cir. 2015).

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<sup>4</sup> Darden weighed 340 pounds.

The video makes clear that Darden did not get on the ground as ordered by the officers and that the taser was employed to assist them in getting Darden to the ground. The taser was employed only twice and it is clear that Darden was not subdued by the first application. Officers struggled to get Darden handcuffed and as soon as they did so, the application of any force stopped. This is consistent with the cases plaintiff cites. Doc. 95 at 9-10. See, e.g., Clark v. Massengill, 641 F. App'x 418, 420 (5<sup>th</sup> Cir. 2016) (once a suspect is handcuffed and subdued, and is no longer resisting, subsequent use of force is excessive). The struggle lasted less than two minutes and the officers' conduct is not to be judged by 20/20 hindsight, but rather with allowance for the need to make split-second judgments. Whether he was resisting arrest or struggling to breathe, Darden did not allow officers to handcuff him.

Given the state of Darden's health, plaintiff's argument is essentially that defendants should not have employed regular police procedures in effectuating his detention. However, he does not cite to any clearly established law to support this position.

Viewing the actions of Snow and Romero individually, as the law requires, Meadours v. Ermel, 483 F.3d 417, 422 (5<sup>th</sup> Cir. 2007), each is entitled to qualified immunity.

The court further notes that plaintiff could not establish an excessive force claim because he cannot show that Darden's death "resulted directly and only from the use of force that was clearly excessive to the need." Doc. 95 at 3; Knight v. Caldwell, 970 F.2d 1430, 1432 n.3 (5<sup>th</sup> Cir. 1992). As plaintiff's own expert says,

the application of restraint was a contributing causal factor of Darden's death. Doc. 97 at 42.

D. City

Inasmuch as its officers did not use excessive force, i.e., did not commit a constitutional violation, City cannot be liable for any constitutional violation. See City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986). As the Supreme Court has stated:

If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.

Id., 475 U.S. at 799.

Plaintiff does not address City's arguments regarding his inability to succeed on his state law claims, apparently conceding that City is entitled to sovereign immunity and there is no waiver of immunity for intentional torts. See Tex. Civ. Prac. & Rem. Code § 101.057(2); Goodman v. Harris Cnty., 571 F.3d 388, 394 (5<sup>th</sup> Cir. 2009); Texas Dep't of Pub. Safety v. Petta, 44 S.W.3d 575, 580 (Tex. 2001); Univ. of Tex. Med. Branch v. York, 871 S.W.2d 175, 177 (Tex. 1994); Duhart v. State, 610 S.W.2d 740, 742 (Tex. 1980).

V.

Order

The court ORDERS that defendants' motions for summary judgment be, and are hereby, granted; that plaintiff take nothing on his claims against defendants; and, that such claims be, and are hereby, dismissed.

App. 56

SIGNED August 10, 2016.

s/\_\_\_\_\_  
JOHN McBRYDE  
United States District Judge

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

**NO. 4:15-CV-221-A**

**[Filed August 10, 2016]**

ERIC C. DARDEN, AS ADMINISTRATOR	)
OF THE ESTATE OF JERMAINE DARDEN,	)
	)
Plaintiff,	)
	)
VS.	)
	)
THE CITY OF FORT WORTH, TEXAS,	)
ET AL.,	)
	)
Defendants.	)
	)

**FINAL JUDGMENT**

In accordance with the court's memorandum opinion and order of even date herewith,

The court ORDERS, ADJUDGES, and DECREES that plaintiff, Eric C. Darden, as Administrator of the Estate of Jermaine Darden, against defendants, City of Fort Worth, W.F. Snow, and J. Romero, be, and are hereby, dismissed with prejudice.

The court further ORDERS, ADJUDGES, and DECREES that defendants have and recover their court costs from plaintiff.

App. 58

SIGNED August 10, 2016.

s/\_\_\_\_\_  
JOHN McBRYDE  
United States District Judge

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**APPENDIX D**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**No. 16-11244**

**[Filed February 27, 2018]**

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ERIC C. DARDEN, as Administrator of the	)
Estate of Jermaine Darden and on behalf	)
of the statutory beneficiaries of the Estate	)
of Jermaine Darden (which are Donneika	)
Goodacre-Darden, surviving mother of	)
Jermaine Darden, Charles H. Darden,	)
surviving father of Jermaine Darden,	)
	)
Plaintiff–Appellant,	)
	)
v.	)
	)
CITY OF FORT WORTH, TEXAS;	)
W. F. SNOW; J. ROMERO,	)
	)
Defendants–Appellees.	)

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Appeal from the United States District Court  
for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 1/24/18, 5 Cir., \_\_\_\_ \_\_\_\_ F.3d \_\_\_\_)

Before KING, PRADO, and SOUTHWICK, Circuit Judges.

PER CURIAM:

- (√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5<sup>TH</sup> CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

\* \* \*

ENTERED FOR THE COURT:

s/\_\_\_\_\_  
UNITED STATES CIRCUIT JUDGE

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**APPENDIX E**

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**U.S. Const. amend. IV.**

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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**42 U.S.C. § 1983**

**Civil action for deprivation of rights**

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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.