

App. 1

**United States Court of Appeals  
For the Eighth Circuit**

---

No. 16-4429

---

Walter Louis Franklin, II, Trustee for  
the Estate of Terrance Terrell Franklin

*Plaintiff-Appellee*

v.

Lucas Peterson, individually, and in his official  
capacity; Michael Meath, individually, and in his  
official capacity; Janee Harteau, Chief of Police for  
the Minneapolis Police Department, individually  
and in her official capacity; City of Minneapolis

*Defendants-Appellants*

---

Appeal from United States District Court  
for the District of Minnesota – Minneapolis

---

Submitted: October 19, 2017

Filed: December 26, 2017

---

Before LOKEN, BEAM, and COLLOTON, Circuit Judges.

---

BEAM, Circuit Judge.

After the shooting death of Walter Louis Franklin,  
II, at the hands of Minneapolis police officers, Franklin's

estate (“the estate”) brought this action against two officers, the City of Minneapolis and the Chief of Police claiming excessive force, wrongful death, and negligence. The defendants moved for summary judgment, which the district court<sup>1</sup> denied on all but the negligence claim. The officers appeal the denial of summary judgment based on qualified immunity.<sup>2</sup> We dismiss the appeal for lack of jurisdiction.

## I. BACKGROUND

Herein we recite the facts as stated by the district court. This case is unique in that the bulk of the facts set forth by the district court are those advanced by the moving party because Franklin is deceased and was the only other individual at the scene with the officers.

On May 10, 2013, police became involved with Franklin after being contacted by a bystander who

---

<sup>1</sup> The Honorable Donovan W. Frank, United States District Judge for the District of Minnesota.

<sup>2</sup> The Notice of Appeal states “All Defendants, in their official and individual capacities” appeal the district court’s order denying qualified immunity under 42 U.S.C. § 1983 on the excessive force claim. However, qualified immunity is a personalized inquiry and courts are charged with evaluating the officials’ conduct individually. *Wilson v. Northcutt*, 441 F.3d 586, 591 (8th Cir. 2006) (“Liability for damages for a federal constitutional tort is personal, so each defendant’s conduct must be independently assessed.”). It is for this reason, we presume, that only Officers Peterson and Meath are referenced in the briefing and counsel clarified at oral argument that the appeal from the denial of qualified immunity necessarily only involves the two officers. On remand the district court should properly address the status of the City of Minneapolis and Chief Harteau in this action.

### App. 3

believed that Franklin was the person he had seen on security footage from an apartment building that had been previously burglarized. Police officers were dispatched to a parking lot where Franklin was located. Three officers initially responded. After the officers arrived, Franklin fled the scene in a vehicle he was driving and struck the door of one of the officers' squad cars as he did so.

After fleeing from the parking lot, Franklin broke into a home and hid in the basement. Officers from the Minneapolis Police Department located Franklin, including Officers Peterson, Meath, Durand, Muro and Sergeant Stender with his K-9, Nash. According to the officers, K-9 Nash located Franklin behind a water heater in a small closet under the basement stairs in the home. K-9 Nash bit Franklin's clothing and tried to pull Franklin out from behind the water heater. Sergeant Stender claims that he ordered Franklin to "show his hands" several times but Franklin remained in his hiding spot and did not show his hands. The officers claimed that in an effort to compel Franklin to respond and comply with the officers' orders, Sergeant Stender approached Franklin and struck him in the head with a closed fist, and, when Franklin did not respond, Sergeant Stender hit Franklin with his flashlight. When Franklin continued to refuse to show his hands, Sergeant Stender moved into the closet and attempted to pull Franklin out by putting Franklin into a headlock. Sergeant Stender stated that Franklin resisted.

#### App. 4

To assist, Officer Meath attempted to subdue Franklin by grabbing his shoulders, pulling him backwards, and delivering two to three knee strikes to Franklin's upper body. Officers Peterson and Durand stated that they heard Officer Meath yell "are you grabbing for my gun?" Officer Meath claimed that Franklin then forced his way out of the closet.

Once out of the closet, Officer Peterson stated that Franklin punched Officer Peterson in the face and that Officer Peterson grabbed Franklin's hair, ripping off some of Franklin's dreadlocks. Franklin then turned and tackled Officer Durand, driving him into the laundry room and to the floor. The officers claimed that as Franklin and Officer Durand fell, Franklin grabbed the pistol grip of Officer Durand's MP5 sub-machine gun and pulled the trigger twice. Officers Meath and Muro were each hit by bullets.

Officer Durand stated that a struggle ensued with Franklin over the MP5, during which the flashlight on the muzzle of the MP5 switched on and Officer Durand yelled out "he's got a gun." Officer Peterson stated that he saw the struggle over the firearm and that Franklin gained sufficient control of the firearm to point it at Officer Peterson. Officer Peterson claimed that in response to this perceived threat, he moved toward Franklin and Officer Durand, reached out in the darkness for Franklin's head, aimed his handgun, and fired at Franklin five times. Officer Meath, who had been shot by the MP5, claimed that he saw Franklin sitting on the ground, with his arms extended, with Officer Peterson "basically kind of on top of" Franklin. When

App. 5

he spotted a gap between Franklin and Officer Peterson, Officer Meath fired his handgun. Franklin suffered gunshot wounds to the head and torso of his body and was pronounced dead at the scene.

The estate presented evidence to the district court in support of its contention that there is a genuine dispute about the events that took place in that basement that day. In support of this argument, the estate relied in part on evidence from a video filmed by Jimmy Gaines (“the Gaines video”) as well as a report from a proposed expert witness who reviewed the Gaines video and offered an analysis. According to the estate, the Gaines video and the accompanying analysis contradict the time line and sequence of events set forth by the officers. The estate highlighted a seventy-second gap of time between when the first shots were fired and the time the officers fired on Franklin, which the estate argued supported a conclusion that the sequence of events was not as presented by the officers and there remained a question as to whether Franklin posed a threat when he was shot and killed.

Too, the estate argued that the evidence gathered at the scene is inconsistent with the officers’ testimony, additionally creating an issue of material fact as to the threat posed by Franklin when the events transpired. The estate pointed out that neither Officer Muro nor Officer Meath observed the MP5 being discharged. The estate additionally noted that the MP5 had no blood on it despite the officers’ testimony that there was an ongoing struggle when Franklin was shot, and there was ample amounts of blood on items in the laundry room

## App. 6

and on Franklin himself. These inconsistencies, according to the estate, call into doubt whether Franklin was engaged in a struggle over the MP5 when he was shot and, more generally, whether he posed a threat of serious physical harm to the officers.

In its analysis the district court held that despite the officers' contention that the use of deadly force was reasonable under the circumstances they faced, the estate raised a genuine dispute as to whether the officers' story was true. The court specifically highlighted the evidence presented by the estate regarding the time gap and the absence of blood on the MP5 as circumstantial evidence that Franklin was not in possession of the MP5 when Officers Peterson and Meath used deadly force against him. Reviewing jurisprudence regarding the use of deadly force and the significant threat of death or serious physical injury to the officer or others that must exist when an officer uses deadly force, the court held that "a factual dispute exists over whether such a situation was present at the time when the officers used deadly force against Franklin." In the end, although the district court acknowledged the credible evidence submitted by the officers laying out the circumstances facing the officers at the time deadly force was used against Franklin, the court held the officers failed to demonstrate that no genuine dispute of material fact remained. "Indeed, [the estate's] evidence raises fact questions regarding the sequence of events leading to the use of deadly force against Franklin, as well as the existence and nature of any threat posed by Franklin when the officers

shot him.” Accordingly, the district court denied summary judgment on the excessive force and wrongful death claims. This interlocutory appeal followed.

## II. DISCUSSION

This is an appeal from the denial of qualified immunity as to Officers Peterson and Meath, a doctrine that “shields a government official from liability unless his conduct violates ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Burns v. Eaton*, 752 F.3d 1136, 1139 (8th Cir. 2014) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Because it protects officials from the burden of defending insubstantial claims, as well as from damage liability, the Supreme Court has “stressed the importance of resolving immunity questions at the earliest possible stage in litigation.” *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)).

We begin with jurisdiction, which is always our “first and fundamental question.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)). In an interlocutory appeal from an order denying qualified immunity, we have authority to decide the purely legal issue of whether the facts alleged by the plaintiff are a violation of clearly established law.

*Mitchell v. Forsyth*, 472 U.S. 511, 528 n.9 (1985); *Jackson v. Gutzmer*, 866 F.3d 969, 975 (8th Cir. 2017) (“The pretrial denial of qualified immunity is an appealable final order to the extent it turns on an issue of law.”). We do not, however, have jurisdiction to review a district court’s interlocutory summary judgment order that “determines only a question of ‘evidence sufficiency,’ *i.e.*, which facts a party may, or may not, be able to prove at trial.” *Johnson v. Jones*, 515 U.S. 304, 313 (1995).

As to the excessive force claim, the Fourth Amendment requires us to ask, from the perspective of a reasonable officer on the scene, “whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” *Graham v. Connor*, 490 U.S. 386, 397 (1989). Relevant here, “[t]he use of deadly force is reasonable where an officer has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or others.” *Ellison v. Leshner*, 796 F.3d 910, 916 (8th Cir. 2015) (quoting *Loch v. City of Litchfield*, 689 F.3d 961, 965 (8th Cir. 2012)). “But, where a person ‘poses no immediate threat to the officer and no threat to others,’ deadly force is not justified.” *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)).

On the claim that the officers unlawfully used deadly force against Franklin, the officers argue that the district court accepted nearly all of the facts provided by the officers as undisputed, including, importantly, that Franklin fought with the officers, gained



control of a sub-machine gun, shot two of them, and then struggled with an officer over control of the firearm. According to the officers, “[n]one of this was controverted below; all of it was assumed by the district court.” In fact, according to the officers, the district court accepted all of the facts presented and focused on only two additional facts – the alleged time gap and the absence of blood on the MP5 – in its denial of qualified immunity. As to these facts, the officers argue that they are either not material or are blatantly contradicted by the record. The problem with this argument, however, is that the district court did *not* hold that the facts relayed in its recitation were undisputed, and more importantly, we lack jurisdiction to review the factual issues that abound in this appeal. *See Johnson*, 515 U.S. at 313-18.

The officers argue that Franklin posed a threat of serious physical harm to each officer and that the district court’s recitation of the undisputed facts supported a conclusion that the officers’ actions were constitutional. However, merely stating the facts known to the court for purposes of drafting its opinion and conducting its analysis does not mean the district court found those facts undisputed. There is no such finding by the district court and, in fact, the court was careful to note throughout its recitation that the facts relayed were as advanced by the officers. The district court repeatedly stated that the facts relayed were “[a]ccording to Defendants,” or as “Sergeant Stender claim[ed],” or as “Officers Peterson and Durand state[d],” and the like. Also, the district court similarly recited the

estate's evidence, stating "Plaintiff contends," and "Plaintiff further argues," etc.

At no point did the district court deem particular facts undisputed, nor did it conduct a legal analysis based upon assumed facts. What the district court *did* do is plainly hold that the estate's evidence raised a genuine dispute as to whether the story told by the officers is true. For example, the court held that there was at least circumstantial evidence that Franklin was not in possession of the MP5 when Officers Peterson and Meath used deadly force against him. This statement by the district court, read in context, was not a determination that this precise moment was determinative in the constitutional analysis, but rather that based on the evidence presented by the estate, the court simply could not determine whether the evidence presented supported a finding that the officers faced a threat of serious physical harm when they used deadly force. This doubt informed by the evidence of the lapse in time and the absence of blood, according to the district court, calls into dispute the officers' version of the alleged struggle. Because the relevant legal inquiry is whether the officers believed that Franklin posed a threat of serious physical harm, and there was a question as to whether the version advanced by the officers was true, the district court denied qualified immunity in this instance. As stated by the district court, "[i]ndeed, [the estate's] evidence raises fact questions regarding the sequence of events leading to the use of deadly force against Franklin, as well as the existence

and nature of any threat posed by Franklin when the officers shot him.”

The instant case stands in contrast to appeals from denials of qualified immunity at summary judgment where this court does conduct a qualified immunity analysis based on facts the district court assumed, or necessarily assumed, viewed in the light most favorable to the nonmoving party. For example, in *Wallace v. City of Alexander, Ark.*, 843 F.3d 763 (8th Cir. 2016), an officer shot a suspect in the back at or near her police vehicle during an arrest and claimed the shooting was unintentional. *Id.* at 766. The district court held that a material fact remained in dispute as to whether the officer intended to shoot the suspect and denied summary judgment as to the officer. *Id.* On appeal in *Wallace*, this court held it lacked jurisdiction to review the factual issue regarding intent, but went on to conduct the qualified immunity analysis, reviewing the purely legal arguments presented in light of the undisputed or assumed facts. *Id.* at 766-67.

The defending officer in *Wallace* additionally briefed and argued that even *if* she intentionally shot the suspect, her conduct did not violate his Fourth Amendment rights, a purely legal issue this court reviewed. *Id.* at 767; *see also White v. Pauly*, 137 S. Ct. 548, 550-52 (2017) (exercising jurisdiction in an appeal from the denial of qualified immunity to decide the purely legal issue of whether an officer violated clearly established law and reiterating that the legal inquiry must be particularized to the facts of the case, accepting as true the plaintiffs’ version of the facts advanced

below); *Mullenix v. Luna*, 136 S. Ct. 305, 308-11 (2015) (reviewing a denial of qualified immunity, discussing the legal question of whether the violative nature of particular conduct is clearly established, based upon the specific facts undisputed in the record and viewed favorably to the nonmoving party); *Jackson*, 866 F.3d at 974, 976-77 (exercising jurisdiction in an interlocutory appeal from the denial of qualified immunity, relying upon undisputed facts and facts viewed most favorably to the plaintiff, to determine whether the plaintiff produced evidence from which a jury could find the defendant's actions constituted excessive force in violation of the Cruel and Unusual Punishment Clause); *Ellison*, 796 F.3d at 914-17 (exercising jurisdiction in an interlocutory appeal from an order denying qualified immunity to decide the purely legal issue whether the facts assumed by the district court entitled the officers to qualified immunity in an excessive force claim in the shooting death of the victim, and refusing to accept the contradictory facts offered by the officers because it would require the court to examine a matter over which it lacked jurisdiction); *Walton v. Dawson*, 752 F.3d 1109, 1116 (8th Cir. 2014) (exercising jurisdiction in an appeal from the denial of qualified immunity at the summary judgment stage where the officials argued that, accepting the district court's factual findings as true, the court can decide the purely legal issue of a clearly established violation of federal law); *Kahle v. Leonard*, 477 F.3d 544, 549-50 (8th Cir. 2007) (exercising jurisdiction in an appeal from the denial of qualified immunity but careful to note that there was no jurisdiction to review issues related to

whether an actor actually committed the act of which he was accused).

Unlike *Wallace* and other cases where this court exercised jurisdiction, what is at issue here are the facts themselves. The officers here acknowledge that the material issue is whether Officers Peterson and Meath reasonably believed that Franklin posed a threat of serious bodily harm or death. To answer that question the officers argue that the primary facts relied upon by the district court to deny qualified immunity are either immaterial or blatantly contradicted by the record. Both claims involve wholly factual issues we are without jurisdiction to review. *Ellison*, 796 F.3d at 916 (concluding that an appellate court cannot accept the contention offered by a defending officer because her advanced theory was premised on a set of facts not assumed by the district court). These officers do not argue that even if inferences are made in the estate's favor the use of deadly force was reasonable in this circumstance, but rather they argue the inferences raised by the estate from the evidence presented are not plausible – a factual dispute.<sup>3</sup> “The Supreme Court

---

<sup>3</sup> We are bound by the Supreme Court's holding in *Johnson* on this factual issue. 515 U.S. at 313. The officers reference *Williams v. Holley*, 764 F.3d 976 (8th Cir. 2014) for the proposition that not only do we have jurisdiction to conduct a review on the merits of the claim, but physical evidence is lacking in this case, thus defeating any claim of a factual dispute. *Williams* did not address the jurisdictional issue, however, and we are not bound by its analysis to the extent it contradicts *Johnson*. “Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having

made clear [in *Johnson* that] we must eschew fact-intensive ‘[W]e didn’t do it!’ defenses and confine appellate review to ‘neat abstract issues of law.’” *Heartland Acad. Cmty. Church v. Waddle*, 595 F.3d 798, 807 (8th Cir. 2010) (alteration in original) (quoting *Johnson*, 515 U.S. at 316-17).

The district court did not make any legal determinations based upon facts viewed in the light most favorable to the estate, it merely held that the factual dispute at this stage prevents such an analysis. Whether each officer reasonably believed Franklin posed a sufficient threat depends on what occurred – a determination the district court held it could not make based on the evidence presented thus far. *Ngo v. Storlie*, 495 F.3d 597, 601 (8th Cir. 2007) (“A denial of summary judgment based on qualified immunity is immediately appealable [only] to the extent the appellant seeks review of the purely legal determinations made by the district court.” (quoting *Henderson v. Munn*, 439 F.3d 497, 501 (8th Cir. 2006))). The district court’s basic conclusion that “it is not clear what happened or what the parties will prove” is not appealable, as it is not a final order. *Johnson*, 515 U.S. at 313.

While we have jurisdiction to determine whether conduct the district court deemed sufficiently supported for purposes of summary judgment constitutes a violation of clearly established law, we lack jurisdiction to determine whether the evidence could support

---

been so decided as to constitute precedents.” *Webster v. Fall*, 266 U.S. 507, 511 (1925).

a finding that particular conduct occurred at all. *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996); *Johnson*, 515 U.S. at 313-18. It is the latter situation we find ourselves in today. There are no facts the district court necessarily assumed that would allow us to conduct a legal analysis, or at least none advanced by the officers.<sup>4</sup> The factual arguments made by the officers on appeal regarding materiality and sufficiency should be made to a jury and do not run to a legal issue on appeal. Accordingly, under *Johnson*, qualified immunity does not prevent suit here because the precise question for trial is the factual question, an issue which is inseparable from, and necessarily informs, the legal one. *Johnson*, 515 U.S. at 314-18. Just as in *Johnson*, the district court determined that the summary judgment record raised a genuine issue of fact concerning whether the officers faced a threat of bodily injury sufficient to support the use of deadly force. Thus, the court's determination was not a final decision. *Id.* at 313.

### III. CONCLUSION

We dismiss the appeal for lack of jurisdiction.

---

<sup>4</sup> This holds true, also, for the appeal of the denial of summary judgment on the state law wrongful death claim. The district court denied summary judgment on the state law claim given the factual disputes. However, having determined we lack jurisdiction on the excessive force claim, we decline to exercise jurisdiction over this state law claim. See *Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389, 394 (th [sic] Cir. 1995).

LOKEN, Circuit Judge, dissenting.

I respectfully dissent. When reviewing an interlocutory appeal from the denial of qualified immunity, we have jurisdiction to determine whether “a given set of facts violates clearly established law.” *Johnson v. Jones* 515 U.S. 304, 319 (1995). In conducting this review, “the court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason.” *Id.*

In *White v. Pauly*, a recent case involving a police officer’s use of deadly force, the Supreme Court in reversing the denial of qualified immunity observed:

Today, it is again necessary to reiterate the longstanding principle that ‘clearly established law’ should not be defined ‘at a high level of generality.’ As this Court explained decades ago, the clearly established law must be ‘particularized’ to the facts of the case. . . . [The Court of Appeals] failed to identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment.

137 S. Ct. 548, 552 (2017). In *Mullenix v. Luna*, another deadly force case, the Court reversed the denial of qualified immunity, explaining: “The relevant inquiry is whether existing precedent placed the conclusion that [the officer] acted unreasonably in these circumstances ‘beyond debate.’ The general principle that deadly force requires a sufficient threat hardly settles this matter.” 136 S. Ct. 305, 309 (2015).



## App. 17

In this case, it is uncontroverted that police officers cornered Walter Franklin hiding in the basement of a home he broke into while fleeing the police. Franklin refused to surrender, and a violent struggle ensued. Franklin grabbed an officer's gun and fired, wounding two officers. Officer Durand continued to struggle with Franklin and yelled, "he's got a gun." Officers Peterson and Meath fired their handguns, mortally wounding Franklin.

In denying qualified immunity, the district court stated the general principle that it is clearly established a police officer may not use deadly force unless the suspect poses a significant threat of death or serious physical injury to the officer or others. The court then reasoned:

While it is certainly true that Officers Peterson and Meath were faced with a situation that posed a significant threat of death or serious physical injury to them or others, a factual dispute exists over whether such a situation was present at the time when the officers used deadly force against Franklin.

The court's basis for that factual dispute? The "Gaines video," filmed from across the street; a proposed expert's opinion that the video established a twenty- to seventy-second gap between the first shots and the shots that killed Franklin; and the fact that no blood was found on Officer Durand's MP5 when officers testified that Durand and Franklin were struggling for the gun when they shot Franklin.

In my view, accepting as true the alleged seventy-second gap between the shots that wounded two officers and the shots that killed Franklin, and the lack of blood on Durand's MP5, there is no existing precedent establishing "beyond debate" that Officers Peterson and Meath acted unreasonably in using deadly force. Indeed, numerous Eighth Circuit cases have held that officers acted in an objectively reasonable manner when they employed deadly force in similar situations. For example, in *Aipperspach v. McInerney*, 766 F.3d 803, 807 (8th Cir. 2014), we upheld the grant of qualified immunity for the use of deadly force, explaining:

The responding officers were confronted with a suspect who held what appeared to be a handgun, refused repeated commands to drop the gun, pointed it once at [an officer], and then waved it in the direction of officers deployed along the ridge line in an action they perceived as menacing.

In *Aipperspach*, the gun turned out to be a toy gun, and a video filmed from an overhead news helicopter showed the suspect making movements that might have been an attempt to surrender or an indication that he had lost his balance, rather than threats to shoot at the officers. *Id.* at 805-06. But the video did not clearly contradict the officers' version of the incident and therefore "shed no material light" on whether the officers who used deadly force reasonably feared for their lives or the lives of fellow officers. *Id.* at 808. Here, of course, the officers were not dealing with a

suspect who was threatening serious injury. Two officers had already been shot.

On this record, I conclude the district court erred in failing to rely on Supreme Court and Eighth Circuit precedents demonstrating that the alleged unreasonable use of deadly force was not beyond debate. Therefore, I would reverse the denial of qualified immunity to Officers Peterson and Meath.

---

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

Walter Louis Franklin, II,  
Trustee for the Estate of  
Terrance Terrell Franklin,  
  
Plaintiff,

Civil No.  
14-1467 (DWF/JSM)

**MEMORANDUM  
OPINION AND  
ORDER**

v.

Lucas Peterson, individually  
and in his official capacity;  
Michael Meath, individually,  
and in his official capacity;  
Janeé Harteau, Chief of Police  
for the Minneapolis Police  
Department, individually and  
in her official capacity; and  
the City of Minneapolis,

(Filed Nov. 10, 2016)

Defendants.

---

J. Ashwin Madia, Esq., Madia Law LLC, and Michael  
B. Padden, Esq., Padden & McCollister PLLC, attor-  
neys for Plaintiff.

Susan L. Segal, City Attorney, Timothy S. Skarda, Sara  
L. Lathrop, Brian S. Carter, George H. Norris, Assis-  
tant City Attorneys, Minneapolis City Attorney's Of-  
fice, attorneys for Defendants.

---

## INTRODUCTION

This matter comes before the Court on the Motion for Summary Judgment filed by Defendants Lucas Peterson, Michael Meath, Janeé Harteau, and the City of Minneapolis. (Doc. No. 47.) Plaintiff Walter Louis Franklin, II, as Trustee for the Estate of Terrance Terrell Franklin (“Plaintiff”), initiated this lawsuit after Terrance Franklin (“Franklin”) was shot and killed during an altercation with Minneapolis police officers. Plaintiff asserts four causes of action: excessive force under 42 U.S.C. § 1983 (Count 1); wrongful death (Count 2); intentional infliction of emotional distress (Count 3); and negligence (Count 4). (Doc. No. 2.) The parties stipulated to the dismissal of the claim for intentional infliction of emotional distress (Count 3). (Doc. No. 58.) For the reasons set forth below, Defendants’ Motion is denied as to Counts 1 and 2 and granted as to Count 4.

## BACKGROUND

This case arises out of deadly force used by police against Terrance Franklin, a young, black male, on May 10, 2013. Police became involved with Franklin after being contacted by a bystander who believed that Franklin was the person he had seen on security footage from an apartment building that had been burglarized. (Doc. No. 50 at ¶ 2, Ex. 1 at 7, 14-17.) Police officers were dispatched to a parking lot where Franklin was located. (*Id.* ¶ 4, Ex. 3.) Three officers initially responded. (*Id.* ¶ 5, Ex. 4 at 4, 11, 50.) After the officers

arrived, Franklin fled the scene in a vehicle he was driving and struck the door of one of the officers' squad cars. (*Id.* ¶ 5, Ex. 4 at 55; *id.* ¶ 6, Ex. 5 at 19, 20, 33-34.)

After fleeing the initial officer interaction, Franklin broke into a home and hid in the basement. (*Id.* ¶ 9, Ex. 8 (“Durand Dep.”) at 77.) Franklin was located by a group of police officers from the Minneapolis Police Department including Officers Lucas Peterson, Michael Meath, Mark Durand, Ricardo Muro, and Sergeant Andrew Stender with his K-9 Nash. (Durand Dep. at 90.)

According to Defendants, Franklin was located by K-9 Nash behind the water heater in a small closet under the stairs leading to the basement. (*Id.* at 108.) K-9 Nash bit onto clothing that Franklin was wearing and tried to pull Franklin out from behind the water heater. (*Id.* at 109.) Sergeant Stender claims that he ordered Franklin to “show his hands” several times but Franklin remained in his hiding spot and did not show his hands. (Doc. No. 50 at ¶ 13, Ex. 12 (“Stender Dep.”) at 70, 97.) Defendants claim that in an effort to compel Franklin to respond and comply with the officers' orders, Sergeant Stender approached Franklin and struck him in the head with a closed fist, and, when Franklin did not respond, Sergeant Stender hit Franklin with his flashlight. (Stender Dep. at 52, 70.) When Franklin continued to refuse to show his hands, Sergeant Stender moved into the closet and attempted to pull Franklin out from behind the water heater by putting Franklin into a headlock. (*Id.* at 71.) Sergeant Stender states that Franklin resisted. (*Id.*)

To assist, Officer Meath attempted to subdue Franklin by grabbing onto his shoulders, pulling him backwards, and delivering two to three knee strikes to Franklin's upper body. (Doc. No. 50 at ¶ 18, Ex. 17 ("Meath Dep.") at 89-90.) Officers Peterson and Durand state that they heard Officer Meath yell "are you grabbing for my gun?" (Doc. No. 50 at ¶ 10, Ex. 9 ("Peterson Dep.") at 125-25; Durand Dep. at 113.) Officer Meath claims that Franklin then forced his way out of the closet. (Meath Dep. at 91.)

Once out of the closet, Officer Peterson states that Franklin punched Officer Peterson in the face and that Officer Peterson grabbed Franklin's hair, ripping off some of Franklin's dreadlocks. (Peterson Dep. at 97-98.) Franklin then turned and tackled Officer Durand, driving him into the laundry room and to the floor. (*Id.* at 98; Durand Dep. at 116.) Defendants claim that as Franklin and Officer Durand fell, Franklin grabbed the pistol grip of Officer Durand's MP5 sub-machine gun and pulled the trigger twice. (Durand Dep. at 117-20, 129, 130, 141.) Officers Meath and Muro were each hit by bullets. (Meath Dep. at 57; Doc. No. 50 at ¶ 16, Ex. 15 ("Muro Dep.") at 100.)

Officer Durand states that a struggle ensued with Franklin over the MP5, during which the flashlight on the muzzle of the MP5 switched on and Officer Durand yelled out "he's got a gun." (Durand Dep. at 124-25, 128.) Officer Peterson states that he saw the struggle over the firearm and that Franklin gained sufficient control of the firearm to point it at Officer Peterson. (Peterson Dep. at 100, 118.) Officer Peterson claims

that in response to this perceived threat, he moved toward Franklin and Officer Durand, reached out in the darkness for Franklin's head, aimed his handgun, and fired at Franklin five times. (*Id.* at 101, 104, 107, 111.) Officer Meath, who had been shot by the MP5, claims that he saw Franklin sitting on the ground, with his arms extended, with Officer Peterson "basically kind of on top of" Franklin. (Meath Dep. at 101.) When he spotted a gap between Franklin and Officer Peterson, Officer Meath fired his handgun. (*Id.* at 101, 103.) Franklin suffered gunshot wounds to the head and torso of his body and was pronounced dead at the scene. (Doc. No. 50 at ¶ 7, Ex. 6.)

Plaintiff contends that there is a genuine dispute about whether the factual claims made by Defendants are accurate. Plaintiff relies on evidence from a video filmed by Jimmy Gaines. (Doc. No. 50 at ¶ 25, Ex. 24. ("Gaines Video").) Plaintiff further relies upon the report of Plaintiff's expert witness, Edward Primeau, which details an analysis of the Gaines Video. (*Id.* ¶ 26, Ex. 25 ("Primeau Report").) Plaintiff claims that the Gaines Video and Primeau Report contradict the timeline and sequence of events set forth by Defendants. Specifically, Plaintiff claims that there is agreement that at second 11 of the Gaines Video, the phrase "officer shot" can be heard. (Primeau Report at 25; see also Doc. No. 50 at ¶ 32, Ex. 31 ("Wyatt Dep.") at 8.) At second 43, Primeau states that he heard: "Come out (unintelligible) . . . put those hands up now[.]" (Primeau Report at 25.) Primeau also states that he "believed that [he] heard gunshots" at second 53. (*Id.* at



26; *see also* Doc. No. 61 at ¶¶ 8, 10, Exs. 7, 9.) In addition, Plaintiff claims that the deposition of Geoffrey Wyatt – who radioed the “officer shot” statement – demonstrates that statement occurred approximately 30 seconds after the shots were fired. (Wyatt Dep. at 40-41.) Thus, Plaintiff claims that there was a gap of over 70 seconds between the time the first shots were fired and the time the officers fired on Franklin.<sup>1</sup> Based largely on this gap – which Plaintiff claims is inconsistent with the sequence set forth by Defendants’ witnesses – Plaintiff asserts that there is a dispute over whether Franklin continued to pose an immediate threat when he was shot and killed.

Plaintiff further argues that there are genuine issues of material fact due to inconsistencies between the officers’ testimony and the facts gathered from the scene. Plaintiff asserts that neither Officer Muro nor Officer Meath observed how the MP5 discharged. (Muro Dep. at 100; Meath Dep. at 97.) Plaintiff additionally notes that the MP5, which according to testimony was the subject of an ongoing struggle when Franklin was shot, had no blood on it, despite ample amounts of blood on items in the laundry room and on

---

<sup>1</sup> Plaintiff claims that other phrases Primeau identifies in his report show that Franklin was alive and talking at various points. Plaintiff, however, did not present any evidence indicating that the voice heard by Primeau is in fact Franklin. At this stage, Plaintiff must “set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). As such, for the purposes of the present Motion, the Court will not rely on unsupported statements made in Plaintiff’s briefing.

Franklin. (Doc. No. 50 at ¶ 22, Ex. 21 at 11-12, 27.) Based on these inconsistencies, Plaintiff argues that a genuine factual dispute exists over whether Franklin was engaged in a struggle over the MP5 when he was shot.

## DISCUSSION

### I. Legal Standard

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). Courts must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Weitz Co., LLC v. Lloyd’s of London*, 574 F.3d 885, 892 (8th Cir. 2009). “Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548 (1986) (quoting Fed. R. Civ. P. 1).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Enter. Bank v. Magna Bank of Mo.*, 92 F.3d 743, 747 (8th Cir.1996); *see also Anderson*, 477 U.S. at 248. The materiality of a fact is determined by the substantive law governing the claim, and “a fact is material if its resolution affects the outcome of the case.” *Gazal v.*

*Boehringer Ingelheim Pharm., Inc.*, 647 F.3d 833, 837-38 (8th Cir. 2011). Determination of materiality concerns the “identification of which facts are critical and which facts are irrelevant” to the appropriateness of judgment. *Anderson*, 477 U.S. at 248. Further, a factual dispute is “genuine” if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* A party opposing a properly supported motion for summary judgment “must set forth specific facts showing that there is a genuine issue for trial.” *Id.* at 250; *see also Krenik v. Cty. of Le Sueur*, 47 F.3d 953, 957 (8th Cir.1995).

## **II. Count 1: Excessive Force**

Defendants ask the Court to grant summary judgment dismissing Plaintiff’s § 1983 claim for use of excessive force in violation of Franklin’s Fourth Amendment rights. Defendants argue that Plaintiff’s claim fails because Defendants’ actions were reasonable and because the officers are entitled to qualified immunity.

### **A. Reasonableness of Force**

First, Defendants claim that the amount of force used against Franklin was objectively reasonable. To establish an excessive force violation of the Fourth Amendment, a plaintiff must prove that the amount of force used was objectively unreasonable under the particular circumstances of the case. *Henderson v. Munn*, 439 F.3d 497, 501 (8th Cir. 2006). The test of

reasonableness “is not capable of precise definition or mechanical application[.]” *Graham v. Connor*, 490 U.S. 386, 396 (1989). Proper application of this standard “requires careful attention to the facts and circumstances of each particular case, 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.” *Id.* “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.* (quotations omitted) (citing *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968)).

“[P]olice 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[.]” *Saucier v. Katz*, 533 U.S. 194, 205 (2001). Under Eighth Circuit precedent, “[t]he use of deadly force is reasonable where an officer has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or others.” *Loch v. City of Litchfield*, 689 F.3d 961, 965 (8th Cir. 2012) (citing *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)). As with other exercises of force, whether it was reasonable for an officer to use deadly force is judged from an “on-scene perspective[.]” *Saucier*, 533 U.S. at 205, and is not swayed simply because, “[i]t may appear, in the calm aftermath, that an officer could have taken a different course,” *Estate of Morgan v. Cook*, 686 F.3d 494, 497 (8th Cir. 2012).

Defendants contend that the undisputed facts show that the use of deadly force by Officers Peterson and Meath was reasonable under the circumstances they faced. They claim that Franklin wrestled control of Officer Durand's MP5 and shot two officers, and that Franklin was raising the gun towards Officer Peterson when Franklin was shot. (Durand Dep. at 117-20, 129, 130, 141; Peterson Dep. at 100, 118.) Plaintiff, however, raises a genuine dispute as to whether that story is true. According to evidence presented by Plaintiff, more than 70 seconds passed between the shots fired at the officers and the shots that killed Franklin. (Gaines Video; Primeau Report at 25.) Further, Plaintiff points to evidence suggesting the absence of blood on the MP5, which would have been either in Franklin's hand or close to him when Franklin was shot. (Doc. No. 50 at ¶ 22, Ex. 21 at 11-12, 27.) This is at least circumstantial evidence that Franklin was not in possession of the MP5 when Officers Peterson and Meath used deadly force against him. *See Brunsting v. Lutsen Mountains Corp.*, 601 F.3d 813, 821 (8th Cir. 2010) (denying motion for summary judgment based on finding a genuine issue of material fact shown through circumstantial evidence).

Defendants protest that the Gaines Video – upon which Plaintiff relies – fails to create a genuine factual dispute. Specifically, Defendants contend that the Gaines Video is of such poor quality that it is inadmissible. (Doc. No. 62 at 11.) If a video is so garbled that the recording as a whole is untrustworthy, such a video will be [sic] not be admitted. *See United States v.*

*Young*, 488 F.2d 1211, 1214 (8th Cir. 1973). The Court finds, however, that the quality of the Gaines Video goes to the weight of the evidence, not its admissibility. Further, Plaintiff does not rely on the Gaines Video alone; in addition, Plaintiff points to the Primeau Report in which Primeau states that he created enhancements to the Gaines Video and believed he heard gunshots. (Primeau Report at 26.) Considering all evidence in the record – including the Gaines Video and the Primeau Report – the Court concludes that genuine issues of material fact preclude summary judgment as to the reasonableness of the force used against Franklin.

### **B. Qualified Immunity**

Second, Defendants argue that Officers Peterson and Meath are entitled to qualified immunity. “The doctrine of qualified immunity protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). When considering qualified immunity, a court may first consider “whether the facts that a plaintiff has alleged . . . or shown . . . make out a violation of a constitutional right[,]” and second consider “whether the right at issue was clearly established at the time of defendant’s alleged misconduct.” *Id.* at 232 (citing *Saucier*, 533 U.S. at 201). For a constitutional right to be clearly established, its contours “must be

sufficiently clear that a reasonable officer would understand that what he is doing violates that right.” *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). “Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.” *Davis v. Hall*, 375 F.3d 703, 712 (8th Cir. 2004).

Defendants argue that Officers Peterson and Meath believed they were acting reasonably when they used deadly force against Franklin. Specifically, Defendants point out that officers may use deadly force when faced with an apparently loaded weapon, when they believe a suspect has a gun, and when they believe that a suspect is reaching for a weapon. See *Thompson v. Hubbard*, 257 F.3d 986, 898-900 [sic] (8th Cir. 2001); *Sinclair v. City of Des Moines*, 268 F.3d 594, 596 (8th Cir. 2001); *Loch v. City of Litchfield*, 689 F.3d 961, 966-67 (8th Cir. 2012). However, as Plaintiff notes, where a suspect “poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.” *Nance v. Sammis*, 586 F.3d 604, 609 (8th Cir. 2009). Eighth Circuit precedent makes clear that officers are “on notice that they may not use deadly force unless the suspect poses a significant threat of death or serious physical injury to the officer or others.” *Craighead v. Lee*, 399 F.3d 954, 962 (8th Cir. 2005). While it is certainly true that Officers Peterson and Meath were faced with a situation that posed a significant threat of death or serious physical injury to them or others, a factual dispute exists over whether such a situation was present at the time when the

officers used deadly force against Franklin. Therefore, taking all facts in the light most favorable to Plaintiff, the Court cannot conclude that qualified immunity shields Defendants.

#### **IV. [sic] Count 2: Wrongful Death**

Defendants next argue that Plaintiff's wrongful death claim should be dismissed. "When death is caused by the wrongful act or omission of any person . . . , the trustee . . . may maintain an action therefor if the decedent might have maintained an action, had the decedent lived, for an injury caused by the wrongful act or omission." Minn. Stat. § 573.02. Defendants assert that because Officers Peterson and Meath were facing a suspect with a loaded gun aimed at Officer Peterson, Officers Peterson and Meath committed no wrongful act or omission causing Franklin's death. (Doc. No. 49 at 30.) As discussed above, however, Plaintiff raises genuine factual disputes as to whether the sequence of events set forth by Defendants is in fact accurate and whether Franklin was threatening the officers when Officers Peterson and Meath used deadly force and caused Franklin's death. These same factual disputes preclude summary judgment as to Plaintiff's wrongful death claim.

Defendants additionally argue that they are immune under the doctrine of official immunity. Under Minnesota law, "a public official is entitled to official immunity from state law claims when that official is charged by law with duties that require the exercise of judgment or discretion." *Johnson v. Morris*, 453 N.W.2d



31, 41-42 (Minn. 1990). Under this doctrine, “personal liability will only attach when the harmful action is made willfully or maliciously.” *Pletan v. Gaines*, 494 N.W.2d 38, 40 (Minn. 1992). It is the plaintiff’s burden to provide proof of the defendant’s “intentional doing of a wrongful act without legal justification or excuse.” *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991). Here, given the factual disputes noted above, the Court cannot conclude that Defendants are entitled to summary judgment on the issue of official immunity.

**V. [sic] Count 4: Negligence**

Finally, Defendants argue that Plaintiff’s claim for negligence should be dismissed. “A defendant in a negligence action is entitled to summary judgment when the record reflects a complete lack of proof on any of the four elements necessary for recovery: (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of that duty being the proximate cause of the injury.” *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001) (citing *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995)).

Defendants present evidence detailing their internal procedures regarding the training, supervision, selection, and retention of officers such as Officers Peterson and Meath. (*See generally* Doc. No. 51.) Plaintiff presents no evidence identifying any factual dispute with respect to this evidence. *C.f.*, *Anderson*, 477 U.S. at 248 (concluding that a party opposing a properly supported motion for summary judgment “must set

forth specific facts showing that there is a genuine issue for trial”). Indeed, Plaintiff does not appear to oppose Defendants’ Motion for Summary Judgment with respect to his negligence claim. Therefore, the Court grants Defendants’ Motion for Summary Judgment as to this claim.

### CONCLUSION

Defendants present credible evidence of the circumstances surrounding the use of deadly force against Franklin by Officers Peterson and Meath. However, with respect to Plaintiffs’ excessive force and wrongful death claims, Defendants have not demonstrated that there is no genuine dispute of material fact. Indeed, Plaintiff’s evidence raises fact questions regarding the sequence of events leading to the use of deadly force against Franklin, as well as the existence and nature of any threat posed by Franklin when the officers shot him. These disputes preclude summary judgment as to Counts 1 and 2. Plaintiff does not, however, contest summary judgment as to Count 4, and accordingly, the Court grants Defendants’ Motion as to that claim.

### ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that:

App. 35

1. Defendants' Motion for Summary Judgment (Doc. No. [47]) is **GRANTED IN PART** and **DENIED IN PART** as follows:

a. Defendants' Motion is **GRANTED** as to Count 4, Plaintiff's negligence claim. As such, Count 4 is **DISMISSED WITH PREJUDICE**.

b. Defendants' Motion is **DENIED** as to Counts 1 and 2, Plaintiff's claims under 42 U.S.C. § 1983 and Plaintiff's wrongful death claim.

Dated:  
November 10, 2016

s/Donovan W. Frank  
DONOVAN W. FRANK  
United States District Judge

---

App. 36

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

No: 16-4429

Walter Louis Franklin, II, Trustee for the  
Estate of Terrance Terrell Franklin

Appellee

v.

Lucas Peterson, individually, and  
in his official capacity, et al.

Appellants

---

Appeal from U.S. District Court  
for the District of Minnesota – Minneapolis  
(0:14-cv-01467-DWF)

---

**ORDER**

The petition for rehearing en banc is denied. The  
petition for rehearing by the panel is also denied.

February 16, 2018

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

---

/s/ Michael E. Gans

---