No. 18-___

IN THE

Supreme Court of the United States

PEGGY SHUMPERT, Individually and as Administrator of the Estate of Antwun Shumpert, Sr., and on behalf of the heirs and wrongful death beneficiaries of Antwun "Ronnie" Shumpert, Sr., Deceased, CHARLES FOSTER, THE ESTATE OF ANTWUN SHUMPERT, SR.,

Petitioners,

v.

CITY OF TUPELO MISSISSIPPI; OFFICER TYLER COOK, in his individual and official capacities,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals erred in finding that the state-created danger doctrine is not clearly established law and in failing to apply it, when there is a conflict between the United States Courts of Appeals on the applicability of this doctrine, and, if the Court of Appeals had applied this doctrine, its judgment would likely have been for the Petitioners.

II. Whether the Court of Appeals erred in concluding that Respondent Officer Tyler Cook's use of canine and deadly force against the decedent did not violate clearly established law for purposes of qualified immunity, when such decision conflicts with relevant decisions of the Supreme Court and other federal courts on the use of such force.

LIST OF ALL PARTIES

The caption of this Petition contains the names of all the parties to the proceeding in the United States Court of Appeals for the Fifth Circuit.

CORPORATE DISCLOSURE STATEMENT

The Petitioners are individuals and not a corporate party. The Petitioners do not have a parent corporation, and there is no publicly held corporation that owns 10 percent or more of stock in the Petitioners.

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The opinion of the United States Court of Appeals for the Fifth Circuit appears at *Shumpert v. City of Tupelo*, 905 F.3d 310 (5th Cir. 2018).

BASIS FOR JURISDICTION OF SUPREME COURT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 24, 2018. There was no order respecting rehearing, and no request for an extension of time to file the Petition for Writ of Certiorari. Jurisdiction to review this case on a writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves a claim for the use of excessive force by a police officer in violation of the Fourth Amendment to the United States Constitution, which provides:

> **Amendment IV. Searches and Seizures; Warrants**
>
> 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.

U.S. Const. amend. IV,

and in violation of 42 U.S.C. § 1983, which provides:

> **§ 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.

42 U.S.C. § 1983.

STATEMENT OF FACTS

A. Basis for Federal Jurisdiction in Court of First Instance.

This case was filed by the Petitioners in the United States District Court for the Northern District of Mississippi. The Petitioners alleged a violation of the Fourth Amendment to the United States Constitution under 42 U.S.C. § 1983. The district court had jurisdiction based on a federal question pursuant to 28 U.S.C. § 1331.

B. Facts Material to Consideration of Questions Presented.

On June 18, 2016, the Tupelo Police Department was conducting surveillance of suspected narcotics activities, when an officer noticed a suspicious car and followed it. (*See* Opinion of United States Court of Appeals for the Fifth Circuit, dated September 24, 2018, A-2.) The officer pulled over Antwun "Ronnie" Shumpert, Sr. ("Shumpert" or "the decedent") and the owner of the car, who was riding as a passenger in the vehicle, for failing to use a turn signal and driving without a tag light. (*Id.*) The decedent got out of the vehicle and ran into a nearby neighborhood. (*Id.*) The other man stayed in the car. (*Id.*) Tupelo Police Department Officers, including Respondent Officer Tyler Cook ("Officer Cook") who was in the area with his canine unit, pursued Shumpert. (*Id.*) Officer Cook and his police dog found Shumpert hiding in a crawl space under a house. (*Id.*) Officer Cook testified that he opened the door to the crawl space and gave Shumpert a command to come out, announced that it was the

Tupelo Police, and told Shumpert to show Officer Cook his hands, that he had a dog, and that the dog would bite. (A-2 to A-3.) Shumpert ran further under the house, and Officer Cook released his dog, which then bit Shumpert. (A-3.) There was no evidence that, when Officer Cook released his dog, Shumpert was capable of escaping from under the house or that he presented a threat to Officer Cook or any other person. (*Id.*) Officer Cook testified that Shumpert began to fight the dog and then ran from under the house and tackled Officer Cook. (*Id.*) Officer Cook testified that he thought he was about to lose consciousness when Shumpert pinned him to the ground, and that he shot Shumpert four times. (*Id.*) Shumpert did not have a weapon. Shumpert died as a result of his gunshot wounds. (*Id.*)

The Petitioners sued Respondents the City of Tupelo, Mississippi and Officer Cook in his individual and official capacities under 42 U.S.C. § 1983 for violating the Fourth Amendment rights of the decedent by using excessive force in arresting him. (A-2; A-3.) The City of Tupelo and Officer Cook filed motions for summary judgment. (A-4.) The United States District Court for the Northern District of Mississippi granted the City of Tupelo's motion on the basis that the Petitioners had failed to establish that the alleged constitutional violations resulted from the City's policies or procedures. (*Id.*)[1] The district court also concluded that the Petitioners did not defeat Officer Cook's qualified immunity defense, and granted summary judgment to him on that basis.

[1]The Petitioners are not appealing the Court of Appeals' affirmation of the judgment in favor of the City of Tupelo.

(*Id.*) Officer Cook did not plead qualified immunity as an affirmative defense to the Petitioners' action.

In finding that Officer Cook was entitled to qualified immunity, the Court of Appeals determined that there was no clearly established law in the United States Supreme Court or the Fifth Circuit as to what constituted reasonable use of canine force, under which it could be concluded that Officer Cook used excessive force by releasing his police dog against Shumpert when Shumpert was confined underneath the house, did not have a weapon, did not act aggressively against Officer Cook, and could not escape. (A-15 to A-20.)[2]

As to Officer Cook's use of deadly force against Shumpert, the Court of Appeals noted that a police officer may use deadly force when a suspect poses a threat of serious harm to the officer or other persons. A-20.) The court held that a reasonable officer could have believed that Shumpert posed a threat of serious harm either to Officer Cook or others when Shumpert ran from under the crawl space, tackled

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[2]The Court of Appeals noted that, after the date of the challenged conduct in Shumpert's case, the Fifth Circuit decided *Cooper v. Brown*, 844 F.3d 517 (5th Cir. 2016). (A-17.) The *Cooper* court held that the use of canine force in that case was excessive. The *Shumpert* court distinguished *Cooper* on the basis that the dog in *Cooper* continued to bite the suspect for one to two minutes and was not called off by the officer until he had finished handcuffing the suspect, that the suspect did not attempt to strike the dog, did not attempt to flee, and the officer could see the suspect's hands and that he had no weapon. (A-18.) The *Cooper* court found that no reasonable officer could conclude that the suspect posed an immediate threat to the officer or others. (*Id.*)

Officer Cook, and repeatedly struck him in the head. (A-21.)

The Court of Appeals did not address the state-created danger doctrine advanced by the Petitioners. (A-21 n.60.) The court found that the Petitioners waived the issue by not sufficiently raising it in their opening brief. (*Id.*) The Petitioners did, however, state in their opening brief in the Court of Appeals that "Cook chose to escalate a stagnant situation by disregarding policy and engaging with the suspect." (A-31.) In their reply brief, the Petitioners amplified this argument by arguing that Officer Cook's actions fell within the state-created danger doctrine. (A-33 to A-35.) The Court of Appeals further concluded that, even if the Petitioners preserved the issue, the state-created danger doctrine is not clearly established law, noting a split in authority between the Courts of Appeals. (A-21 n.60.)

ARGUMENT

I. THE COURT OF APPEALS ERRED IN FINDING THAT THE STATE-CREATED DANGER DOCTRINE IS NOT CLEARLY ESTABLISHED LAW AND IN FAILING TO APPLY IT, WHEN THERE IS A CONFLICT BETWEEN THE UNITED STATES COURTS OF APPEALS ON THE APPLICABILITY OF THIS DOCTRINE, AND, IF THE COURT OF APPEALS HAD APPLIED THIS DOCTRINE, ITS JUDGMENT WOULD LIKELY HAVE BEEN FOR THE PETITIONERS

The Court of Appeals noted that the state-created danger doctrine has been applied when a

state actor knowingly placed a person in danger. (A-21 n. 60.) After concluding that the Petitioners were barred from arguing this issue because they did not sufficiently raise it in their opening brief, the court found that, even if the Petitioners had preserved the issue, the state-created danger doctrine is not clearly established law so as to negate Officer Cook's qualified immunity. The court noted that there is a split in the Circuits on this point. (*Id.*) The decisions from the various United States Courts of Appeals evidence a clear conflict between the decisions of the Courts of Appeals on the applicability of the state-created danger doctrine.

A. First Circuit

The First Circuit has not adopted the state-created danger doctrine. *See Irish v. Maine*, 849 F.3d 521 (1st Cir. 2017) (while the First Circuit has discussed the possible existence of the state-created danger doctrine, the court has never found it applicable to any specific set of facts).

B. Second Circuit

The Second Circuit has adopted the state-created danger doctrine. *See Sanchez v. City of New York*, 736 F. App'x 288 (2d Cir. 2018) (there is a state-created danger exception to the general rule that the state has no duty to protect a person against private violence); *Claudio v. Sawyer*, 409 F. App'x 464 (2d Cir. 2011) (state-created danger doctrine applied; plaintiffs failed to state § 1983 claim under this doctrine); *Pearce v. Labella*, 473 F. App'x 16 (2d Cir. 2012) (plaintiffs adequately stated claim under

state-created danger doctrine so as to defeat claim of qualified immunity in § 1983 action).

C. Third Circuit

The Third Circuit has adopted the state-created danger doctrine. *See Rivas v. City of Passaic*, 365 F.3d 181 (3d Cir. 2004) (in § 1983 action, genuine issues of material fact existed as to whether emergency responders deprived plaintiff of his right to be free from a state-created danger); *Ray v. Cain*, 724 F. App'x 115 (3d Cir. 2018) (applying state-created danger doctrine, officers' conduct did not rise to level necessary to establish state-created danger); *Kedra v. Schroeter*, 876 F.3d 424 (3d Cir. 2017), *cert. denied*, 138 S. Ct. 1990 (2018) (plaintiff had cognizable § 1983 claim under state-created danger doctrine).

D. Fourth Circuit

The Fourth Circuit has adopted the state-created danger doctrine. *See Doe v. Rosa*, 664 F. App'x 301 (4th Cir. 2016) (recognizing state-created danger doctrine, but holding that it did not apply in absence of evidence that state officials knew plaintiffs); *Robinson v. Lioi*, 536 F. App'x 340 (4th Cir. 2013) (plaintiff had a viable substantive due process § 1983 claim against police officer under state-created danger doctrine).

E. Fifth Circuit

The Fifth Circuit has not adopted the state-created danger doctrine. *See Shumpert v. City of Tupelo*, 905 F.3d 310 (5th Cir. 2018) (court has

repeatedly declined to decide whether a stated-created danger cause of action is viable in the Fifth Circuit); *Saenz v. City of McAllen*, 396 F. App'x 173 (5th Cir. 2010) (Fifth Circuit has not recognized state-created danger doctrine as the basis for a § 1983 claim); *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198 (5th Cir. 1994) (no Fifth Circuit case has yet predicated relief on a state-created danger doctrine); *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002) (Fifth Circuit has not addressed viability of state-created danger doctrine or defined contours of person's right to be free from state-created danger); *Piotrowski v. City of Houston*, 51 F.3d 512 (5th Cir. 1995) (Fifth Circuit has not adopted state-created danger doctrine for § 1983 actions).

F. Sixth Circuit

The Sixth Circuit has adopted the state-created danger doctrine. *See Boler v. Earley*, 865 F.3d 391 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 1281 (2018) (recognizing ability to establish a due process violation through the state-created danger doctrine); *Richardson v. Huber Heights City Sch. Bd. of Educ.*, 651 F. App'x 362 (6th Cir. 2016) (finding liability for violating plaintiff's due process rights under state-created danger doctrine); *Robinson v. Twp. of Redford*, 48 F. App'x 925 (6th Cir. 2002) (established Sixth Circuit law recognized possibility of holding state actor liable for private acts of violence under state-created danger doctrine).

G. Eighth Circuit

The Eighth Circuit has adopted the state-created danger doctrine. *See Glasgow v. Neb., Dep't of Corr.*, 819 F.3d 436 (8th Cir. 2016) (recognizing state-created danger doctrine, but holding that it did not apply under facts of case); *Fields v. Abbott*, 652 F.3d 886 (8th Cir. 2011) (same).

H. Ninth Circuit

The Ninth Circuit has adopted the state-created danger doctrine, *See Bracken v. Okura*, 869 F.3d 771 (9th Cir. 2017) (there were genuine issues of material fact as to whether police officer was liable in § 1983 action for state-created danger); *Henry A. v. Willden*, 678 F.3d 991 (9th Cir. 2012) (allegation that state and county officials knew of danger of abuse and neglect in certain foster homes adequately stated a § 1983 due process claim against such officials under state-created danger doctrine).

I. Tenth Circuit

The Tenth Circuit has adopted the state-created danger doctrine. *See Estate of Reat v. Rodriguez*, 824 F.3d 960 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 1434 (2017) (discussing two preconditions necessary for application of state-created danger doctrine); *Waugh v. Dow*, 617 F. App'x 867 (10th Cir. 2015) (genuine issue of material fact existed as to deputy's state of mind for purposes of qualified immunity under state-created danger doctrine in § 1983 action).

Thus, seven Circuits have adopted the state-created danger doctrine and two have not. There is a clear conflict between the decisions of the United States Courts of Appeals on this point.

The Court of Appeals erred in finding that the Petitioners waived their argument that the state-created danger doctrine provides a basis for recovery against Officer Cook and overcomes his claim of qualified immunity. The Supreme Court has noted that a litigant waives his right to raise an issue when he does not contest it in his brief. *See District of Columbia v. Wesby*, 138 S. Ct. 577 (2018); *see also Knatt v. Hosp. Serv. Dist. No. 1 of E. Baton Rouge Parish*, 327 F. App'x 472 (5th Cir. 2009) (party waived appellate review of claim when claim was not presented to district court or argued in brief on appeal from summary judgment). The Court has also observed that an argument is waived when the party did not "press" its theory in the lower courts or brief the issue. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2282 (2015). The Fifth Circuit has held that an argument was waived when it was never "mentioned" in the party's appellate briefs. *Berkley Reg'l Ins. Co. v. Phila. Indem. Ins. Co.*, 600 F. App'x 230, 236 (5th Cir. 2015). The Supreme Court has concluded that even a limited presentation of an issue in a party's brief may suffice to raise the issue so as to preclude a finding of waiver. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007).

In the case at bar, the Petitioners stated in their opening brief in the Court of Appeals that "Cook chose to escalate a stagnant situation by disregarding policy and engaging with the suspect."

(A-31.) This statement incorporates the essential element of the state-created danger doctrine that the state actor increased the danger to Shumpert by his actions. *See Piotrowski*, 51 F.3d at 515, or created an environment that was dangerous to the injured party. *See Johnson*, 38 F.3d at 201. Thus, the Petitioners "pressed" the issue of the state-created danger doctrine in their opening brief in the Court of Appeals, and they "mentioned" it in that brief. The fact that the argument was of limited scope is not sufficient to result in a finding of waiver. In their reply brief the Petitioners amplified their argument on the state-created danger doctrine by arguing that Officer Cook's actions explicitly fell within that doctrine. (A-33 to A-35.)

The state-created danger doctrine is an important matter on which there is conflict between the Courts of Appeals. Its importance is illustrated by the fact that, had the Fifth Circuit applied the doctrine in the present case, the Petitioners likely would have prevailed in the Court of Appeals. Officer Cook violated Tupelo Police Department policy by failing to call for backup and waiting until backup arrived, as well as by failing to secure a perimeter around the scene. Officer Cook also violated policy by failing to call a supervisor before deploying his police dog. Without provocation or violence from Shumpert, Officer Cook ordered his dog to attack Shumpert, creating a danger to the suspect. Officer Cook then shot and killed Shumpert despite the fact that he did not show a weapon. By his actions, Officer Cook placed the decedent in a position of danger which stripped him of his ability to defend himself. Shumpert was not suspected of committing a crime of violence and was not ticketed

for any violations. Officer Cook was not aware of a warrant for Shumpert's arrest. The only offense of which the decedent was suspected was a slow rolling traffic stop. Thus, Officer Cook's actions created or increased the danger to Shumpert and created an environment which led to Shumpert's being shot and killed.

For all these reasons, this Court should grant the Petition for Certiorari in order to resolve the conflict between the Circuits as to whether the state-created danger doctrine is a viable theory of recovery against a state actor who claims qualified immunity, as well as to review whether the Fifth Circuit's failure to apply the doctrine in this case constituted legal error resulting in the court's holding that the Petitioners were not entitled to recover under their § 1983 claim.

II. THE COURT OF APPEALS ERRED IN CONCLUDING THAT RESPONDENT OFFICER TYLER COOK'S USE OF CANINE AND DEADLY FORCE AGAINST THE DECEDENT DID NOT VIOLATE CLEARLY ESTABLISHED LAW FOR PURPOSES OF QUALIFIED IMMUNITY, WHEN SUCH DECISION CONFLICTS WITH RELEVANT DECISIONS OF THE SUPREME COURT AND OTHER FEDERAL COURTS ON THE USE OF SUCH FORCE

Qualified immunity shields state officials from money damages unless a plaintiff pleads facts showing: (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged

conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011); *Taylor v. Barkes*, 135 S. Ct. 2042 (2015). A government official's conduct violates clearly established law, so that the official is not entitled to qualified immunity from claims for money damages, when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right. *al-Kidd*, 563 U.S. at 741; *Taylor*, 135 S. Ct. at 2044. To find a right clearly established for purposes of qualified immunity, the Court does not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. *al-Kidd*, 563 U.S. at 741; *Taylor*, 135 S. Ct. at 2044. It is not necessary that the very act in question has been previously held unlawful for a constitutional right to be clearly established for purposes of qualified immunity but, in light of preexisting law, the unlawfulness must be apparent. *Hope v. Pelzer*, 536 U.S. 730 (2002). In *Hope*, the Court observed:

> Our opinion in *Lanier* thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier,* we expressly rejected a requirement that previous cases be "fundamentally similar." Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with "materially similar"

> facts. Accordingly, pursuant to *Lanier*, the salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional. It is to this question that we now turn.

Id. at 741.

The Court of Appeals recognized the principles applied by the Supreme Court in addressing the issue of whether Officer Cook was entitled to qualified immunity. The court also noted that, in determining what constitutes clearly established law for purposes of qualified immunity, the district court looks first to Supreme Court precedent and then to its own, and if there is no directly controlling authority, the court may rely on decisions of other courts to the extent that they constitute a robust consensus of cases of persuasive authority. (A-14.) The court noted that the touchstone of the inquiry regarding whether the constitutional right allegedly violated was clearly established, as an element of the qualified immunity analysis, is fair warning. (*Id.*) The law can be clearly established despite notable factual distinctions between the precedents relied on and the case before the court, as long as the prior decisions give reasonable warning that the conduct at issue violated constitutional rights. (*Id.*)

A. Canine Force

The Court of Appeals noted that neither the Supreme Court nor the Fifth Circuit has addressed the question of what constitutes the reasonable use of canine force during an arrest. (A-16.) The court noted that, although decided after the conduct challenged in the present case, the Fifth Circuit decision in *Cooper*, 844 F.3d at 522, determined that the use of canine force is unreasonable if it is used against a suspect who does not present an immediate threat to the safety of the officer or others. There is authority from other Courts of Appeals, however, which suggests that Officer Cook's use of canine force against the decedent violated clearly established law.

For example, in *Watkins v. City of Oakland, Cal.*, 145 F.3d 1087 (9th Cir. 1998), the court concluded that excessive duration of a police dog bite and improper encouragement of the dog's attack by police officers could constitute excessive force that would be a constitutional violation. The *Watkins* court described the police dog attack at issue:

> On November 20, 1993, Officer Chew and his police canine "Nero" responded to a silent alarm at Hart & Son Auto Body Shop, a commercial warehouse in Oakland. Four other Oakland police officers also responded. Upon arrival, the officers established a perimeter outside the warehouse because they had seen a person running within the building. There was no evidence as to whether the person was armed. Before releasing Nero to search for the person,

Officer Chew announced twice: "This is the Oakland Police Department canine unit. Give yourself up or I'll release my dog who is going to find you and he is going to bite you." Watkins did not surrender to the police and claims that he did not hear the announcement. Officer Chew released Nero, a 72 pound German Shepherd, to search. Nero ran out of sight of Officer Chew, located Watkins who was hiding in a car, and bit him. Upon arriving at the scene, Officer Chew did not call Nero off of Watkins; instead, he ordered Watkins to show his hands. Watkins, who was recoiling from the dog's bite, failed to comply. Officer Chew then pulled Watkins out of the car onto the ground. Nero continued to bite until Watkins complied with Officer Chew's orders to show his hands.

Officer Chew and Officer David Walsh, another officer at the scene, testified that ten to fifteen seconds elapsed between the time Officer Chew ordered Watkins to show his hands and the time Watkins complied with that order. The officers both agree that Nero continued to bite Watkins throughout that period. In a later statement to the OPD Internal Affairs Division, Officer Chew stated that the time period was about thirty seconds.

> Officer Chew justified his delay in calling off Nero because Watkins, while resisting the dog, failed to show his hands to prove that he was unarmed. Watkins explained that he did not show his hands because he was resisting the dog and recoiling from the pain of Nero's attack. Watkins further claims that Officer Chew continued to allow Nero to bite him even though he was obviously helpless and surrounded by police officers with their guns drawn. Watkins was subsequently handcuffed, arrested and ultimately charged with a violation of California Penal Code § 459, commercial burglary.

Id. at 1090.

The court concluded that the law was clearly established that a police dog bite of excessive duration was an unconstitutional use of force:

> However, Watkins makes a different claim of excessive force than that described by Officer Chew. He argues that the duration and extent of force applied in effecting arrest after the officers caught up with Nero amounted to an unconstitutional application of force. *See Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994). In *Mendoza*, we explained:
>
> > We do not believe that a more particularized expression of the

> law is necessary for law enforcement officials using police dogs to understand that under some circumstances the use of such a "weapon" might become unlawful. For example, no particularized case law is necessary for a deputy to know that excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control....
>
> We therefore hold that the deputies' use of the police dog is subject to excessive force analysis, and that this law is clearly established for purposes of determining whether the officers have qualified immunity.

Id. at 1362.

> We agree that it was clearly established that excessive duration of the bite and improper encouragement of a continuation of the attack by officers could constitute excessive force that would be a constitutional violation. Therefore, we affirm the district court's denial of qualified immunity to Officer Chew on summary judgment.

Watkins, 145 F.3d at 1093.

Similarly, in *Becker v. Elfreich*, 821 F.3d 920 (7th Cir. 2016),[3] the court concluded that, at the time of the arrest at issue, it was clearly established that no more than minimal force was permissible to arrest a non-resisting or passively resisting suspect, and that the officer was not entitled to qualified immunity when he pulled the suspect down three steps after he had surrendered in his mother's house and placed his knee in the suspect's back while allowing his police dog to continue to bite the suspect.

In the case at bar, Officer Cook located Shumpert hiding in a crawl space under a house. (A-2.) Officer Cook opened the door to the crawl space and gave Shumpert a command to come out, announced that it was the Tupelo Police, told Shumpert to show Officer Cook his hands, that he had a dog, and that the dog would bite. (*Id.*) Shumpert ran further under the house, and Officer Cook released his dog, which then bit Shumpert. (*Id.*) Officer Cook released his dog without provocation or violence from Shumpert. There was no evidence that, when Officer Cook released his dog, Shumpert was capable of escaping from under the house or that he presented a threat to Officer Cook or any other person. The foregoing authority demonstrates that the law was clearly established that the use of canine force by a police officer against an unresisting or passively resisting suspect is unreasonable. Here, at the moment Officer Cook released his dog, Shumpert was running away from

[3] *Becker* was decided on May 12, 2016, before the incident at issue in the present case occurred on June 18, 2016.

Officer Cook and was not threatening him or any other person.

The Court of Appeals erred in concluding that the law was not clearly established that it constitutes unreasonable force for a police officer to release his dog to bite a fleeing suspect who presents no immediate threat to the officer or other persons, and in finding that Officer Cook's conduct in releasing his dog on Shumpert was not unlawful. Accordingly, this Court should reverse the judgment of the Court of Appeals.

B. Deadly Force

The Supreme Court has held that the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. *Tennessee v. Garner*, 471 U.S.1 (1985). When the suspect poses no immediate threat to the officer or others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. *Id.* at 12. In order to justify the use of deadly force, the suspect must pose a threat of serious physical harm to the officer or others, such as by threatening the officer with a weapon. *Id.* at 11; *see also Manis v. Lawson*, 585 F.3d 839 (5th Cir. 2009) (use of deadly force is justifiable if officer has probable cause to believe that suspect poses threat of serious physical harm). It has also been held that it may constitute the use of excessive force to use deadly force in combination with canine force. In *Costa v. County of Ventura*, 680 F. App'x 545 (9th Cir. 2017), the court held that the plaintiffs could proceed with their excessive force § 1983 action based on a police officer's shooting of

their son when he was immobilized by a police dog. The court noted that the plaintiffs' excessive force claim alleged violation of a clearly established right. *Id.* at 546.

In the present case, Officer Cook's use of deadly force on Shumpert violated clearly established law. Officer Cook testified that Shumpert began to fight the dog and then ran from under the house and tackled Officer Cook. Officer Cook stated that he believed that he was about to lose consciousness when Shumpert pinned him to the ground, and that he shot Shumpert four times. (A-3.) Shumpert did not have a weapon, and Officer Cook did not see a weapon in the possession of Shumpert. Even assuming that Shumpert tackled Officer Cook and pinned him to the ground as Officer Cook claimed, Shumpert was trying to flee, not to remain at the scene in order to engage Officer Cook in a fight. There was no indication that Shumpert posed an immediate threat to Officer Cook. Officer Cook's use of deadly force to kill Shumpert under such circumstances amounted to the use of deadly force to prevent an unarmed suspect from fleeing, so as to constitute unreasonable force under *Garner*.

The Court of Appeals erred in concluding that the law on the use of deadly force on an unarmed, fleeing suspect was not clearly established, and that a reasonable officer could have believed that Shumpert posed a threat of serious harm under the circumstances.

Accordingly, this Court should reverse the judgment of the Court of Appeals.[4]

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[4]It is important to note that the issue of Officer Cook's qualified immunity was not properly raised before the district court or the Court of Appeals, because Officer Cook did not raise the issue of qualified immunity as an affirmative defense. This Court has held that qualified immunity is an affirmative defense which must be pleaded by a public official in a § 1983 action. *See Gomez v. Toledo*, 446 U.S. 635 (1980). Federal courts in the Fifth Circuit have noted similarly. *See Brown v. St. Landry Parish Sheriff's Dep't*, 298 F. Supp. 3d 879 (W.D. La. 2018) (qualified immunity is an affirmative defense to a § 1983 action); *Veritext Corp. v. Bonin*, 259 F. Supp. 3d 484 (E.D. La. 2017), *rev'd on other grounds and remanded*, 901 F.3d 287 (5th Cir. 2018), *aff'd*, 901 F.3d 287 (5th Cir. 2018) (qualified immunity from liability for damages is an affirmative defense that public officials must both plead and prove); *Thomas v. State*, 294 F. Supp. 3d 576 (N.D. Tex. 2018), *report and recommendation adopted*, No. 3:17-CV-0348-N-BH, 2018 WL 1254926 (N.D. Tex. Mar. 12, 2018) (a governmental employee who is sued under § 1983 may assert the affirmative defense of qualified immunity). Numerous Courts of Appeals have recognized that the consequence of failing to assert the affirmative defense of qualified immunity is that the defense is waived. *See Johnson v. Gibson*, 14 F.3d 61 (D.C. Cir. 1994) (qualified immunity for official action is an affirmative defense that can be waived if not properly raised); *Harris v. Miller*, 818 F.3d 49 (2d Cir. 2016) (qualified immunity is an affirmative defense that may be waived); *Sharp v. Johnson*, 669 F.3d 144 (3d Cir. 2012) (qualified immunity is an affirmative defense and generally must be included in a responsive pleading or it may be considered waived); *Henricks v. Pickaway Corr. Inst.*, 782 F.3d 744 (6th Cir. 2015) (qualified immunity is an affirmative defense that may be waived by a state officer if not asserted in a responsive pleading to a § 1983 action).

Because Officer Cook failed to plead qualified immunity as an affirmative defense to the Petitioners' § 1983 action, he waived that defense, and the Court of Appeals erroneously granted summary judgment to Officer Cook on the basis of qualified immunity.

CONCLUSION

The Court of Appeals erred in failing to apply the state-created danger doctrine, in that it is clearly established law in most United States Courts of Appeals. There is a clear conflict between the Courts of Appeals as to the existence and application of the state-created danger doctrine. This conflict involves an important matter, in that, if the Court of Appeals had applied the state-created danger doctrine in the present case, the Petitioners likely would have prevailed in that court.

The Court of Appeals erred in concluding that the law was not clearly established that it constitutes unreasonable force for a police officer to release his dog to bite a fleeing suspect who presents no immediate threat to the officer or other persons, and in finding that Officer Cook's conduct in releasing his dog on Shumpert was not unlawful. At the time Officer Cook released his dog, Shumpert was cornered and incapable of escaping from under the house, and he presented no threat to Officer Cook or any other person. Shumpert was unresisting or passively resisting at the moment Officer Cook released his dog. In fact, he was running away from Officer Cook. Under the facts of this case, Officer Cook violated clearly established law in his use of canine force.

The Court of Appeals erred in concluding that the law on the use of deadly force on an unarmed, fleeing suspect was not clearly established, and that a reasonable officer could have believed that Shumpert posed a threat of serious harm under the circumstances. Shumpert did not have a weapon,

and Officer Cook did not see a weapon in the possession of Shumpert when Officer Cook shot him. Shumpert was trying to flee, not to fight or injure Officer Cook. There was no indication that Shumpert posed an immediate threat to Officer Cook. Officer Cook's use of deadly force to kill Shumpert under such circumstances constituted the unlawful use of deadly force to prevent an unarmed suspect from fleeing.

For these reasons, the Petitioners respectfully request that this Honorable Court grant their Petition for Certiorari.

Respectfully submitted,

Peggy Shumpert, Individually and as Administrator of the Estate of Antwun Shumpert, Sr., and on behalf of the heirs and wrongful death beneficiaries of Antwun "Ronnie" Shumpert, Sr., Deceased, Charles Foster, The Estate of Antwun Shumpert, Sr.

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APPENDIX

INDEX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 17-60774

PEGGY SHUMPERT, Individually, and as Administrator of the Estate of Antwun Shumpert, Sr., and on behalf of the heirs and wrongful death beneficiaries of Antwun "Ronnie" Shumpert, Sr., Deceased; CHARLES FOSTER; THE ESTATE OF ANTWUN SHUMPERT, SR.,

Plaintiffs - Appellants

v.

CITY OF TUPELO, MISSISSIPPI; OFFICER TYLER COOK, in his individual and official capacities,

Defendants - Appellees

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

Before STEWART Chief Judge, and WIENER and HIGGINSON, Circuit Judges.

WIENER, Circuit Judge.

Filed September 24, 2018

Plaintiffs-Appellants appeal the district court's grant of summary judgment dismissing their Fourth Amendment, 28 U.S.C. § 1983 excessive force and state law claims against Defendants-Appellees, the City of Tupelo and Officer Cook. Plaintiffs also appeal the district court's grant of Defendants' motion for sanctions and denial of Plaintiffs' motion for sanctions. We affirm.

I. FACTS AND PROCEEDINGS

In June 2016, the Tupelo Police Department ("TPD") was conducting surveillance of suspected narcotics activities at the Townhouse Motel. On the evening of June 18, Officer Senter noticed a car that he suspected was involved in such activities and followed it. Officer Senter pulled over Antwun Shumpert, Sr. and Charles Foster for failing to use a turn signal and driving without a working tag light. Shumpert, who was driving, stopped on the side of the road and then ran from the car into a nearby neighborhood. Foster, the owner of the vehicle, stayed in it. TPD officers, including Officer Cook who was in the area with his police K9, pursued Shumpert. Officer Cook and his K9 eventually located Shumpert hiding in a crawl space under a house. Officer Cook testified that he opened the door to the crawl space and "gave [Shumpert] the command to come out ... announced that it was Tupelo Police, show me your hands, told [Shumpert that he] had a dog and that it would bite."

After this warning, Shumpert ran further under the house, prompting Officer Cook to release his dog which then bit Shumpert. Officer Cook

testified that Shumpert began to fight the dog then ran from under the house and tackled Officer Cook. Shumpert pinned Officer Cook to the ground and repeatedly struck him in the face. Fearing he was about to lose consciousness, Officer Cook shot Shumpert four times. Shumpert later died as the result of his gunshot wounds.

During the time of Officer Cook's encounter with Shumpert, Foster remained with the vehicle. After Shumpert was shot, Foster was detained by the Tupelo Police Department ("TPD") for about one hour, after which the investigation was turned over to the Mississippi Highway Patrol and Mississippi Bureau of Investigation. According to Plaintiffs, Foster was detained for a total of five or six hours. His car and person were searched, including a body cavity search. Foster was later released and no charges were filed against him.

In October 2016, Foster and Shumpert's wife, Peggy, individually and on behalf of the heirs and wrongful death beneficiaries of Shumpert (collectively referred to as "Plaintiffs") filed suit against the City of Tupelo, Mississippi, Mayor Jason Shelton and Police Chief Bart Aguirre, in their official capacities ("the City"), and against Officer Tyler Cook in his individual and official capacity. Plaintiffs claimed constitutional violations under 28 U.S.C. § 1983, and excessive force, wrongful death, negligence, and negligent or intentional infliction of emotional distress under 28 U.S.C. § 1343. Plaintiffs also asserted Mississippi state law claims against Officer Cook.

Both the City and Officer Cook filed motions for summary judgment. The district court held that Plaintiffs failed to establish that the alleged constitutional violations resulted from the City's policies or procedures and granted summary judgment on behalf of the City. The court also determined that Plaintiffs did not defeat Officer Cook's qualified immunity defense and granted summary judgment on that ground. In response to Defendants' motion, the district court also sanctioned Plaintiffs for discovery violations, but declined to sanction Defendants. Plaintiffs now appeal each of the summary judgment decisions as well as the district court's award of sanctions.

II. ANALYSIS

This appeal raises issues regarding *Monell* liability, qualified immunity, Mississippi state law, and discovery sanctions. We address each in turn.

A. *Monell* Liability

A municipality cannot be held liable under § 1983 on a theory of respondeat superior.[1] To establish municipal liability pursuant to § 1983, a plaintiff must demonstrate three elements: "a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom."[2] An official policy must be either unconstitutional or have been adopted "with

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[1] *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 692 (1978).

[2] *Piotrowski v. City of Houston,* 237 F.3d 567, 578 (5th Cir. 2001) (citing *Monell,* 436 U.S. at 694).

deliberate indifference to the known or obvious fact that such constitutional violations would result."[3] "Deliberate indifference is a degree of culpability beyond mere negligence or even gross negligence; it 'must amount to an intentional choice, not merely an unintentionally negligent oversight.'"[4] "These requirements must not be diluted, for '[w]here a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into respondeat superior liability.'"[5]

Plaintiffs allege that the City is liable because the TPD's failure to train Officer Cook caused the constitutional violations. "[T]he failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury."[6] "In resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform."[7] A plaintiff must show that (1) the municipality's training policy or procedure was inadequate; (2) the inadequate training policy was a "moving force" in causing violation of plaintiff's rights; and (3) the municipality was deliberately

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[3] *Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force,* 379 F.3d 293, 309 (5th Cir. 2004).

[4] *James v. Harris Cty.,* 577 F.3d 612, 617–18 (5th Cir. 2009) (quoting *Rhyne v. Henderson Cty.,* 973 F.2d 386, 392 (5th Cir. 1992)).

[5] *Snyder v. Trepagnier,* 142 F.3d 791, 796 (5th Cir. 1998) (alteration in original) (quoting *Bd. of Cty. Comm'rs of Bryan Cty., v. Brown,* 520 U.S. 397, 415 (1997)).

[6] *City of Canton v. Harris,* 489 U.S. 378, 390 (1989).

[7] *Id.*at 390.

indifferent in adopting its training policy.[8] "We have said that the connection must be more than a mere 'but for' coupling between cause and effect."[9] "The deficiency in training must be the actual cause of the constitutional violation."[10] Plaintiffs assert that the City violated Shumpert's Fourth Amendment rights and is liable under § 1983 for excessive force. They also daim that the City is liable for violating Foster's Fourth Amendment rights.

1. Shumpert's Fourth Amendment and § 1983 claims

Plaintiffs contend that Officer Cook was not qualified to be a K9 handler under TPD policies, and that, after he was promoted to this position, the City failed to train him adequately as a K9 handler. The parties agree that TPD policy requires officers to have five years of experience, at least three of which must be with the TPD, before they are eligible to become K9 handlers. Officer Cook became a K9 handler after only two years with the TPD. Defendants explain that Officer Cook was promoted because he had previous experience as a K9 handler in the military. They emphasize that, before this incident, Officer Cook did not have any disciplinary

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[8] *Sanders-Burns v. City of Plano,* 594 F.3d 366, 381 (5th Cir. 2010); *Valle v. City of Houston,* 613 F.3d 536, 544 (5th Cir. 2010); *Pineda v. City of Houston,* 291 F.3d 325, 332 (5th Cir. 2002).

[9] *Valle,* 613 F.3d at 546 (quoting *Thompson v. Connick,* 578 F.3d 293, 300 (5th Cir. 2009), *rev'd sub nom. Connick v. Thompson,* 563 U.S. 51 (2011) (internal quotations and citations omitted)).

[10] *Id.*

issues and had received K9 training and certifications in compliance with TPD policy.

Plaintiffs are correct that the TPD failed to follow department guidelines in promoting Officer Cook, but they have failed to demonstrate that this decision amounted to "deliberate indifference," as required to impose municipal liability.[11] To establish deliberate indifference, "[u]sually a plaintiff must show a pattern of similar violations, and in the case of an excessive force claim, as here, the prior act must have involved injury to a third party."[12] Plaintiffs have not established that the TPD had a routine policy—or even any prior instances—of promoting patrol officers to K9 handlers without the requisite experience.[13] The undisputed evidence shows that Officer Cook received canine training and certifications and had served the TPD as a K9 handler for three years without incident. Because Plaintiffs have failed to demonstrate that the TPD's K9 training policies were inadequate or that the TPD was deliberately indifferent in training or promoting K9 officers, the district court properly granted TPD's summary judgment motion in regard to Plaintiffs'

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[11] *See Piotrowski,* 237 F.3d at 578.

[12] *Valle,* 613 F.3d at 547.

[13] Because the single-incident "exception is generally reserved for those cases in which the government actor was provided no training whatsoever," *Peña v. City of Rio Grande City,* 879 F.3d 613, 624 (5th Cir. 2018), it does not apply to this case. Furthermore, Plaintiffs do not raise the single-incident exception in their brief and it is therefore forfeited. *United States v. Bowen,* 818 F.3d 179, 192 (5th Cir. 2016), cert. denied, 136 S. Ct. 2477 (2016).

claims that the TPD failed to train Officer Cook as a K9 handler.[14]

Plaintiffs also claim that Defendants' fluid and inconsistent policies and procedures caused Officer Cook to violate Shumpert's constitutional rights. In particular, Plaintiffs aver that Cook was not adequately trained to (1) set up a perimeter or call for backup in a barricade situation, (2) negotiate before using force, or (3) obtain a supervisor's approval before engaging a K9. Plaintiffs claim that Officer Cook's lack of training was evident based on the fact that he used a K9 to pursue Shumpert in the first place, as K9s are only supposed to be used when pursuing violent or serious offenders.

Defendants respond that TPD policies did not require Officer Cook to establish a perimeter in this case and that he had discretion whether to call for backup. Defendants further explain that Officer Cook did not violate TPD policy in engaging the K9, because TPD policy requires supervisor notification only after an officer uses an impact weapon. Defendants also contend that Officer Cook did not violate department policy by using the K9 when searching for Shumpert because Officer Cook was responding to an all-points bulletin rather than to a specific K9 request.

Again, Plaintiffs have failed to demonstrate that TPD's policies were the moving force behind the

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[14] *See Sanders-Bums,* 594 F.3d at 381; *Valle,* 613 F.3d at 544; *Pineda,* 291 F.3d at 332.

alleged constitutional violation.[15] "[M]ere proof that the injury could have been prevented if the officer had received better or additional training cannot, without more, support liability."[16] Plaintiffs have failed to present evidence that additional training would have prevented Shumpert's injuries. The undisputed record indicates that TPD policies included detailed training about how to respond to a call for officer assistance and the requirements for officers to announce their presence to a suspect. Officer Cook did not secure the perimeter of the building in accordance with department best practices, but TPD policy explains that "[o]fficers have wide latitude when determining how best to deal with any situation they encounter" and that "[i]f a second officer is unavailable, the first responder must exercise discretion in determining the best course of action." These policies are not unconstitutional, and there is no evidence that the TPD was deliberately indifferent in adopting these procedures.[17] Plaintiffs have not satisfied the requirements for municipal liability under *Monell,* so the district court was correct in granting summary judgment on behalf of the City in regard to Shumpert's Fourth Amendment and § 1983 claims.

2. Foster's Fourth Amendment claims

Plaintiff Foster alleges that the TPD violated his Fourth Amendment rights because (1) Officer

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[15] *See Sanders-Burns,* 594 F.3d at 381; *Valle,* 613 F.3d at 544; *Pineda,* 291 F.3d at 332.

[16] *See Roberts v. City of Shreveport,* 397 F.3d 287, 293 (5th Cir. 2005).

[17] *See Sanders-Burns,* 594 F.3d at 381; *Valle,* 613 F.3d at 544; *Pineda,* 291 F.3d at 332; *Piotrowski,* 237 F.3d at 578.

Senter did not have probable cause to stop the vehicle; (2) TPD officers did not read Foster his *Miranda* rights before his arrest; (3) Foster's handcuffs were too tight; (4) officers did not respond to his complaints that he could not breathe in the back of the police car; and (5) TPD officers subjected Foster to an unreasonable search and seizure. Defendants respond that Foster was pulled over during a valid *Terry* stop, and that after just 45 minutes, the entire scene was turned over to the Mississippi State Police. Defendants contend that Foster's claims that his handcuffs were too tight and that he could not breathe in the car do not demonstrate TPD officers acted with reckless disregard for his safety and well-being. They also contend that Plaintiffs have failed to identify any TPD policy or custom which caused the alleged constitutional violations.

It is true that Plaintiffs have not pointed to an official TPD policy or policymaker that caused the alleged constitutional violations.[18] In fact, Plaintiffs have failed to establish any causal link between the alleged violations and a TPD policy that was unconstitutional or adopted "with deliberate indifference to the known or obvious fact that such constitutional violations would result."[19] Because Plaintiffs failed to provide evidence of "(1) an official [TPD] policy (or custom), of which (2) a policy maker can be charged with actual or constructive knowledge" that caused Foster's alleged constitutional violations, the district court correctly

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[18] *See Piotrowski,* 237 F.3d at 578 (citing *Monell,* 436 U.S. at 694).

[19] *Johnson,* 379 F.3d at 309.

granted Defendants' motion for summary judgment on Foster's Fourth Amendment claims.[20]

B. Qualified Immunity

Plaintiffs also appeal the district court's decision to dismiss their § 1983 excessive force and Fourth Amendment claims against Officer Cook in his personal capacity on qualified immunity grounds. Government officials may invoke qualified immunity to shield themselves "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 ."[21] "Once a defendant asserts the qualified immunity defense, '[t]he plaintiff bears the burden of negating qualified immunity."'[22] "Needless to say,

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[20] *See Pineda,* 291 F.3d at 328. Additionally, to the extent Foster contends that his Fifth Amendment rights were violated because he never received a *Miranda* warning, we note that he has not alleged that his supposed interrogation led to any incriminating statements or that his statements were later used against him. Foster was not charged with any crime, so his claims of a constitutional violation based on *Miranda* are entirely without merit. *See Miranda v. Arizona,* 384 U.S. 436, 478-79 (1966) ("[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized … until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.").

[21] *Pearson v. Callahan,* 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)).

[22] *Hyatt v. Thomas,* 843 F.3d 172, 177 (5th Cir. 2016) (quoting *Brown v. Callahan,* 623 F.3d 249, 253 (5th Cir. 2010)).

unsubstantiated assertions are not competent summary judgment evidence."[23]

In reviewing a motion for summary judgment based on qualified immunity, this court undertakes a two-step analysis.[24] We must decide (1) whether an officer's conduct violated a federal right and (2) whether this right was clearly established.[25] These steps may be considered in either order.[26]

"When a plaintiff alleges excessive force during an investigation or arrest, the federal right at issue is the Fourth Amendment right against unreasonable seizures."[27] We thus must consider Officer Cook's (1) use of K9 force and (2) use of deadly force. The resolution of this case turns primarily on whether these rights were clearly established, so we will begin with that step of the qualified immunity analysis.

To determine whether a right was clearly established, we must evaluate whether Officer Cook's conduct was proscribed by clearly established law at the time of the incident. "To answer that question in the affirmative, we must be able to point to controlling authority—or a robust consensus of

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[23] *Forsyth v. Barr,* 19 F.3d 1527, 1533 (5th Cir. 1994).

[24] *Rivera v. Bonner,* 691 F. App'x 234, 237 (5th Cir. 2017) (unpublished).

[25] *See id.*

[26] *Pearson,* 555 U.S. at 236 ("The judges of the district courts and the courts of appeals should be 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.").

[27] *Tolan v. Cotton,* 134 S. Ct. 1861, 1865 (2014).

persuasive authority—that defines the contours of the right in question with a high degree of particularity."[28] In determining what constitutes clearly established law, this court first looks to Supreme Court precedent and then to our own.[29] If there is no directly controlling authority, this court may rely on decisions from other circuits to the extent that they constitute "a robust 'consensus of cases of persuasive authority.'"[30]

"To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right."[31] Ultimately, the touchstone is "'fair warning': The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.'"[32]

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[28] *Morgan v. Swanson,* 659 F.3d 359, 371–72 (5th Cir. 2011) (en bane) (quotation and citation omitted).

[29] *See id.* at 412.

[30] *al-Kidd,* 131 S. Ct. at 2084 (quoting *Wilson v. Layne,* 526 U.S. 603, 617 (1999)).

[31] *Taylor v. Barkes,* 135 S. Ct. 2042, 2044 (2015) (quoting *Reichle v. Howards,* 132 S. Ct. 2088, 2093 (2012)); *see also Hope v. Pelzer,* 536 U.S. 730, 739 (2002) (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)) (citations omitted) ("For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent.'").

[32] *Kinney v. Weaver,* 367 F.3d 337, 350 (5th Cir. 2004) (en bane) (quoting *Hope,* 536 U.S. at 740).

It is "clearly established that [arrestees] ha[ve] a constitutional right to be free from excessive force during an investigatory stop or arrest."[33] This does not end the inquiry, however, as "[t]he Supreme Court has carefully admonished that we are 'not to define clearly established law at a high level of generality'"[34] To defeat qualified immunity, a plaintiff must demonstrate that "it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted."*[35]

1. K9 force

Plaintiffs have the burden of demonstrating that Officer Cook violated a "clearly established law at the time the challenged conduct occurred."[36] Plaintiffs do not provide any legal authority to demonstrate that Officer Cook violated clearly established law by releasing the K9. Instead, they contend generally that Shumpert had a constitutional right to be free from excessive force.

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[33] *Tarver v. City of Edna,* 410 F.3d 745, 753–54 (5th Cir. 2005).

[34] *Hernandez v. United States,* 785 F.3d 117, 120 (5th Cir. 2015) (en bane) (quoting *al-Kidd,* 563 U.S. at 742).

[35] *Id.* (emphasis added) (quoting *Brosseau v. Haugen,* 543 U.S. 194, 199 (2004)); *see also Brosseau,* 543 U.S. at 198–99 ("[T]here is no doubt that *Graham v. Connor* clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in *Anderson* [*v. Creighton*] 'that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense ....'" (citation omitted) (quoting *Saucier v. Katz,* 533 U .S. 194, 206 (2001))).

[36] *Bush v. Strain,* 513 F.3d 492, 501 (5th Cir. 2008).

This court has previously rejected such general contentions.[37]

Even if Plaintiffs had included case law to support their argument, they would still be unable to demonstrate that Officer Cook's conduct violated clearly established law. At the time of the challenged conduct, neither the United States Supreme Court nor this court had addressed what constitutes reasonable use of K9 force during an arrest.[38] After

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[37] *See Cass v. City of Abilene,* 814 F.3d 721, 732 (5th Cir. 2016) ("Appellants ' entire argument on this second prong of the qualified immunity test is that 'it is clearly established in the law that citizens are protected against unjustified, excessive police force.' This general statement is insufficient to meet Appellants' burden."); *see also al-Kidd,* 563 U.S. at 742 ("We have repeatedly told courts …not to define clearly established law at a high level of generality. The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established.") (citations omitted).

[38] Other courts had found the use of K9 force justified in similar circumstances. *See Crenshaw v. Lister,* 556 F.3d 1283, 1292 (11th Cir. 2009) (holding use of K9 force during arrest—including 31 dog bites—was reasonable because arrestee was suspected of committing serious crimes, actively fled from police, and police thought he might be armed); *Miller v. Clark Cty.,* 340 F.3d 959, 965 (9th Cir. 2003) (use of K9 force was justified against suspect who had fled from police and was hiding in woods); *Matthews v. Jones,* 35 F.3d 1046, 1051 (6th Cir. 1994) (use of K9 force was reasonable when suspect fled into the dark woods after a traffic stop, making it easier for suspect to ambush the officers); *Robinette v. Barnes,* 854 F.2d 909, 913 (6th Cir. 1988) (use of deadly K9 force was warranted when suspected felon was hiding inside dark building, had been warned that a dog would be used, and still refused to surrender).

that date, this court decided *Cooper v. Brown,* which addressed the issue.[39]

In *Cooper,* the police initiated a traffic stop based on a suspected DUI.[40] The suspect stopped, but then ran from the police and into a residential neighborhood.[41] The officer who initiated the stop notified officers in the area about the fleeing suspect.[42] Officer Brown, along with his police K9, responded, and the K9 located the suspect and bit him on the leg.[43] The dog continued to bite Cooper for one to two minutes.[44] Cooper did not attempt to flee, did not strike the dog, and Officer Brown could see Cooper's hands and "appreciate[d] that he had no weapon."[45] Despite these facts, Officer Brown did not order the K9 to release the bite until he had finished handcuffing Cooper.[46] Cooper filed a § 1983 claim against Officer Brown in his individual capacity, and Officer Brown moved for summary judgment on the basis of qualified immunity.[47]

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[39] *See Cooper v. Brown,* 844 F.3d 517 (5th Cir. 2016). Because *Cooper* had not been decided at the time of the conduct at issue, it cannot define clearly established law for this case. Nonetheless, a discussion of *Cooper* is helpful in fully explaining the issues in this case, so we include it in our analysis.

[40] *Id.* at 521.

[41] *Id.*

[42] *Id.*

[43] *Id.* Importantly, the initial bite was not at issue in *Cooper,* as the record indicated that Officer Brown did not give a bite command. Instead, the excessive force claim was based on the duration of the dog bite and the officer's failure to intervene.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

The court determined that Officer Brown's use of K9 force was clearly excessive and unreasonable given the facts and circumstances of that case, so he was not entitled to qualified immunity.[48] The court explained that "[n]o reasonable officer could conclude that Cooper posed an immediate threat to Brown or others."[49] There was no indication he was, or would be, violent. Officer Brown knew that Cooper did not have a weapon. Once Officer Brown found him, Cooper did not resist arrest or further attempt to flee. Rather, he complied with Officer Brown's instructions. Officer Brown, however, did not stop the use of K9 force. Because Officer Brown did not attempt to negotiate and "subjected Cooper to a lengthy dog attack that inflicted serious injuries, even though he had no reason to believe that Cooper posed a threat," the court held that the use of force was clearly excessive and unreasonable.[50] Thus, under *Cooper,* the law is now clearly established that when "[n]o reasonable officer could conclude that [a suspect] pose[s] an immediate threat to [law enforcement officers] or others," it is unreasonable to use K9 force to subdue a suspect who is complying with officer instructions.[51]

Even if *Cooper* were applicable, Officer Cook's conduct would not violate clearly established law. We emphasized in *Cooper* that "[o]ur caselaw makes certain that once an arrestee stops resisting, the degree of force an officer can employ is reduced."[52] Because the officer in *Cooper* continued to use force

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[48] *Id.* at 522.
[49] *Id.*
[50] *Id.* at 523.
[51] *Id.*
[52] *Id.* at 524.

and even increased its use while the threat to officers decreased, he violated clearly established law. By contrast, Officer Cook did not use or increase the use of force after Shumpert was subdued; instead, Shumpert ignored Officer Cook's instructions and retreated further under the home, preventing Officer Cook from determining whether he was armed. While caselaw establishes that it is unreasonable to use force after a suspect is subdued or demonstrates compliance[53] this court has repeatedly held that the "measured and ascending" use of force is not excessive when a suspect is resisting arrest—provided the officer ceases the use of force once the suspect is subdued.[54] Because it is undisputed that Shumpert was violently resisting arrest and that Officer Cook did not know whether he was armed, Plaintiffs have not met their burden of demonstrating that—under the discrete facts of this case—Officer Cook's use of K9 force was objectively unreasonable in light of clearly established law.[55] The district court properly determined that Officer Cook was entitled to qualified immunity on this claim.

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[53] *Ramirez v. Martinez,* 716 F.3d 369, 378 (5th Cir. 2013); *Bush,* 513 F.3d at 501–02.

[54] *See Bailey v. Preston,* 702 F. App'x 210, 211 (5th Cir. 2017) (unpublished); *Poole v. City of Shreveport,* 691 F.3d 624, 629 (5th Cir. 2012) (holding use of force was not unreasonable when officers "responded with 'measured and ascending' actions that corresponded to [the suspect's] escalating verbal and physical resistance"); *Galvan v. City of San Antonio,* 435 F. App'x. 309, 311 (5th Cir. 2010) (unpublished) (explaining that the use of force was reasonable when it involved "measured and ascending responses" to a plaintiffs noncompliance).

[55] *See* cases cited, note 38.

2. Deadly force

We must next determine whether Officer Cook's use of deadly force violated clearly established law. United States Supreme Court and Fifth Circuit precedent is clear that an officer may use deadly force when a suspect poses a threat of serious harm either to the officer or to other individuals.[56] Whether Shumpert posed a threat of serious harm is based on the facts and circumstances of this particular case. We review the facts in the light most favorable to Shumpert, "but only when … both parties have submitted evidence of contradictory facts."[57] Officer Cook testified that Shumpert ran from under the crawl space, tackled him, and repeatedly struck him in the head. According to Officer Cook's testimony, he tried to fight Shumpert until he (Officer Cook) felt he might lose consciousness. At that point, he fired four shots at Shumpert.

Plaintiffs allege that at least one shot was fired from some distance, discrediting Officer Cook's testimony. Plaintiffs also contend that Dr. Mitchell, their forensic expert, noted that one of Shumpert's

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[56] *Tennessee v. Garner,* 471 U.S. 1, 11 (1985) ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."); *Mace. v. City of Palestine,* 333 F.3d 621, 624 (5th Cir. 2003) ("Use of deadly force is not unreasonable when an officer would have reason to believe that the suspect poses a threat of serious harm to the officer or others.").

[57] *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc).

gun shot wounds was caused from a short distance.[58] These facts, however, do not conflict with Officer Cook's testimony regarding the incident. The only two individuals to witness the shooting were Officer Cook and Shumpert, who is now tragically prevented from providing his version of the encounter. Nevertheless, Plaintiffs still have the burden of adducing evidence that contradicts Officer Cook's description of the shooting.[59] They have failed to meet this burden. A reasonable officer could have believed that Shumpert "posed a threat of serious harm," so Officer Cook's use of deadly force under these circumstances did not violate clearly established law.[60] He is therefore entitled to qualified

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[58] Even if Officer Cook fired one of the four shots from a distance, the use of deadly force was still justified, as an officer using deadly force "need not stop shooting until the threat has ended." *Plumhoff v. Rickard,* 134 S. Ct. 2012, 2022 (2014). Other officers who were in the area, as well as Charles Foster, testified that they heard four shots fired in rapid succession, indicating all the shots were fired before the threat ended.

[59] "At the summary judgment stage, we require evidence—not absolute proof, but not mere allegations either." *Ontiveros v. City of Rosenberg,* 564 F.3d 379, 383 (5th Cir. 2009) (quoting *Reese v. Anderson,* 926 F.2d 494, 499 (5th Cir. 1991)).

[60] In their reply brief and at oral argument, Plaintiffs argued that Officer Cook is not entitled to qualified immunity because he created the situation which led to Shumpert's injuries. *Johnson v. Dallas Indep. Sch. Dist.,* 38 F.3d 198, 200 (5th Cir. 1994) ("When state actors knowingly place a person in danger" the state is "accountable for the foreseeable injuries that result from their conduct[.]"). Plaintiffs assert that "state actors may be held liable if they created the plaintiff['s] peril" or "increased the risk of harm." *Piotrowski v. City of Houston,* 51 F.3d 512, 515 (5th Cir. 1995)). In response, Officer Cook argues that Plaintiffs are barred from raising a state-created danger theory at this stage in the proceedings, because they did not raise this issue in the district court or their opening brief.

immunity on this claim.[61]

C. Mississippi State Law Claims

Plaintiffs also appeal the district court's decision to dismiss their state law claims against Officer Cook. The Mississippi Tort Claims Act states:

> A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim ... Arising out of any act or omission of an employee of a governmental entity engaged in the performance [of] ... police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not

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Plaintiffs have waived this issue, as they did not sufficiently raise it in their opening brief. *United States v. Scroggins,* 599 F.3d 433, 446 (5th Cir. 2010) ("A party that asserts an argument on appeal, but fails to adequately brief it, is deemed to have waived it.") (quoting *Knatt v. Hosp. Serv. Dist. No. 1,* 327 F. App'x 472, 483 (5th Cir. 2009) (unpublished)). Even if Plaintiffs had preserved this issue, the theory of state-created danger is not clearly established law. *See Chavis v. Borden,* 621 F. App'x 283, 286 (5th Cir. 2015) (unpublished) ("Unlike our sister Circuits, we have repeatedly declined to decide whether [a state-created danger] cause of action is viable in the Fifth Circuit."); *see also Saenz v. City of McAllen,* 396 F. App'x 173, 177 (5th Cir. 2010) (unpublished) (quoting *Walker v. Livingston,* 381 F. App'x 477, 479–80 (5th Cir. 20.10) (unpublished)) ("[T]his court has held that the state created danger theory is 'not clearly established law within this circuit such that a § 1983 claim based on this theory could be sustained[.]'")

[61] *See Hope,* 536 U.S. at 739.

> engaged in criminal activity at the time of injury[.][62]

It is undisputed that at the time of the encounter, Officer Cook was acting in the course and scope of his police duties and that Shumpert was engaged in criminal activity.[63] The plain language of the Mississippi Tort Claims Act absolves officers from liability in these circumstances, so we affirm the district court's dismissal of Plaintiffs' state law claims against Officer Cook.

D. Discovery Sanctions

Plaintiffs also appeal the district court's decisions regarding discovery sanctions. Defendants served Plaintiffs with the first set of interrogatories, requests for production, and requests for admission on November 23, 2016. Plaintiffs denied the requests for admission on December 12, 2016, but did not answer the interrogatories or otherwise respond to the production request. Two months after the discovery responses were due, Defendants wrote to Plaintiffs' counsel and requested the information. When Plaintiffs' counsel failed to respond, Defendants filed a motion to compel. Defendants sought costs and attorney's fees related to the motion.

Shortly after Defendants filed the motion to compel, Plaintiffs responded to the discovery request

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[62] Miss. Code Ann. § 11-46-9.

[63] *See Miss. Dep't of Pub. Safety v. Durn,* 861 So. 2d 990, 997 (Miss. 2003) ("Misdemeanor traffic offenses are criminal activities within the [Mississippi Tort Claims Act].").

and filed an opposition to Defendants' motion to compel. Plaintiffs claimed that they did not intend to be defiant or noncompliant and that their failure to respond did not "thwart the discovery process." Defendants, however, deemed Plaintiffs' discovery responses insufficient, and again wrote to Plaintiffs' counsel requesting additional information. When Plaintiffs' counsel did not respond, Defendants filed a second motion to compel.

The magistrate judge granted both motions to compel[64] and sanctioned Plaintiffs pursuant to Federal Rule of Civil Procedure 37(a)(5)(A). Defendants submitted records of the costs and fees associated with the discovery motions, totaling $3,086.00. Plaintiffs' counsel also filed a motion for sanctions, claiming that Defendants filed the motions to compel before scheduling a conference with the magistrate judge, as required by the case management order.[65] Defendants explained that they had attempted to contact Plaintiffs' counsel before filing the motions, but never received a response. The magistrate judge denied Plaintiffs' motion for sanctions and held that Defendants costs and fees were reasonable. The district court affirmed the magistrate judge's decisions.

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[64] According to the City, the first motion to compel was granted "in its entirety" and "nearly all of the second motion to compel" was granted.

[65] Plaintiffs' counsel filed several other motions seeking either to have the sanctions set aside or impose sanctions on Defendants, all of which were denied by the magistrate judge. Plaintiffs then filed motions to reconsider each of the magistrate judge's orders. These motions were also denied.

1. Standard of Review

This court reviews Rule 37 sanctions for an abuse of discretion.[66] Factual findings under lying the sanctions are reviewed for clear error only.[67] "A district court has broad discretion in all discovery matters, and such discretion will not be disturbed ordinarily unless there are unusual circumstances showing a clear abuse."[68] "[T]he vigor of our review of a district court's sanction award depends on the circumstances of the case."[69] "If the sanctions imposed are *substantial* in amount, type, or effect, appellate review of such awards will be inherently more rigorous; such sanctions must be quantifiable with some precision."[70] This court has previously held that sanctions of even $50,000 are not "on the high end of the scale."[71]

2. Sanctions against Plaintiffs' counsel

Plaintiffs contend that the district court was not *required* to impose sanctions. Plaintiffs' counsel's only justification for his failure to respond to the discovery request was that he was busy with

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[66] *See Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 488 (5th Cir. 2012).

[67] *Positive Software Sols., Inc. v. New Century Mortg. Corp.,* 619 F.3d 458, 460 (5th Cir. 2010).

[68] *Moore v. CITGO Ref. & Chems.* Co., *L.P.,* 735 F.3d 309, 315 (5th Cir. 2013) (quoting *Kelly v. Syria Shell Petroleum Dev. B.V.,* 213 F.3d 841, 855 (5th Cir. 2000)).

[69] *United States v. City of Jackson,* 359 F.3d 727, 732 (5th Cir. 2004).

[70] *Topalian v. Ehrman,* 3 F.3d 931, 936 (5th Cir. 1993) (emphasis added) (quoting *Thomas v. Capital Sec. Servs., Inc.,* 836 F.2d 866, 883 (5th Cir. 1988)).

[71] *City of Jackson,* 359 F.3d at 732–33.

professional and personal obligations. These circumstances do not "substantially justif[y]" Plaintiffs' failure to comply with the discovery deadlines or respond to Defendants.[72] The district court did not abuse its discretion in granting Defendants ' motion for sanctions.[73]

Plaintiffs also contend that the amount of the sanctions was unreasonable. The total sanctions award in this case was $3,086.00, which the district court found represented reasonable costs for filing two motions to compel. The court noted that this case involved "heightened media scrutiny," which necessarily demanded careful research and attention to factual details when drafting the discovery motions. There is no evidence that the district court abused its discretion in awarding $3,086.00 in sanctions.[74]

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[72] FED. R. CIV. PROC. 37(a)(5).

[73] *See* FED. R. CIV. PROC. 37(a); *Smith & Fuller,* 685 F.3d at 488; *City of Jackson,* 359 F.3d at 732. Plaintiffs argue the district court abused its discretion in awarding fees and costs related to Defendants' second motion to compel, as that court did not grant that motion in its entirety. This argument is without merit. Under Rule 37, when a motion to compel is granted in part and denied in part, the district court has discretion to "apportion the reasonable expenses for the motion." The magistrate judge explained that "it would be unconscionable to apportion expenses" because "[o]f the five interrogatories placed in issue, the court denied only a fraction of one interrogatory, rendering the apportionable expenses, if any, too trivial to qualify." This explanation demonstrates that the court did not abuse its discretion in awarding costs and fees in relation to the second motion to compel.

[74] *See Positive Software Sols., Inc.,* 619 F.3d at 460. Furthermore, the low amount of the sanction award in this case does not require particularly rigorous review. *See Topalian,* 3 F.3d at 936.

3. Plaintiffs' motion for sanctions against Defendants

Plaintiffs also contend that the district court abused its discretion in failing to sanction Defendants for violating the case management order. That order states that if a discovery dispute arises, the parties must first communicate among themselves to resolve the dispute. If those communications fail, the parties must conduct a telephone conference with the magistrate judge. "Only if the telephonic conference with the judge is unsuccessful in resolving the issue may the party file a discovery motion."

It is undisputed that Defendants did not conduct a telephone conference with the magistrate judge before filing the motions to compel. But Defendants contend that it was impossible to arrange a telephone conference because Plaintiffs' counsel would not even respond to their written communications. In their view, Plaintiffs' refusal to communicate exempted Defendants from the telephone conference requirement.

In denying Plaintiffs' motion for sanctions, the magistrate judge explained that Federal Rule of Civil Procedure 16(f)(2) states that a party should not be sanctioned for violating a case management order if the noncompliance "was substantially justified or other circumstances make an award of expenses unjust."[75] Because Defendants had twice attempted to communicate with Plaintiffs' counsel but received no response, the magistrate judge determined that

[75] FED. R. CIV. PROC. 16.

"an award of sanctions [against Defendants] would be wholly unjust."[76] These facts do not amount to "unusual circumstances showing a clear abuse."[77] The district court did not abuse its discretion in declining to sanction Defendants.

III. CONCLUSION

We affirm the district court's summary judgment decisions in favor of the City and Officer Cook. We also affirm the district court's decisions to grant Defendants' motion for sanctions and deny Plaintiffs' motion for sanctions.

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[76] The district court also noted that Defendants had previously agreed to an extension of discovery deadlines, at Plaintiffs' request.

[77] *See Moore,* 735 F.3d at 315 (quoting *Kelly,* 213 F.3d at 855).

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI ABERDEEN DIVISION

PEGGY SHUMPERT, individually and as the Administrator of the Estate of Antwun Shumpert, Sr., THE ESTATE OF ANTWUN SHUMPERT, SR., and CHARLES FOSTER — PLAINTIFFS

V. CIVIL ACTION NO. 1:16-CV-120-SA-DAS

CITY OF TUPELO, MISSISSIPPI, MAYOR JASON SHELTON, CHIEF BART AGUIRRE, and OFFICER TYLER COOK — DEFENDANTS

ORDER

For all of the reasons fully explained in a separate memorandum opinion issued this same day, Tyler Cook's Motion for Summary Judgment [190] on all of the Plaintiffs' claims is GRANTED. All of the Plaintiffs' claims against Cook are DISMISSED with prejudice. Because all of the Plaintiffs' claims against the City of Tupelo, as well as their official capacity claims against Shelton, Aguirre, and Cook were previously dismissed by other orders of this Court, there are no remaining claims. All claims are DISMISSED with prejudice, and this CASE is CLOSED.

SO ORDERED, on this the 6th day of November, 2017.

/s/ Sharion Aycock
UNITED STATES DISTRICT JUDGE

Filed November 6, 2017

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MEMORANDUM OPINION

In their Second Amended Complaint [59], the Plaintiffs assert a federal claim for excessive force under 42 U.S.C. § 1983 and the Fourth Amendment to the United States Constitution against Tupelo Police Officer Tyler Cook individually.[1] The Plaintiffs also ask the Court to exercise supplemental jurisdiction over a number of state law claims. Cook filed a Motion for Summary Judgment [190],

[1] In their summary judgment response the Plaintiff's explicitly waive their official capacity and due process/medical care claim against Cook. *See* Response [191]. The Plaintiff's other official capacity claims and claims against the City are the subject of a separate summary judgment motion that the Court will not address here.

Filed November 6, 2017

requesting that the Court dismiss all of the Plaintiffs' claims against him. The Plaintiffs filed a Response [191], and Cook filed a Reply [197] making these issues ripe for review.

Factual and Procedural Background

On the evening of June 18, 2016, the Tupelo Police Department Special Operations Unit was conducting surveillance of the Townhouse Motel due to complaints of drug activity. One of the surveillance team members watched a vehicle enter the motel parking lot without stopping at the office and then exit about three minutes later. Suspecting that the occupants of the vehicle were involved in narcotics activity, the surveilling officer notified the team that the vehicle was now headed north on South Gloster Street.

Another officer, Joseph Senter, was in his unmarked patrol car near that location and started following the suspect vehicle. After observing the vehicle make a right tum without signaling, Senter activated his blue lights and attempted to initiate a traffic stop.[2] Senter radioed that the vehicle was "slow rolling" him and continued to follow. The vehicle went through a three-way stop without stopping and made a left hand turn on Harrison Street. Then, the vehicle stopped and the driver, Antwun "Ronnie" Shumpert, exited the vehicle and ran into a nearby neighborhood. The passenger,

[2] According to Senter, he first noticed that the vehicle's tag light was out. Foster submitted an affidavit averring that the tag light was working and that it was damaged when the vehicle was later lowed from the scene.

Charles Foster, remained with the vehicle. Senter gave chase on foot, identifying Shumpert over the radio as a black male wearing shorts and a maroon jersey with the number five on it.

Officer Cook was in the area, parked his patrol vehicle and set out on foot with his K9, Alec, in an effort to locate Shumpert. Alec led Cook to the rear of a nearby house where Cook observed a hand trying to hold the door to the crawlspace under the house closed from the inside. The area was dark, and the only light illuminating the area was the light attached to Cook's drawn gun. Cook opened the crawlspace door and announced, "Tupelo Police Department, show me your hands, come out from under the house, I have a dog, and he will bite." At this point Shumpert attempted to flee further under the house. Cook gave the bite command to Alec and released him sending him under the house through the crawlspace door. K9 Alec engaged Shumpert, and Shumpert began punching the dog and slamming the dog's head up against the floor joists above. Shumpert fought Alec off, but Alec held on to Shumpert's jersey. Still engaged in a struggle, Alec and Shumpert came out from under the house, and in the process, Shumpert's maroon jersey came off. As he exited the crawlspace, Shumpert charged and tackled Cook with a football style tackle, with Shumpert ending up on top of Cook punching him. Cook attempted to strike back at Shumpert with his fist and gun. Cook started to lose consciousness, and as he did, he shot Shumpert four times in succession, twice in the chest, once in the stomach, and once in the groin.

Several officers were in the area and heard the gunshots. Officers Senter and Adam Merrill were the first to arrive at the scene. Senter handcuffed Shumpert and requested an ambulance. Emergency medical personnel arrived within approximately five minutes, administered aid to Shumpert, and then transported him to the hospital. Cook was also transported to the hospital where he was treated for bruising to his face. Shumpert ultimately died from his wounds.

Standard of Review

Federal Rule of Civil Procedure 56 governs summary judgment. Summary judgment is warranted when the evidence reveals no genuine dispute regarding any material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). The rule "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.* v. *Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

In reviewing the evidence, factual controversies are to be resolved in favor of the non-movant, "but only when ... both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp.,* 37 F. 3d 1069, 1075 (5th Cir. 1994) (en banc) When such contradictory facts exist, the Court may "not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods. Inc.,* 530 U.S. 133, 150, 120 S Ct. 2097, 147 L. Ed. 2d 105 (2000).

The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact" *Celotex,* 477 U.S. at 323, 106 S. Ct. 2548. The nonmoving party must then "go beyond the pleadings" and 'designate 'specific facts showing that there is a genuine issue for trial.'" *Id* at 324, 106 S. Ct. 2548 (citation omitted).

Because Cook asserts that he is entitled to the protection of qualified immunity in this case the Court notes, "A good-faith assertion of qualified immunity alters the usual summary judgment burden of proof, shifting it to the plaintiff to show that the defense is not available" *Orr v. Copeland,* 844 F.3d 484, 490 (5th Cir 2016) (quoting *Cass v. City of Abilene,* 814 F.3d 721, 728 (5th Cir. 2016) (internal quotation marks omitted)).[3] A plaintiff "must rebut the defense by establishing that

[3] The Plaintiff briefly argued that Cook failed to raise the affirmative defense of qualified immunity. The Plaintiffs cite to Local Civil Rule 7(b)(2)(A) which states, "Affirmative defenses must be raised by motion. Although the affirmative defenses may be enumerated in the answer the court will not recognize a motion included within the body of the answers, but only those caused by a separate filling." L. R. CIV. R. 7(b)(2)(A) Although Cook does not specifically mention qualified manually in his motion document [190], he devolves many pages of the accompanying memorandum [187] to the issue. Clearly the Plaintiffs and the Court were on notice that qualified annuity is the primary substantive issue in this case at summary judgment, and both parties fully briefed the issue. The Court finds that Cook substantially complied with the requirements of the Local Rule.

the officer's allegedly wrongful conduct violated clearly established law." *Wolfe v. Meziere,* 566 F. App 'x 353, 354 (5th Cir. 20 14) (citing *Michalik v Hermann,* 422 F.3d 252, 262 (5th Cir. 2005); *Bazan ex rel. Bazan v. Hidalgo Cnty.,* 246 F.3d 481, 489 (5th Cir. 2001)). The Plaintiff "cannot rest on conclusory allegations and assertions but must demonstrate genuine issues of material fact regarding the reasonableness of the officer's conduct." *Id.*

Preliminary Issue Evidence

Titus Smith, a resident of San Antonio, Texas, is Shumpert's brother-in-law. The Plaintiffs produced an affidavit from Smith that they argue creates several material factual disputes. In the affidavit, Smith recounts an anonymous telephone call he received early in the morning on June 19, 2016. According to Smith, the anonymous male caller related a very different version of the events involving Shumpert and Cook. Smith made attempts to identify the caller but was unable to.

The Defendants object to this affidavit arguing that it is hearsay and inadmissible for consideration here under the Federal Rules of Evidence and Federal Rule of Civil Procedure 56(c). Rule 56 states, in relevant part:

> (2) A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. [. . .]

> (4) An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

FED. R. CIV P. 56(c)(2)(4) . The Plaintiffs do not dispute that the affidavit is hearsay, but argue that the affidavit is admissible under the present sense impression and excited utterance exceptions to the hearsay rule. *See* FED. R. EVID. 803(1-2). The relevant text of Rule 803 states:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
>
> (1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
>
> (2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

FED. R. EVID. 803.

Although the affidavit is allegedly based on Smith's personal knowledge of the call he received, there is no indication that the account of the

anonymous caller is based on the caller's personal knowledge. Thus, under the plain language of Rule 803(1) the statement does not fall under the exception because there is no indication that the declarant perceived the events described. In addition, there is no indication that the declarant made the statements close in time to the events.

The basis for the present sense impression exception "relies on the contemporaneousness of the event under consideration and the statement describing that event. Because the two occur almost simultaneously, there is almost no 'likelihood of [a] deliberate or conscious misrepresentation.'" *United States v. Polidore,* 690 F.3d 705,720 (5th Cir. 2012) (citing *Rock v. Huffco Gas & Oil Co.,* 922 F.2d 272, 280 (5th Cir. 1991) (citations omitted)). According to Smith, he received the call early in the morning of June 19, before daybreak. Officer Senter initiated the traffic stop around 9:30pm on the 18th making the length of time between the events and the call, hours even by the most generous accounting.

The lack of evidence of personal knowledge by the anonymous caller similarly undermines the potential admissibility of the statement under the plain language of Rule 803(2). There is simply no indication that the anonymous caller personally observed the events, or that the he remained "under the stress of the excitement that it caused" at the time he called Smith. *See* FED. R. EVID. 803(2). Although the passage of a specific amount of time is not necessarily dispositive under the excited utterance exception, in this instance there is simply no indication that the statement was a product of spontaneity or excitement instead of reflective or

deliberative thought. *See* FED. R. EVID. 803(2) Advisory Committee Notes; *United States v. Hefferon,* 314 F.3d 211, 222 (5th Cir. 2002). *United States v. Jackson,* 204 F.3d 1118, n.46 (5th Cir. 1999). Finally, the Court notes that the statement is also inadmissible under the residual exception of Rule 807 because the statement lacks "equivalent circumstantial guarantees of trustworthiness" which is the "lodestar of the residual hearsay exception analysis." *United States v. El-Mezain,* 664 F.3d 467, 498 (5th Cir.), *as revised* (Dec. 27. 2011) (citing *United States v. Walker,* 410 F. 3d 754, 758 (5th Cir. 2005))

For all of these reasons, the Court finds that the Smith Affidavit lies well outside the boundaries of admissibility, and the Court will not consider the affidavit as part of its summary judgment analysis.

Excessive Force

To bring a § 1983 excessive force claim under the Fourth Amendment, a plaintiff must show that he "suffered (1) an injury that (2) resulted directly and only from the use of force that was excessive to the need and that (3) the force used was objectively unreasonable." *Hamilton v. Kindred,* 845 F.3d 659, 662 (5th Cir. 2017) (citing *Flores v. Palacios,* 381 F.3d 391, 396 (5th Cir. 2004)). Defendant Cook argues that the Plaintiffs cannot establish an excessive force claim, and that he is entitled to the protection of qualified immunity.

Qualified immunity protects government officials from liability for civil damages to the extent that their conduct is objectively reasonable in light of

clearly established law. *Crostley v. Lamar Cty., Texas,* 717 F.3d 410,422-24 (5th Cir. 2013) (citing *Horlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *Kinney v. Weaver,* 367 F.3d 37, 346 (5th Cir. 2004)). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments,' and 'protects all but the plainly incompetent or those who knowingly violate the law.'" *Davidson v. City of Stafford, Texas,* 848 F.3d 384, 391 (5th Cir.), *as revised* (Mar. 31, 2017) *(quoting Messerschmidt v. Millender,* 565 US. 535, 546, 132 S. Ct. 1235, 182 L. Ed. 2d 47 (2012); *Ashcroft v. al- Kidd,* 563 U.S. 731, 743, l31 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)). As noted above, the usual Summary judgment burden of proof is altered in the case of a qualified immunity defense. *Orr,* 844 F.3d at 490.

"A plaintiff can overcome a qualified immunity defense by showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Allen* v· *Cisneros,* 8 l 5 F.3d 239, 244 (5th Cir. 2016) (quoting *al-Kidd,* 563 U.S. at 735, 131 S. Ct. 2074; */Harlow,* 457 U.S. at 818, 102 S. Ct. 2727). In excessive force cases, "the second prong of the analysis is better understood as two separate inquiries: whether the allegedly violated constitutional rights were clearly established at the time of the incident: and, if so, whether the conduct of the defendants was objectively unreasonable in light of that then clearly established law." *Griggs v. Brewer,* 841 F.3d 308, 313 (5th Cir. 2016) (citing *Tarver* v. *City of Edna,* 410 F. 3d 745, 750 (5th Cir. 2005) (citations and quotations omitted).

Indeed, the relevant inquiry is 'whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 312 (citing *Poole v. City of Shreveport,* 691 F.3d 624, 627 (5th Cir. 2012) (quoting *Graham v. Connor,* 490 U.S. 386, 398, !09 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)). The us of force must be evaluated "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" *Id.* Whether a particular use of force was "objectively reasonable" depends on several factors, 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 *Griggs,* 841 F.3d at 312 (citing *Deville v. Marcantel,* 567 F.3d 156, 167 (5th Cir. 2009); *Graham,* 490 U.S. at 396, 109 S. Ct. 1865). "If officers of reasonable competence could disagree as to whether the plaintiff's rights were violated, the officer's qualified immunity remains intact." *Griggs,* 841 F.3d at 313 (citing *Tarwer,* 410 F.3d at 750.

In this case, there were two applications of force: (1) Cook sending the K9 Officer into the crawlspace after Shumpert, and (2) Cook shooting Shumpert.

K9 and Excessive Force

The Plaintiffs' excessive force claim as to Cook's application of force through the K9 Officer fails due to a complete lack of evidence on the first two elements of the claim injury and causation. *See*

Hamilton, 845 F. 3d at 662; *Flores,* 381 F.3d at 396. There is no evidence in the record that Shumpert sustained an injury attributable to the K9, Alec. There are multiple medical records, pathological reports, and expert medical reports in the record, none of which, including the Plaintiffs' own medical expert report, reference any injury related to a dog bite or other injury ascribed to Alec.

Even if the Plaintiffs were able to establish injury and causation, they failed to meet their summary judgment burden on qualified immunity with regard to Cook's deployment of Alec. As noted above, the Plaintiffs have the burden of "establishing that [Cook's] allegedly wrongful conduct violated clearly established Law," and demonstrating "genuine issues of material fact regarding the reasonableness of the [Cook's] conduct." *Wolfe,* 566 F. App'x at 354; *Michalik,* 422 F.3d at 262; *Bazan,* 246 F.3d at 489.

The Plaintiffs rely solely on *Cooper v. Brown,* 844. F.3d 517 (5th Cir. 2016), to establish both prongs of their qualified immunity argument. In *Cooper,* an individual stopped on suspicion of driving under the influence fled the scene and hid in a small wood-fenced area. *ld .* at 52 I . A K9 officer located the suspect, and upon discovery, the K9 bit the suspect on the calf and held on. *See id* The K9 continued to bite and hold the suspect for two minutes until the officer had handcuffed the suspect and bad him in custody . *See id.* The suspect suffered significant injures to his lower leg, enduring years of severe pain, and requiring multiple surgeries. *See id.* It was undisputed that the suspect complied with all of the officer's

commands never resisted, kept both of his hands in view so that the officer was assured that he was unarmed, and did not fight the dog . *See id.*

Applying the factors from *Graham,* the Fifth Circuit found that 'under the, facts in this record, permitting a dog to continue biting a compliant and non-threatening arrestee is objectively unreasonable. *Id.* at 524. The *Cooper* Court went on to find that the officer was not entitled to qualified immunity because the officer had "fair warning" that subjecting a "compliant and non-threatening arrestee" to excessive force, regardless of the instrumentality,[4] was a clearly established constitutional violation. *See id.*

The facts of the instant case are readily distinguishable from *Cooper,* Unlike the suspect in *Cooper,* Shumpert did not comply with Cook's commands, continued to resist and flee, and fought back against the dog. Looking to the factors outlined in *Graham* 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, the Court finds that the first factor, severity of

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[4] The district court found the right "clearly established through the *Hope* exception, reassume that although there was a lack of robust consensus" among appellate courts on these particular facts, the constitutional violation was so "obvious" that at fell within the exception outlined by the Supreme Court in *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) *Cooper v. Brown*, 156 F. Supp. 3d 818 821 (N.D. Miss., 2016) The Fifth Circuit affirmed but did not apply the Hope exception, instead finding the right clearly established though other cases involving applications of excessive force though means other than dog bites, *Cooper*, 344 F. 3d at 524-26.

the crime, weighs in Shumpert's favor. Although the officers initially followed Shumpert on suspicion of drug activity, the stop was initiated for a minor traffic violation.[5] Shumpert did escalate the situation by refusing to stop. The second *Graham* factor weighs in favor of qualified immunity Based on the record, a reasonable officer in Cook's position could have believed Shumpert was an immediate threat. It was unclear whether the crawlspace had another exit or access to the interior of the house, and Shumpert was f1eeing further under the building. Under these Circumstances, it was reasonable for reasonable officer in Cook's position to believe that Shumpert did pose an immediate threat to Cook, other officers in the area, and to the potential occupants of the house. The third and final *Graham* factor weighs heavily in faror of qualified immunity. Contrary to the Plaintiffs' assertions, the situation was not stagnant. Shumpert refused to comply vv ith Cook's commands and continued to actively flee, evade, and then fight the K9 Officer. Under these factors, the Plaintiffs failed to show that Cook's decision to deploy Alec was objectively unreasonable.

In addition, the Court finds the *Cooper* decision inadequate to meet the "clearly established" prong of the qualified immunity inquiry. The *Cooper* Court relied heavily on the fact that the suspect in that case did not attempt to resist or flee in any way noting, "Our caselaw makes curtain that once an arrestee stops resisting, the degree of force an officer

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[5] The Defendants also argue that Shumport committed misdemeanor crimes of Disorderly Conduct Miss Code Ass. §97-35-7. Resisting Lawful Arrest, MISS CODE ASS. §97-9-73, and the felony of Burglary of a Dwelling MISS CODE ASS. §97-17-23 The Plaintiffs do not respond to this argument.

can employ is reduced." *Cooper,* 844 F. 3d at 524. The factual distinctions in this case fail to meet the requisite standard of placing "the statutory or constitutional question *beyond debate." ld.* (citing *Morgan v. Swanson,* 659 F.3d 359, 371-72 (5th Cir. 2011) (en banc) (quoting *al-Kidd,* 563 U.S. at 741, 131 S. Ct. 2074)).

The Plaintiffs also argue that Cook deviated from Tupelo Police Department operating procedures when he chose to deploy Alec, and that this establishes a constitutional violation. The Plaintiffs argue that under Department procedure Cook should not have used Alec to locate Shumpert in the first place because Shumpert was not a violent offender, that Cook should have waited for backup, that Cook should have had supervisor clearance before deploying Alec, and that deploying Alec violated the barricade policy. The essence of the Plaintiffs argument is that Cook violated department policy and that this is a *per se* constitutional violation, or at least evidence of a constitutional violation. The Plaintiffs do not cite a single case in support of this argument, nor have they brought forth any evidence or expert testimony to support their contention that Cook violated specific policies. The Defendants' witnesses, officers, experts and the Departments 30(b)(6) designee uniformly agree that Cook did not violate any applicable policy In any event, this argument by the Plaintiffs is only marginally applicable here.

The correct frame work under which Cook's actions must be judged is not a subjective one viewed in the clear unobstructed retrospection of hindsight and application of Department policy. The correct

standard is an objective one. "The use of force must be evaluated "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Griggs,* 84 F.3d at 312 (citing *Poole,* 691 F.3d at 627; *Graham,* 490 U.S. at 398, 109 S. Ct. 1865). "'Qualified immunity' gives government officials breathing room to make reasonable but mistaken Judgments,' and 'protects all but the plainly incompetent or those who *knowingly violate* the law.'" *Devidson,* 848 F.3d at 39l (quoting *Messerschmidt,* 565 U.S. at 546, l32 S. Ct. 1235; *al-Kidd.* 563 U.S. at 743, 131 S. Ct. 2074) (emphasis added).

As to Cook's decision to deploy Alec, the Plaintiffs failed to establish essential elements of their excessive force claim, injury and causation, and failed to carry their burden on both prongs of qualified immunity. *See Hamilton,* 845 F.3d at 662 (citing *Flores,* 381 F.3d at 396); *Allen,* 815 F.3d at 244 (quoting *al-Kidd,* 563 U.S. at 735, 131 S. Ct. 2074; *Harlow,* 457 U.S. at 818, 102 S. Ct. 2727). Because there is no evidence in the record that Shumpert sustained any injury that resulted directly from Cook's decision to deploy Alec, and because the Plaintiffs failed to establish that Cook's decision to deploy Alec was objectively unreasonable in light of clearly established law, Cook is entitled to qualified immunity on this issue. *See Hamilton,* 845 F.3d at 662 (citing *Flores,* 381 F.3d at 396); *Griggs,* 841 F.3d at 313 (citing *Tarver,* 410 F.3d at 750); *Graham,* 490 U.S. at 398, 109 S. Ct. 1865

Deadly Force

Turning to Cook's use of deadly force, the application of the controlling precedent yields a

similar result. As noted above, whether a particular use of force was "objectively reasonable" depends on several factors, 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. *Deville,* 567 F.3d at 167 (quoting *Graham,* 490 U.S. at 396, l 09 S. Ct. 1865).

As Shumpert emerged from the crawlspace and tackled Cook, the two were actively engaged in a fight with both landing blows on the other. Based on the record, Shumpert was on top of him beating him in the face, he struck back at Shumpert with his left hand and his gun, and only started firing when he started to lose consciousness. Under these facts, all three *Graham* factors favor qualified immunity. *See id.*

Moreover, "An officer's use of deadly force is not excessive, and thus no constitutional violation occurs, when the officer reasonably believes that the suspect poses a threat of serious harm to the officer or to others." *Mendez v. Poitevent,* 823 F.3d 326, 331 (5th Cir. 2016) (citing *Manis v. Lawson,* 585 F.3d 839, 843 (5th Cir. 2009)). "This is an objective standard: The question is not whether the officer actually believed that the suspect posed a threat of serious harm but whether a 'competent officer could have believed' as much." *Id.* (citing *City & Cty. of San Francisco v. Sheehan,* U.S., 135 S. Ct. 1765, 191 L. Ed. 2d 856 (2015)); *see also Anderson v. Creighton,* 483 U.S. 635, 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (explaining the objective nature of the inquiry).

Under the facts and circumstances particular to this case, a competent officer could have believed that Shumpert posed a threat of serious harm. The facts of *Mendez* are strikingly similar to those of the instant case. The officer in *Mendez* was engaged in a physical fight with a suspect. After being struck on the temple and starting to lose consciousness, the officer fired two shots killing the suspect. The *Mendez* Court found that use of force objectively reasonable even though the suspect in that case had started to flee the scene and was approximately fifteen feet away when the officer fired. *Id.* at 334. The *Mendez* Court found that a reasonable officer confronted with that situation could have believed that the suspect "posed a threat of serious harm, justifying the use of deadly force." *Id.* This Court reaches the same conclusion based on the facts presented in this case. Cook and Shumpert were engaged in a serious physical fight, both landing physical blows on the other. As Cook was starting to lose consciousness, fearing for his own safety, he fired four successive shots, at least three of which it is undisputed were fired when Shumpert was on top of him.

The Plaintiffs rely on *Tolan v. Cotton,–,* U.S. – 134 S. Ct. 1861, 1863, 188 L. Ed. 2d 895 (2014) to support their argument that there are genuine disputes of material fact preventing summary judgment on this issue.[6] In *Tolan,* the Supreme

[6] The Plaintiffs also rely on Department policy that states, 'deadly force may not be used to apprehend an unnamed, non-dangerous suspect, even one suspected of commiting a felony." The Court discussed the mapplicability of the Plaintiffs' policy arguments above I'ven so, the Plaintiffs' bare assertion that this policy is applicable under these facts is unsupported by evidence in the record.

Court reversed the Fifth Circuit's grant of qualified immunity because "the Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.,* 188 L. Ed. 2d 895 (citing *Liberty Lobby,* 477 U.S. at 255, 106 S. Ct. 2505). In that case, a police officer shot an unarmed man (Tolan) on his parent's porch approximately twenty feet away. *Id.* The Fifth Circuit held that "even if [the officer's] conduct did violate the Fourth Amendment, [he] was entitled to qualified immunity because he did not violate a clearly established right. *Id.,* 188 L. Ed. 2d 895 (citing *Tolan v. Cotton,* 713 F.3d 299, 306 (5th Cir. 2013), *cert. granted, judgment vacated.* 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014), and *aff'd in part, vacated in part, remanded,* 573 F. App'x 330 (5th Cir. 2014)). The Supreme Court found that the Fifth Circuit had inappropriately construed facts in the movant's favor. In particular, the Supreme Court found that there was conflicting testimony given by the officer and Tolan, Tolan's mother, Tolan's father, and another officer present at the scene, and that the Fifth Circuit credited the officer's testimony over that of the other witnesses. *Id.* at 1865, 188 L. Ed. 2d 895.

This Court is well aware of its duty to resolve factual controversies "in favor of the Plaintiff when both parties submitted evidence of contradictory facts." *Little,* 37 F.3d at 1075. This does not mean that the Plaintiffs can "rest on conclusory allegations and assertions." Instead, they "must demonstrate genuine issues of material fact regarding the reasonableness of the officer's conduct." *Wolfe,* 566 F. App'x at 354 (citing *Michalik,* 422 F.3d at 262);

Bazan, 246 F.3d at 489. The Court has resolved all factual controversies in the Plaintiffs' favor, when there is evidence of contradictory facts. The facts and testimony in this case are simply not disputed to an extent any where near that presented in *Tolan,* especially with regard to eyewitness testimony.

Instead, the Plaintiffs argue that physical evidence creates a question of fact on a key element of Cook's version of events. In support of this assertion, the Plaintiffs rely on the report of their medical expert that states, "Although it is unclear the body position during the shootings, most likely the shooter is on top of Mr. Shumpert for at least one of the gunshot wounds (Wound D) [to Shumpert's groin area]. This opinion is based upon the steep trajectory and location of the wound track." Setting aside issues of admissibility, certainty, and the lack of scientific basis and methodology in this report, the Plaintiffs' assertion, taken as true is not dispositive here, nor does it raise a genuine dispute of material fact on the ultimate issue of whether Cook's use of force was objectively reasonable. Indeed, the Plaintiffs expert's conclusions are generally consistent with the struggle between Cook and Shumpert. Moreover, it is undisputed, and corroborated by several different witness accounts including that of Foster that Cook fired his shots in quick succession without a delay or lag in between each one. In addition, the Supreme Court has found that, in some cases involving as many as fifteen shots, if the initial firing at a suspect is justified, "the officers need not stop shooting until the threat has ended." *Plumhoff v . Rickard,* U.S.__, 134 S. Ct. 2012, 2022, 188 L. Ed. 2d 1056 (2014).

The Court is mindful of its obligation to not weigh credibility at the summary judgment stage. Although the Plaintiffs do not attack Cook's credibility, his version of events is the only one cited in the record, as the only other witness to these events is deceased. The fact that Cook's version is the only one we have does not *per se* cast doubts on its veracity. *See Ontiveros v. City of Rosenberg. Tex.,* 564 F.3d 379, 383 (5th Cir. 2009). As noted above, the standard by which Cook's actions must be judged is one of objective reasonableness, "in light of the facts and circumstances confronting [the officer], without regard to [the officer's] underlying intent or motivation," and the Plaintiffs "may not defeat summary judgment by merely asserting that the jury might, and legally could, disbelieve the defendant []." *Graham,* 490 U.S. at 396–97, 109 S. Ct. 1865; *Liberty Lobby,* 477 U.S. at 252, 106 S. Ct. 2505.

Even in cases in which the defendant law enforcement officer is the only person offering an account of his actions, the officer's actions, if not controverted by other competing material evidence in the record, may still be found to be reasonable, and that officer's account may suffice to grant qualified immunity. *See Ontiveros,* 564 F.3d at 383; *see also LaFrenier v. Kinirey,* 550 F.3d 166, 169 (1st Cir. 2008) (noting that the plaintiff must put material facts in dispute even where the movant relies on the testimony of an interested witness; "[t]he Fifth Circuit has … refused to allow a nonmovant to defeat summary judgment where, as here, he or she 'points to nothing in the summary judgment record that casts doubt on the veracity of the [witness's] version of the events."). In other words, the Plaintiffs must offer or point to evidence that contradicts or

undermines Cook's account; skepticism is insufficient. *See Ontiveros,* 564 F.3d at 383 (upholding as reasonable police officer's conduct when he was the only witness to the shooting); *see also, Aujla v. Hinds Cty., Mississippi,* 61 F. App'x 917 (5th Cir. 2003) (affirming grant of qualified immunity when plaintiff points to nothing in the summary judgment record that casts doubt on the veracity of the deputies' version of the events.)

When reviewing the reasonableness of an officer's conduct the Court must "allo[w] 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." *Plumhoff,* 134 S. Ct. at 2020, 188 L. Ed. 2d 1056 (citing *Graham,* 490 U.S. at 396–97, 109 S. Ct. 1865). The facts of this case presented exactly these circumstances. The Court finds that Cook's actions were "'objectively reasonable' in light of the facts and circumstances confronting [him]." *Griggs,* 84l F.3d at 312 (citing *Poole,* 691 F.3d at 627 (quoting *Graham,* 490 U.S. at 398, 109 S. Ct. 1865).

In addition, the Court finds that under Supreme Court and Fifth Circuit precedent, it is not a violation of a clearly established Fourth Amendment right for an officer to shoot a suspect when it was reasonable for an officer to believe that a suspect posed a serious and immediate threat. *See Hatcher v. Bement,* 676 F. App'x 238, 244 (5th Cir. 2017) (gathering cases).

The Plaintiffs failed to overcome Cook's qualified immunity defense "by showing (1) that the

official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Allen,* 815 F.3d at 244 (quoting *al-Kidd,* 563 U.S. at 735, 131 S. Ct. 2074; *Harlow,* 457 U.S. at 818, 102 S. Ct. 2727). The Plaintiffs also failed to raise a question of fact as to whether the "allegedly violated constitutional rights were clearly established at the time of the incident; and, if so, whether the conduct of the defendants was objectively unreasonable in light of that then clearly established law." *Griggs,* 841 F.3d at, 313 (citing *Tarver,* 410 F.3d at 750). Because "officers of reasonable competence could disagree as to whether the plaintiff's rights were violated, [Cooks's] qualified immunity remains intact." *Id.*

Although the Court finds above that Cook is entitled to the protection of qualified immunity for the discrete uses of force for both the deployment of Alec, and for his use of deadly force, the Court also finds that viewing these discrete uses of force together in the totality of the circumstances, Cook is entitled to the protection of qualified immunity. The thrust of the Plaintiffs' arguments in this case urge the Court to apply a subjective standard; that given the circumstances presented to Cook on that night in June of 2016, there were other choices Cook could have made, and perhaps more well considered decisions that could have led to a different outcome here, preferably an outcome where Shumpert lived. This argument is not lost on this Court, but it is simply not the legal standard that clear precedent binds this Court to apply. The Court has applied the facts and evidence to the law, and the outcome is clear. Cook's actions, even if they may not be beyond all bounds of criticism and reproach, fall well within

the bounds prescribed by the qualified immunity doctrine. As such, Cook is entitled to its protection.

State Law Claims

Finally, the Plaintiff's assert several state law claims against Cook including civil assault and battery, general negligence, and intentional infliction of emotional distress, and wrongful death Cook asserts exemption from liability under Mississippi Code § 11-46-9(1)(c). The Mississippi Tort Claims Act provides a qualified waiver of sovereign immunity under Mississippi law for certain tortious acts by municipal employees. The Act does not waive sovereign immunity for:

> any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury;

MISS. CODE. ANN. § 11-46-9(1)(c).

Cook argues that he is exempt from liability because Shumpert was actively engaged in criminal activity at the relevant time. The Plaintiffs do not respond to this argument but instead argue that Cook acted with reckless disregard. Under the plain language of the statute, whether Cook acted with reckless disregard is irrelevant because, as the Plaintiffs at least tacitly agree, Shumpert was engaged in criminal activity. *See id.; see also*

Hancock v. City of Greenwood, Miss., 942 F. Supp. 2d 624, 626 (N.D. Miss. 2013) (citing *Chapman v. City of Quitman,* 954 So. 2d 468, 474 (Miss. Ct. App. 2007); *Williams v. City of Cleveland, Miss.,* No. 2: l 0-CV-215-SA, 2012 WL 3614418, at *20 (N.D. Miss. Aug. 21, 2012), *aff'd,* 736 F.3d 684 (5th Cir. 2013) (citing *City of Jackson v. Powell,* 917 So. 2d 59, 69–70 (Miss. 2005)). The application of this Code section is therefore straightforward to these facts and Cook is exempt from liability.

Conclusion

Because the Plaintiffs failed to establish several essential elements of their claims, as fully explained above, and Cook is entitled to the protections of qualified immunity and immunity under the MTCA, Cook's Motion for Summary Judgment [l90] on all of the Plaintiffs' claims is GRANTED. All of the Plaintiffs' claims against Cook are DISMISSED with prejudice. Because all of the Plaintiffs' claims against the City of Tupelo, as well as their official capacity claims against Shelton, Aguirre, and Cook were previously dismissed by other orders of this Court, there are no remaining claims. All claims are DISMISSED with prejudice, and this CASE is CLOSED.

SO ORDERED, on this the 6th day of November, 2017.

/s/ Sharion Aycock
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

PEGGY SHUMPERT, INDIVIDUALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF ANTWUN SHUMPERT, SR., THE ESTATE OF ANTWUN SHUMPRRT, SR., and CHARLES FOSTER	**PLAINTIFFS-APPELLANTS**
v.	**NO. 17-60774**
CITY OF TUPELO, MISSISSIPPI, MAYOR JASON SHELTON, CHIEF BART AGUIRRE, AND OFFICER TYLER COOK	**DEFENDANTS-APPELLEES**

PRINCIPAL BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

On Appeal from the United States District Court
for the Northern District of Mississippi, Aberdeen
Division No. 1:16CV120-SA-DAS
The Honorable Sharion Aycock, Presiding

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related to police protection unless he acts in reckless disregard. "Reckless disregard" exceeds gross negligence and embraces willful and wanton conduct. *Miss. Dep't of Pub. Safety v. Durn,* 861 So.2d 990, 994-95 (Miss.2003) (quoting *City of Jackson v. Lipsey,* 834 So.2d 687, 69l-92 (Miss.2003)). The terms "reckless," "willful," and "wanton" refer to conduct that "is so far from a proper state of mind that it is treated in many respects as if harm was intended." *Maldonado v. Kelly,* 768 So.2d 906, 910 (Miss.2000) (emphasis removed) *(quoting Maye v. Pearl River County,* 758 So.2d 391, 394 (Miss.1999)).

"The usual meaning assigned to ... [these] terms is that the actor has intentionally done an act of unreasonable character in reckless disregard of the risk known to him, or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." *Id.* Such conduct "usually is accompanied by a conscious indifference to consequences, amounting almost to a willingness that harm should follow." *Id.*

In the instant matter, Cook chose to escalate a stagnant situation by disregarding policy and engaging with the suspect. Policy required calling for backup and waiting until backup arrived. Policy required securing a perimeter. Policy required a negotiator. K9 policy required calling a supervisor before deployment. Decedent was not suspected of being violent, armed, or engaged in a felony. However, Cook consciously and recklessly disregarded all of this training

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

PEGGY SHUMPERT, Individually and as Administrator of the Estate of Antwun Shumpert, Sr., and on behalf of the heirs and wrongful death Beneficiaries of Antwun "Ronnie" Shumpert, Sr., Deceased; CHARLES FOSTER; THE ESTATE OF ANTWUN SHUMPERT, SR.	**PLAINTIFFS-APPELLANTS**
v.	**NO. 17-60774**
CITY OF TUPELO, MISSISSIPPI; OFFICER TYLER COOK, in his individual and official capacities	**DEFENDANTS-APPELLEES**

REPLY BRIEF OF APPELLANTS TO OFFICER TYLER COOK

On Appeal from the United States District Court
for the Northern District of Mississippi, Aberdeen
Division No. 1:16CV120-SA-DAS
The Honorable Sharion Aycock, Presiding

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II. Officer Tyler Cook was not entitled to summary judgment, as genuine issues of material fact exist.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c).* In this context, a fact is "material" if its resolution could affect the outcome of the action. *Burrell v. Dr. Pepper/Seven UP Bottling Grp., Inc.,* 482 F.3d 408, 411 (5th Cir. 2007). A "genuine" issue is present "only if a reasonable jury could return a verdict for the non-movant. *Fordoche, Inc. v. Texaco, Inc.,* 463 F.3d 388, 392 (5th Cir. 2006).

On summary judgment, a court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non- movant's favor. In accordance with the foregoing, the lower court's ruling in favor of Cook's *Motion for Summary Judgment* should be reversed and remanded.

A. Officer Tyler Cook created the danger that led to the death of Antwun Shumpert.

"When state actors knowingly place a person in danger, the due process clause of the

constitution has been held to render them accountable for the foreseeable injuries that result from their conduct, whether or not the victim was in formal state custody." *Johnson v. Dallas Indep. Sch. District,* 38 F.3d 198, 200 (5th Cir. 1994).

Moreover, "state actors may be held liable if they created the plaintiff['s] peril, increased the risk of harm, or acted to render them more vulnerable to danger." *Id.* In order for a plaintiff to prove that an officer created a danger, the plaintiff must evidence that the officer increased the danger to plaintiff and that the officer acted with "deliberate indifference". *Piotrowski v. City of Houston,* 51 F.3d 512, 515 (5th Cir. 1995).

In this matter, Officer Tyler Cook ("Cook") observed a house in the nearby neighborhood with a conventional crawl space underneath and noticed a hand trying to hold the door shut. Cook opened the door and found Decedent hiding under the house. Cook alleges that Decedent attempted to flee further under the house, so Cook commanded the K9 to follow Decedent and bite. The K9 bit Decedent and Decedent exited from under the house. Thereafter, Cook shot Decedent multiple times. Cook alleges that Decedent was on top of Cook beating him unconscious and the same caused Cook to fear for his life and shoot Decedent multiple times. However, Dr. Mitchell testified that Cook was on top of Decedent for at least one of the gunshot wounds due to the steep trajectory and location of the wound track.

As illustrated, Cook affirmatively placed Decedent in a position of danger stripping him of

his ability to defend himself. Without provocation or violence from Decedent, Cook demanded his K9 to attack Decedent, creating a danger and peril. Thereafter, without Decedent showing a weapon, Cook shot Decedent to death. Please note that on the night of the subject incident, Decedent was not suspected of committing a crime of violence; Decedent was never ticketed for any violations from the subject incident; Cook was not aware of a warrant for Decedent's arrest; Cook admitted that the only crime Decedent was suspected of was slow rolling a traffic stop; Cook did not suspect Decedent of committing a violent felony when he first encountered Decedent under the house; and Cook was unaware of anyone being in the house who could be in danger.

Cook did not engage in *any* negotiations with Decedent before sending in the K9 with the "bite" command. Cook did not feel that his life was in danger when he approached the crawl space, yet Cook still commanded the K9 to attack Decedent. While the K9 was attacking Decedent, Cook never gave the release command, and instead grabbed the dog off of Decedent *after* Cook shot Decedent. As Cook created the danger, acted with deliberate indifference to the plight of Decedent, and there are genuine issues of the material fact regarding the same, summary judgment is improper. Thus, the holding of the lower court should be reversed and remanded.

B. Officer Tyler Cook acted with reckless disregard to the rights of Antwun Shumpert.

Miss Code Annotated Section 11-46-9(1)(c) provides governmental immunity for police officers acting within the course and scope of his employment