App. 1

United States Court of Appeals
for the Fifth Circuit

No. 19-60677

AMANDA KAY RENFROE, INDIVIDUALLY, AS THE WIDOW OF MICHAEL WAYNE RENFROE, DECEASED; AND AS THE NATURAL MOTHER AND ADULT NEXT FRIEND OF S.W.R., HER MINOR CHILD, WHO ARE THE SOLE HEIRS AND WRONGFUL DEATH BENEFICIARIES OF MICHAEL WAYNE RENFROE, DECEASED,

Plaintiff—Appellant,

versus

ROBERT DENVER PARKER; RANDALL TUCKER,

Defendants—Appellees,

THE ESTATE OF MICHAEL WAYNE RENFROE, AND AMANDA KAY REFROE, IN HER OFFICIAL CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF MICHAEL WAYNE RENFROE,

Plaintiff—Appellant,

versus

ROBERT DENVER PARKER, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; SHERIFF RANDALL TUCKER, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:18-CV-609
USDC No. 3:19-CV-396

(Filed Sep. 10, 2020)

Before KING, GRAVES, and OLDHAM, *Circuit Judges.*
JAMES E. GRAVES, *Circuit Judge*:

This qualified immunity case arises from the death of Michael Renfroe, who was shot to death by Madison County Sheriff's Deputy Robert Parker. Constrained by precedent and the failure of Mr. Renfroe's estate to offer any competent summary judgment evidence to contradict Deputy Parker's testimony, which is supported by video footage, we affirm the district court's grant of summary judgment in favor of all defendants.

I. BACKGROUND

On the evening of June 8, 2018, the Madison County Sheriff's Department ("MCSD") received a 911 call from an individual named Willard McDaniel, who reported an attempted burglary. Mr. McDaniel provided a description of the vehicle the suspects were driving to the 911 dispatcher, who then radioed all on-duty MCSD deputies. Deputy Parker responded to the call. The deputy, who was in his MCSD uniform and driving a marked MCSD vehicle, drove to Old Natchez

Trace Road, where the events detailed below took place. His dash camera, which was engaged, shows some of the encounter, but not the fatal shooting.

Mr. Renfroe's wife Amanda witnessed the shooting. But she was not deposed, and she did not submit a sworn declaration or affidavit to the district court. Because she provided no competent summary judgment evidence, only the dash camera footage and Deputy Parker's testimony are available for our consideration.

A. Video Footage

The dash camera footage shows Deputy Parker parking some distance behind the Renfroes' truck and the driver-side door of the Renfroes' truck opening. Mr. Renfroe exits through that door and begins walking across the road and toward the police car, raising his arms slightly at his sides. Then, apparently without prompting from Deputy Parker, Mr. Renfroe kneels face-down on the ground. The passenger door of the truck opens, and Mrs. Renfroe begins walking toward her husband. Mr. Renfroe then gets up and begins running toward the police vehicle and, presumably, Deputy Parker, who by then was outside the vehicle. Deputy Parker tases Mr. Renfroe, who keeps running and appears to rip the taser darts off his chest. Mr. Renfroe then runs out of view of the dash cam. The video then reflects a collision, with someone grunting off-camera and the police vehicle swaying slightly. As Mrs. Renfroe runs toward the police vehicle, four

gunshots can be heard in quick succession. Deputy Parker then radios to say "shots fired."

B. Deputy Parker's Testimony

According to Deputy Parker, who submitted a sworn declaration to the district court, Mr. Renfroe yelled "now, M . . F . . . , let's do this" as he ran toward the deputy. The video footage does not capture this alleged statement. However, the microphone for the dash camera is inside the police vehicle, and all voices outside the vehicle are muffled.

Deputy Parker also alleges that, after Mr. Renfroe ran out of view of the dash cam, he began to assault Deputy Parker. Deputy Parker testified that he tried to protect himself from Mr. Renfroe, but that Mr. Renfroe continued the assault by "placing his hands around [Deputy Parker's] throat" and "hitting [Deputy Parker] on the side of the head." Deputy Parker avers that he attempted to move down the side of his vehicle, but realized that he could not escape Mr. Renfroe's attack. He then fired four shots toward Mr. Renfroe's upper torso.

Following Mr. Renfroe's death, Mrs. Renfroe brought a Section 1983 claim for excessive force as well as several state-law claims. She named as defendants Deputy Parker, Sheriff Randall Tucker, and "John Does 1-100." After the parties engaged in a brief period of immunity-related discovery, Deputy Parker and Sheriff Tucker (collectively, "Defendant-Appellees") moved for summary judgment on the claims brought against them in their individual capacities. The court granted

that motion, finding that Mrs. Renfroe had "fail[ed] to create a material factual dispute," that there had been no constitutional violation, and that "even assuming a constitutional violation, [Mrs.] Renfroe ha[d] not identified a sufficiently relevant case that would have put [Deputy] Parker on notice that his actions violated [Mr. Renfroe's] rights."

In their summary judgment motion, Defendant-Appellees asked the district court to *sua sponte* address Mrs. Renfroe's claims against them in their official capacities. The district court rightly declined to do so, but—consistent with the mandates of Federal Rule of Procedure 56(f)—notified Mrs. Renfroe that it would consider Defendant-Appellees' summary judgment arguments on those claims. It gave Mrs. Renfroe fourteen days "to show cause why the official-capacity claims . . . should not be dismissed." Mrs. Renfroe responded by conceding those claims, and the district court granted summary judgment on them as well. The district court further declined to exercise supplemental jurisdiction over the state-law claims, dismissing them without prejudice. Mrs. Renfroe appealed.

II. DISCUSSION

On appeal, Mrs. Renfroe argues that (1) the qualified immunity doctrine violates the separation of powers and is therefore unconstitutional and void; (2) the district court erred in excluding her expert report; (3) the district court erred in granting summary judgment to Defendant-Appellees on her Section 1983

claims; and (4) the district court should have allowed discovery on the official-capacity claims. Each argument fails.

A. The Separation of Powers

According to Mrs. Renfroe, "[q]ualified immunity is judge-made law that was created in the judicial branch," despite the fact that," [u]nder the separation of powers, only the legislative branch makes law." Both the Supreme Court and this circuit, however, have consistently recognized the doctrine of qualified immunity for over 50 years. *See Pierson v. Ray*, 386 U.S. 547, 557 (1967). While qualified immunity has its critics, this panel is bound by previous decisions of the Fifth Circuit and the Supreme Court. Until and unless the Supreme Court or Congress alters the status of the doctrine, Mrs. Renfroe' s argument must fail.

B. The Expert Report

In her response to Defendant-Appellees' summary judgment motion, Mrs. Renfroe submitted an expert report by Capitol Special Police Chief Roy Taylor. The district court found that it could not consider the report because it addressed an issue of law and did not "create an issue of fact as to what occurred on the night of the shooting." On appeal, Mrs. Renfroe challenges the district court's exclusion of the report. That challenge is unavailing.

Experts cannot "render conclusions of law" or provide opinions on legal issues. *Goodman v. Harris Cnty.*, 571 F.3d 388, 399 (5th Cir. 2009). "Reasonableness under the Fourth Amendment or Due Process Clause is a legal conclusion." *United States v. Williams*, 343 F.3d 423, 435 (5th Cir. 2003) (citation omitted). It is therefore error to allow expert testimony on whether an officer used unreasonable force. *See id.*

In his report, Mr. Taylor primarily recited the facts of the incident and briefly commented on the MCSD's use-of-force policy. He concluded by stating:

> It is my opinion [that] Deputy Parker's use of deadly force . . . was unnecessary and objectively unreasonable and resulted in his death. Deputy Parker's decision to shoot violated well-established law enforcement use of force training and standards and was a greater level of force than any other reasonable officer would have used under the same or similar circumstances in 2018.

"Material that is inadmissible will not be considered on a motion for summary judgment because it would not establish a genuine issue of material fact if offered at trial[.]" *Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990) (quotation marks and citation omitted). Mrs. Renfroe does not challenge the applicability of that rule to this issue. Instead, she emphasizes that Defendant-Appellees did not object to the expert report or move to strike it from the record. But that contention is incorrect: Deputy Parker objected to the

expert report in his reply to Mrs. Renfroe' s summary judgment response.

We therefore affirm the district court's exclusion of the expert report.

C. Summary Judgment

Mrs. Renfroe advances many claims on appeal, several of which can be viewed collectively as a challenge to the district court's grant of summary judgment in favor of Defendant-Appellees. Given her failure to offer competent summary judgment evidence, we find these arguments without merit.

This court reviews a grant of summary judgment de novo, applying the same standard as the district court. *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 328 (5th Cir. 2017); *Miss. River Basin All. v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Austin*, 864 F.3d at 328 (internal quotation marks and citation omitted). All facts and reasonable inferences are construed in favor of the nonmovant, and the court should not weigh evidence or make credibility findings. *Deville v. Marcantel*, 567 F.3d 156, 163-64 (5th Cir. 2009). The resolution of a genuine issue of material fact "is the exclusive province of the trier of fact and may not be

decided at the summary judgment stage." *Ramirez v. Landry's Seafood Inn & Oyster Bar*, 280 F.3d 576, 578 n.3 (5th Cir. 2002).

"A qualified immunity defense alters the usual summary judgment burden of proof." *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). Once an officer invokes the defense, the plaintiff must rebut it by establishing (1) that the officer violated a federal statutory or constitutional right and (2) that the unlawfulness of the conduct was "clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)); *see Gates v. Tex. Dep't of Protective & Regul. Servs.*, 537 F.3d 404, 419 (5th Cir. 2008). "[A]11 inferences are drawn in [the plaintiff's] favor." *Brown*, 623 F.3d at 253. But "a plaintiff's version of the facts should not be accepted for purposes of qualified immunity when it is 'blatantly contradicted' and 'utterly discredited' by video recordings." *Hanks v. Rogers*, 853 F.3d 738, 744 (5th Cir. 2017) (citation omitted); *see also Scott v. Harris*, 550 U.S. 372, 380-81 (2007).

On appeal, Mrs. Renfroe states broadly that "[t]here are genuine issues of material fact about the reasonableness of Deputy Parker's use of deadly force against Michael Renfroe"; that because Mr. Renfroe was "unarmed, shoeless, and clad only in pajama bottoms," he "could not objectively have put Defendant Parker in fear of an immediate substantial risk of death or serious bodily injury"; and that the district court erroneously "resolved conflicting facts in favor of Defendant Parker."

The district court cannot be said to have resolved conflicting facts in favor of Deputy Parker, however, because Mrs. Renfroe did not offer any competent evidence of her own alleged facts. Despite being present, Mrs. Renfroe did not submit an affidavit describing what she saw as the shooting unfolded. And the allegations in her complaint are insufficient. *See Nat'l Ass'n of Gov't Emps. v. City Pub. Serv. Bd. of San Antonio, Tex.*, 40 F.3d 698, 713 (5th Cir. 1994) ("Conclusory allegations unsupported by specific facts . . . will not prevent an award of summary judgment; the plaintiff [can]not rest on his allegations . . . to get to a jury without any significant probative evidence tending to support the complaint.") (quotation marks and citation omitted). Instead, "Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quotation marks omitted).

The evidence properly before the district court shows that Deputy Parker was responding to a call from dispatch reporting that a truck similar to the Renfroes' was present during an attempted burglary. Mr. Renfroe ran toward Deputy Parker, unaffected by the deputy's use of a taser. According to the unrebutted testimony of Deputy Parker, Mr. Renfroe began assaulting him as soon as he disappeared from the dash camera. And that unrebutted testimony is supported

by video, which shows the body of the police vehicle jostling and shaking.

Mrs. Renfroe emphasizes that Mr. Renfroe was not armed at the time of the shooting and that Deputy Parker did not warn him before using lethal force. But this court has previously found that an individual need not be armed for a law enforcement officer to believe that he is in danger of serious physical harm. *See, e.g.*, *Colston v. Barnhart*, 130 F.3d 96, 99-100 (5th Cir. 1997). And as this court recognized in *Colston*, an officer's duty to warn a suspect before using deadly force depends on whether that officer has time to do so. *Id. at* 100. The video footage reflects that, given Mr. Renfroe' s swift approach, it was not feasible for Deputy Parker to issue a warning.

Mrs. Renfroe seeks to rely on *Flores v. City of Palacios*, 381 F.3d 391 (5th Cir. 2004). But *Flores* can be easily distinguished, as that case involved an officer who shot at a suspect's fleeing car to prevent escape. *Flores*, 381 F.3d at 393. There, the officer shot at a sixteen-year-old who was driving away in her car. *Id.* at 394. Here, Deputy Parker shot at a man who was actively assaulting him and who had previously been tased with no effect.

Mrs. Renfroe has not demonstrated the existence of a genuine dispute as to material facts bearing on whether Deputy Parker violated a federal right. We

therefore affirm the district court's grant of summary judgment against her.[1]

D. Discovery

After the district court granted Defendant-Appellees summary judgment on the individual-capacity claims based on qualified immunity, it entered a show cause order requiring Mrs. Renfroe to address whether her official-capacity claims could proceed despite the court's finding that there had been no constitutional violation. Instead of responding to that order, Mrs. Renfroe filed a motion seeking a continuance and additional discovery to develop her claims under Federal Rule of Civil Procedure 56(d). That rule provides that" [i]f a [summary judgment] nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . allow time to . . . take discovery." Fed. R. Civ. P. 56(d). The district court found that Mrs. Renfroe had failed to satisfy the requirements of Rule 56(d), denied discovery as to the official-capacity claims, and ruled in favor of Defendant-Appellees as to those claims. Mrs. Renfroe appeals that ruling.

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[1] As noted above, the district court also granted summary judgment in favor of Sheriff Randall Tucker. We agree with that court's analysis of the individual-capacity claims brought against Sheriff Tucker and affirm its grant of summary judgment with respect thereto.

This court reviews a district court's denial of a Rule 56(d) motion for abuse of discretion. *Am. Fam. Life Assurance Co. of Columbus v. Biles*, 714 F.3d 887, 894 (5th Cir. 2013) (citation omitted). Motions made under Rule 56(d) "are broadly favored and should be liberally granted," but a nonmovant "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts." *Id.* (internal quotation marks and citations omitted). "Rather, a request to stay summary judgment under Rule 56([d]) must set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion." *Raby v. Livingston*, 600 F.3d 552, 561 (5th Cir. 2010) (internal quotation marks and citation omitted).

Mrs. Renfroe's motion did not meet even this unexacting standard. It argued only that "[g]iven that the court specifically stayed all discovery that is not related to qualified immunity [an individual capacity claim], the court, as a matter of course, should now allow discovery on the official capacity claims prior to ruling on the defendants' motion for summary judgment." As such, the district court did not abuse its discretion in denying Mrs. Renfroe's motion.

III. CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment in favor of Defendant-Appellees on the claims brought against them in their individual and official capacities is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

AMANDA KAY RENFROE, INDIVIDUALLY AND AS THE NEXT FRIEND OF S.W.R. — PLAINTIFF

V. — CIVIL ACTION NO. 3:18-CV-609-DPJ-LRA

ROBERT DENVER PARKER AND RANDALL TUCKER — DEFENDANTS

ORDER

(Filed Jun. 7, 2019)

Defendants Madison County Sheriff's Deputy Robert Denver Parker and Madison County Sheriff Randall Tucker seek summary judgment on Plaintiff Amanda Kay Renfroe's claims against them in their individual capacities. Mot. Summ. J. [17]. Renfroe asks the Court to strike one of Defendants' exhibits in support of their summary-judgment motion and to strike certain relief requested in Defendants' memorandum. Mot. to Strike [32]; Mot. to Strike [38]. For the following reasons, Defendants' motion is granted, and the individual-capacity claims are dismissed. Plaintiff's motion to strike the relief requested is granted, but her motion to strike Defendants' exhibit is considered moot. Finally, Plaintiff will be given 14 days to show cause why the official-capacity claims should not be dismissed.

I. Facts and Procedural History

This case arises from the fatal shooting of Renfroe's husband, Michael Wayne Renfroe, by Defendant Parker on June 8, 2018.[1] That morning, Faye Burns Renfroe, Michael's mother, learned that Michael "was walking down the side of Highway 43 . . . completely naked." Am. Compl. [13] ¶ 11. According to the Amended Complaint, Faye "sought assistance from the Madison County Sheriff's Office . . . in safely and kindly taking Mike . . . into protective custody pending an involuntary commitment proceeding." *Id.* 1114.

Later that evening, the Madison County Sheriff's Department received a 911 call from Willard McDaniel advising "that he suspected two people may have attempted to burglarize his truck." *Id.* ¶ 17. He "described the suspects as occupying a white or grey Ford pick-up truck with a 4-wheeler all terrain vehicle loaded in the back of the bed." *Id.* The dispatcher then alerted all available units that a possible burglary was in progress. Defendant Parker responded to the call and drove to the scene. He knew nothing about Faye's earlier call to the Madison County Sheriff's Department seeking to commit Michael.

What happened next was recorded on the dashcam in Parker's patrol car. Driving down a dark and otherwise deserted street, Parker came upon a white Chevrolet truck parked just off the road. When Parker

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[1] All references to "Renfroe" in this order will be to Plaintiff Amanda Kay Renfroe. Other individuals who share that last name will be referred to by their first names.

stopped his patrol car a reasonable distance from the truck, Michael emerged, shirtless, from its driver's side. He took approximately 18 steps toward Parker with his arms extended out by his side and then—without verbal instructions from Parker—dropped to his hands and knees in the middle of the road. Seconds later, Michael suddenly rose and bull rushed toward Parker yelling, according to Parker, "Now, motherfucker, let's do this." Parker Decl. [17-1] ¶ 13. Parker stands 5'11" and weighs approximately 150 pounds; Michael was 6'2" and weighed 205 pounds.

In response, Parker first attempted non-lethal force by deploying his taser as Michael approached. Though the darts hit his chest, Michael continued charging, and approximately two seconds later, Parker's vehicle was visibly jostled when Michael apparently reached Parker. The rest of the encounter occurred beyond the camera's view, though an audible struggle can be heard in the background. Parker says Michael tried to choke him and struck him on the side of the head while pinning Parker against his vehicle. According to Parker, he realized that he could not escape the assault, so he drew his weapon and fired four gunshots in rapid succession into Michael's center mass.[2]

All of this transpired quickly. The entire encounter—from the time Michael opened the door to his

[2] It is worth noting that Renfroe herself was present at the scene and in a position to observe what transpired, but she submitted no affidavit contradicting Parker's version of the incident.

truck until the fourth gunshot was fired—lasted less than a minute. And only eight seconds elapsed between the time Parker deployed his taser and the final shot.

Renfroe filed this lawsuit against Parker and Sheriff Tucker, in their official and individual capacities, on August 31, 2018. In her Amended Complaint [13] she asserts a § 1983 claim for excessive force as well as state-law tort claims. Defendants moved for summary judgment "as to the individual liability claims asserted against them" on January 31, 2019, and the parties engaged in a brief period of immunity-related discovery. Mot. Summ. J. [17] at 1. Renfroe responded to Defendants' motion and filed two motions to strike, one aimed at an exhibit Defendants submitted and the other at a request for relief contained within Defendants' memorandum. Mot. to Strike [32]; Mot. to Strike [38]. The matters raised in all motions have been fully briefed, and the Court has jurisdiction and is prepared to rule.

II. Standard

Summary judgment is warranted under Federal Rule of Civil Procedure 56(a) when evidence reveals no genuine dispute regarding any material fact and that the moving party is entitled to judgment as a matter of law. 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 (1986).

The party moving for summary judgment "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." *Id.* at 323. 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 (citation omitted). In reviewing the evidence, factual controversies are to be resolved in favor of the nonmovant, "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 (2000). Conclusory allegations, speculation, unsubstantiated assertions, and legalistic arguments have never constituted an adequate substitute for specific facts showing a genuine issue for trial. *TIG Ins. Co. v. Sedgwick James of Wash.*, 276 F.3d 754, 759 (5th Cir. 2002); *Little*, 37 F.3d at 1075; *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993).

III. Analysis

In their motion, Defendants seek summary judgment on Renfroe's claims against them in their individual capacities. But in their memorandum, they urge

the Court to also dismiss the official-capacity claims. Defs.' Mem. [24]. This request for relief drew one of Renfroe's motions to strike. The Court will first address the individual-capacity claims and then consider the arguments regarding the official-capacity claims.

A. Individual-Capacity Claims

1. Excessive-Force § 1983 Claims

a. Sheriff Tucker

In their summary-judgment memorandum, Defendants argued that Tucker—who was not personally involved in the incident with the Renfroes—is entitled to qualified immunity on the excessive-force claim Defs.' Mem. [19] at 17-18. In response, Renfroe said only, "Defendant Randall Tucker is liable for all acts of his deputies, including the federal civil rights claims that the plaintiffs are asserting in this case." Pl.'s Resp. [40] at 12. But "[u]nder section 1983, supervisory officials are not liable for the actions of subordinates on any theory of vicarious liability." *Thompkins v. Belt*, 828 F.2d 298, 303 (5th Cir. 1987). Renfroe has not, therefore, "demonstrate[d] the inapplicability" of Tucker's qualified-immunity defense. *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002). Defendants' motion is granted as to the individual-capacity § 1983 claim against Tucker.

b. Deputy Parker

Parker also relies on qualified immunity as to the excessive-force claim asserted against him in his individual capacity. As the Fifth Circuit has summarized:

> [T]he doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have been believed to be legal. This immunity protects all but the plainly incompetent or those who knowingly violate the law. Accordingly, we do not deny immunity unless existing precedent must have placed the statutory or constitutional question beyond debate. The basic steps of this court's qualified-immunity inquiry are well-known: a plaintiff seeking to defeat qualified immunity must show: (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.

Anderson v. Valdez, 845 F.3d 580, 599-600 (5th Cir. 2016) (citation and quotation marks omitted, punctuation altered).[3]

"If the defendant's conduct did not violate [the] plaintiff's constitutional rights under the first prong, . . . he is entitled to qualified immunity." *Blackwell v.*

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[3] Renfroe argues that the qualified-immunity doctrine "violates the separation of powers," so the Court should not apply it. Pl.'s Mem. [41] at 19. But this Court must follow binding precedent, and the Supreme Court continues to apply qualified immunity. *See Kisela v. Hughes*, 138 S. Ct. 1148 (2018).

Lague, No. 07-30184, 2008 WL 1848119, at *2 (5th Cir. Apr. 24, 2008). If the defendant did violate the plaintiff's constitutional rights, "the court then asks whether qualified immunity is still appropriate because the defendant's actions were 'objectively reasonable' in light of law which was clearly established at the time of the disputed action.'" *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010) (quoting *Collins v. Ainsworth*, 382 F.3d 529, 537 (5th Cir. 2004)). Finally, "[o]nce an official pleads the defense, the burden then shifts to the plaintiff, who must rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established law." *Id.* (noting that qualified-immunity defense alters usual summary-judgment burden of proof); *see McClendon*, 305 F.3d at 323 (noting burden is on plaintiff to "demonstrate the inapplicability of the defense").

To establish her excessive-force claim, Renfroe must prove Michael "(1) suffered some injury which (2) resulted from force that was clearly excessive to the need for force; (3) the excessiveness of which was objectively unreasonable." *Heitschmidt v. City of Hous.*, 161 F.3d 834, 839 (5th Cir. 1998). In the deadly force context, "[a]n 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." *Mattis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009). "The question is one of 'objective reasonableness,' not subjective intent, and an officer's conduct must be

judged in light of the circumstances confronting him, without the benefit of hindsight." *Id.* (quoting *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382 (5th Cir. 2009)). The Court must pay "careful attention to the facts and circumstances" of the case, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Finally, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

Based on this test, Parker did not violate Michael's Fourth Amendment rights. Parker came upon Michael's vehicle—without backup—stopped on the side of a dark road. As far as Parker knew, Michael was suspected of burglarizing a truck on a homeowner's property. And while Michael initially went down on all fours in the middle of the road, he suddenly, and for no apparent reason, jumped up and charged Parker at full speed yelling, "Now, motherfucker, let's do this." After a taser failed to impede the attack, Parker—the considerably smaller man—found himself pinned to his vehicle while Michael choked and hit him. And as noted above, Parker "had mere seconds to assess the potential danger." *Kisela*, 138 S. Ct. at 1153 (reversing denial of qualified immunity). A reasonable officer

under these circumstances would have perceived a threat of death or serious bodily harm, so the use of deadly force was not excessive.

Renfroe disputes this result both factually and legally. Factually, she takes issue with Parker's account, but she fails to create a material factual dispute. First, she disputes the quote Parker attributed to Michael because it was not recorded by the dashcam microphone. Pl.'s Mem. [41] at 15. But the microphone was inside the patrol car, and Michael was not within range when he allegedly made the statement. Moreover, Renfroe cites no record evidence contradicting Parker's account. Indeed there is no record evidence of the incident other than Parker's testimony and the video. Second, she interprets the video as suggesting that Parker first exited his vehicle "seconds before" shooting Michael. Pl.'s Mem. [41] at 10. Even assuming that could help her case, the video supports Parker's explanation. The sound of Parker's door opening is heard approximately 42 seconds into the video, just before Michael got on the ground. In addition, the interior microphone clearly picked up the dispatcher, but Parker's voice is muffled and distant, indicating that he exited the vehicle. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) (holding that district court should have rejected plaintiff's testimony because it conflicted with videotape surveillance footage). Third, Renfroe says post-incident photographs of Parker belie his claim that Michael hit him. While the struggle with Michael may not have left marks on Parker's body, the audio from the dashcam and the jostling of the camera clearly support Parker's

account that he was physically attacked just before he fired the shots. Finally, Renfroe disputes Parker's claim that he fired the gunshots while backing up because the dashcam video establishes that he fired the four shots in rapid succession. Pl.'s Resp. [40] at 5-6. But the fact that the shots were fired in rapid succession does not necessarily conflict with the shooter edging backwards over that short period of time. In sum, Renfroe fails to support her factual arguments with record evidence. But even assuming she is correct, the video still establishes that a reasonable officer would have been in fear of death or serious physical harm.

Legally, Renfroe primarily argues that "deadly force against a suspect can only be used [if] the suspect threatens the officer with a weapon, [] was necessary to prevent escape, and where feasible, some warning has been given." Pl.'s Mem. [41] at 6. Starting with the weapon, it is factually true that Michael was unarmed. But a weapon is not necessary to create the risk of serious physical harm. *See Guerra v. Bellino*, 703 F. App'x 312,317 (5th Cir. 2017) (finding use of deadly force against unarmed suspect was reasonable where suspect "charg[ed] almost directly toward [officer] in the dark from less than a car's length away"). As for the suggestion that deadly force may be used only to prevent escape, Renfroe relies on *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992). *See* Pl.'s Mem. [41] at 6-7. But *Fraire* held that the officer properly used deadly force "to prevent his own death or great bodily harm" even though he was not "trying to hinder [a suspect's] escape." 957 F.2d at 1276. Finally, regarding the

warning issue, there was little time to react, yet Parker did attempt non-lethal force before he was attacked.

Because Renfroe has not established a Fourth Amendment violation, Parker is entitled to qualified immunity on the § 1983 claim against him in his individual capacity. And even assuming a constitutional violation, Renfroe has not identified a sufficiently relevant case that would have put Parker on notice that his actions violated Michael's rights. *See Kisela*, 138 S. Ct. at 1153 (reversing denial of qualified immunity where facts did not fit clearly established law).[4]

2. State-Law Claims

Defendants argued in great detail that Renfroe's state-law claims against them in their individual capacities are likewise ripe for summary judgment. Defs.' Mem. [19] at 19-24. Renfroe ignored those arguments, focusing instead on the § 1983 excessive-force claim Defendants' arguments appear meritorious, and Renfroe has otherwise abandoned the state-law individual-capacity claims. *See Black v. N Panola Sch. Dist.*, 461 F.3d 584,588 n.1 (5th Cir. 2006) ("[Plaintiff's] failure to pursue this claim beyond [the] complaint constituted abandonment."). Summary judgment is warranted as to these claims.

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[4] Renfroe argues that the Court should disregard Defendants' expert's declaration. Pl.'s Mem. [41] at 11-14. The Court has not relied on either of the experts' submissions in ruling on the present motions.

B. Official-Capacity Claims

Defendants did not include the official-capacity claims in their summary-judgment motion. Instead, they asked the Court to "*sua sponte* address [Renfroe's] claims against them in their official capacities" at the conclusion of their memorandum. Defs.' Mem. [19] at 24. This request drew a motion to strike from Renfroe, who correctly noted that, under the Federal Rules of Civil Procedure and the Court's Local Rules, all requests for relief must be made in the form of a motion. *See* Fed. R. Civ. P. 7(b)(1); L.U. Civ. R. 7(b). In response, Defendants argued that under Rule 56, the Court may grant summary judgment in the absence of a motion "so long as proper notice is given to the adverse party." Defs.' Mem. [44] at 1; *see* Fed. R. Civ. P. 56(f) ("Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may: (1) grant summary judgment for a nonmovant; [or] (2) grant the motion on grounds not raised by a party.").

Renfroe is correct that Defendants' request for summary judgment on the official-capacity claims in their memorandum failed to comply with the Court's rules. So the request will be stricken. But, the Court hereby gives Renfroe notice, under Federal Rule of Civil Procedure 56(f), that it will consider Defendants' summary-judgment arguments with respect to the official-capacity claims, especially in light of the Court's conclusion that no constitutional violation occurred. *See Whitley v. Hanna*, 726 F.3d 631, 648 (5th Cir. 2013) ("All of Whitley's inadequate supervision, failure to

train, and policy, practice, or custom claims fail without an underlying constitutional violation.") (citing *Bustos v. Martini Club, Inc.*, 599 F.3d 458, 467 (5th Cir. 2010)). Renfroe shall have fourteen days to show cause why the official-capacity claims (under § 1983 and state law) should not be dismissed. Defendants may file a reply in support of their argument as to the official-capacity claims within seven days of Renfroe's response.

IV. Conclusion

The Court has considered all arguments. Those not addressed would not have changed the outcome. For the foregoing reasons, Defendants' Motion for Summary Judgment [17] is granted, and the individual-capacity claims against Tucker and Parker are dismissed. Plaintiff's Motion to Strike [38] is granted, but Plaintiff will be given 14 days to show cause why Defendants are not entitled to summary judgment on the official-capacity claims. Failure to file a timely response will result in dismissal of those claims without further notice. Finally, insofar as the Court did not consider the subject exhibit, Plaintiff's Motion to Strike [32] is considered moot.

SO ORDERED AND ADJUDGED this the 7th day of June, 2019.

s/ Daniel P. Jordan III
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

AMANDA KAY RENFROE, INDIVIDUALLY AND AS THE NEXT FRIEND OF S.W.R.	PLAINTIFF
V.	CIVIL ACTION NO. 3:18-CV-609-DPJ-LRA
ROBERT DENVER PARKER AND RANDALL TUCKER	DEFENDANTS

CONSOLIDATED WITH

THE ESTATE OF MICHAEL WAYNE RENFROE AND AMANDA KAY RENFROE	PLAINTIFFS
V.	CIVIL ACTION NO. 3:19-CV-396-DPJ-LRA
ROBERT DENVER PARKER AND SHERIFF RANDALL TUCKER	DEFENDANTS

ORDER

(Filed Aug. 13, 2019)

Plaintiff Amanda Kay Renfroe asks the Court to reconsider its decision awarding summary judgment to Defendants Robert Denver Parker and Randall Tucker, in their individual capacities, in this excessive-force case. Mot. [55]. She also asks for a Federal Rule of Civil Procedure 56(d) continuance of the deadline to respond to the Court's show-cause order as to the official-capacity claims. Mot. [52]. For the reasons that follow, the

Rule 56(d) motion is denied, and the motion to alter or amend is granted as to the state-law claims.

I. Facts and Procedural History

The facts are more fully set forth in the Court's June 7, 2019 Order [46]. Renfroe filed the lead case of these consolidated lawsuits against Parker and Tucker, in their individual and official capacities, on August 31, 2018. She alleged excessive-force under 42 U.S.C. § 1983 and also asserted state-law tort claims. On January 31, 2019, Defendants asked for "summary judgment in their favor as to the individual liability claims asserted against them." Mot. [17] at 1; *see also* Mem. [19] at 1 (seeking summary judgment "based on their individual immunity to the plaintiffs' federal and state law claims"). And while not moving for summary judgment on the official-capacity claims, Defendants in their memorandum asked the Court to "*sua sponte* address [Renfroe's] claims against them in their official capacities." Mem. [19] at 24.

On June 7, 2019, the Court granted Defendants' motion as to the individual-capacity claims, but declined Defendants' invitation to award summary judgment on the official-capacity claims. Instead, the Court gave Renfroe notice that it would consider Defendants' arguments and gave her "14 days to show cause why Defendants are not entitled to summary judgment on the official capacity claims." Order [46] at 11; *see* Fed. R. Civ. P. 56(f) ("After giving notice and a reasonable time to respond, the court may: (1) grant summary

judgment for a nonmovant; (2) grant the motion on grounds not raised by a party; or (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.").

In lieu of a response to the show-cause directive, Renfroe filed her Motion for Continuance Pursuant to Rule 56(d) of the Federal Rules of Civil Procedure [52] on June 28, 2019. She thereafter filed her Motion to Alter or Amend Order [55]. Renfroe asks the Court to set aside summary judgment on the individual-capacity claims and permit her to engage in discovery before responding to the official-capacity claims. Defendants responded to both motions, and Renfroe declined the opportunity to file a timely reply in support of either.

II. Analysis

A. Motion to Alter or Amend [55]

Renfroe invokes Federal Rule of Civil Procedure 59(e) in her motion seeking reconsideration of the summary-judgment order. But "Rule 59(e) governs motions to alter or amend a final judgment," and there is no final judgment in this case. *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 336 (5th Cir. 2017). Instead, Renfroe's motion should be considered under Rule 54(b), which "allows parties to seek reconsideration of interlocutory orders and authorizes the district court to 'revise[] at any time' any order or other decision . . . [that] does not end the action.' *Id.* (quoting Fed. R. Civ. P. 54(b)). Under the rule, the Court "is free to reconsider and reverse its decision for any reason it deems sufficient, even in the

absence of new evidence or an intervening change in or clarification of the substantive law." *Lavespere v. Niagra Mach. & Tool Works, Inc.*, 910 F.2d 167, 185 (5th Cir. 1990).

With this standard in mind, the Court addresses the four arguments Renfroe makes in support of her motion: (1) the Court failed to consider her expert's report; (2) the Court made impermissible credibility determinations; (3) Renfroe did not abandon her state-law claims against Defendants in their individual capacities; and (4) the Court did not address her argument challenging the constitutionality of qualified immunity.

1. Expert Opinion

Renfroe says the Court should have considered her expert's opinion when assessing the reasonableness of the force used against her husband. Specifically, she points out that her expert, Roy Taylor, opined that Parker's use of deadly force "was unnecessary and objectively unreasonable" and involved "a greater level of force than any other reasonable officer would have used under the same or similar circumstances in 2018." Taylor Report [55-1] at 8. But as Defendants argued in their response to this motion, "[r]easonableness under the Fourth Amendment or Due Process Clause is a legal conclusion." *United States v. Williams*, 343 F.3d 423, 435 (5th Cir. 2003) (citation omitted). It is therefore error to allow expert testimony on whether an officer used unreasonable force. *Id.* And "[evidence]

that is inadmissible will not be considered on a motion for summary judgment because it would not establish a genuine issue of material fact if offered at trial[.]" *Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990) (citation omitted). Renfroe offered no reply to this argument, and her expert's report does not create an issue of fact as to what occurred on the night of the shooting. Whether Parker's actions that night were reasonable is a question of law, and Taylor's contrary opinion receives no weight.

2. Weighing the Evidence

Renfroe says the Court "wrongly sided with the Defendants and made credibility determinations in favor of the Movants in several areas." Am. Mem. [57] at 6. She then lists five instances where she says the Court impermissibly credited Parker's version of events. Those examples fall within three basic categories, none of which demonstrate that the Court impermissibly "pick[ed] sides" as Renfroe argues. *Id.* at 5.[1]

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[1] The examples Renfroe pointed to were the Court's findings that:

> 1. Finally, Renfroe disputes Parker's claim that he fired the gunshots while backing up because the dash-cam video establishes that he fired the four shots in rapid succession. But the fact that the shots were fired in rapid succession does not necessarily conflict with the shooter edging backwards over that short period of time. In sum, Renfroe fails to support her factual arguments with record evidence. But even assuming she is correct, the video still establishes that a reasonable officer would have been in fear of death . . . or serious

First and foremost, under Rule 56(c)(1), Renfroe was required to present countervailing evidence regarding the events that night, something she could have easily done with her own affidavit. Instead, the Court was left with the dashcam video and Parker's record evidence that was largely consistent with that video. When a party fails to create a record, the Court is free to "consider the fact[s] undisputed for purposes of the motion." *See* Fed. R. Civ. P. 56(e)(2). Indeed the Court pointed this out in the first passage Renfroe cites as proof of impermissible evidence weighing. As the Court stated then, "Renfroe fails to support her factual

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> physical harm. June 7, 2019 *Order* [docket #46, page 8].
>
> 2. She (Amanda Renfroe) interprets the video as suggesting that Parker first exited his vehicle seconds before shooting Michael. . . . Even assuming this could help her case, the video supports Parker's explanation. June 7, 2019 *Order* [docket #46, page 8].
>
> 3. Parker—the considerably smaller man—found himself pinned to his vehicle while Michael choked and hit him. June 7, 2019 *Order* [docket #46, page 7].
>
> 4. A reasonable officer under these circumstances would have perceived a threat of death or serious bodily injury, so the use of deadly force was not excessive. June 7, 2019 *Order* [docket #46, page 7].
>
> 5. Third, Renfroe says post-incident photographs of Parker belie his claim that Michael hit him While the struggle with Michael may not have left marks on Parker's body, the audio from the dashcam and the jostling of the camera clearly support Parker's account that he was physically attacked just before he fired the shots. June 7, 2019 *Order* [docket #46, page 8].

Pl.'s Am. Mem. [57] at 6.

arguments with record evidence." June 7, 2019 Order [46] at 8 (quoted in Pl.'s Am. Mem. [57] at 6).

Renfroe does, however, offer one example of record evidence she thinks the Court ignored. Parker testified that he was backing up between shots, something Renfroe rejects given the rapidity of the rounds. *See* Pl.'s Am. Mem. [57] at 8. Even in a light most favorable to her, the Court concluded that Parker could have been backing up while firing, and there was no other evidence contradicting his account. *See* June 7, 2019 Order [46] at 8. Regardless, the very next sentence of the Order states, "[E]ven assuming she is correct, the video still establishes that a reasonable officer would have been in fear of death or serious physical harm." *Id.* In other words, whether Parker was backing up is immaterial based on what happened before that.

Renfroe also takes issue with the Court's refusal to accept unsupported factual arguments that conflicted with the dashcam video. *See* Pl.'s Am. Mem. [57] at 6 (quoting June 7, 2019 Order [46] at 8). In the Order, the Court placed significant weight on the audio and visual evidence from the dashcam video. *See* June 7, 2019 Order [46] at 8. And it rejected unsupported assertions that conflicted with that evidence. *Id.* (citing *Scott v. Harris*, 550 U.S. 372, 380 (2007) (holding that district court erred by failing to reject plaintiffs sworn testimony because it conflicted with videotape surveillance footage)). Renfroe now says the video failed to capture the actual shots—though they can be heard—and therefore the Court erred in relying upon that evidence. *See* Pl.'s Am. Mem. [57] at 8 (citing *Ramirez v.*

Martinez, 716 F.3d 369, 374 (5th Cir. 2013)). But this case is not like *Ramirez*, where a trial court rejected record evidence because it seemingly conflicted with a partial video of the event. 716 F.3d at 374. Here, Renfroe did not testify regarding the events, she did not offer record evidence creating a material fact as to those portions of Parker's account upon which the Court based its holding, and the video was consistent with the Court's finding that the force was not excessive. Indeed, the video essentially tells the story.

Finally, Renfroe says the Court was weighing evidence when it held that the force was not excessive. *See* Pl.'s Am. Mem. [57] at 6 (citing June 7, 2019 Order [46] at 7). But the reasonableness of deadly force "is a pure question of law" when no factual dispute has been created. *Scott*, 550 U.S. at 381 n.8.

In sum, there was no genuine issue of material fact as to what occurred on the night Parker fatally shot Renfroe's husband. The events depicted in the dashcam video along with unrebutted evidence establish—as a matter of law—that Parker did not use excessive force.[2]

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[2] Renfroe argues that the five holdings she quoted in her motion for reconsideration are just illustrative. It is therefore worth noting that the factual issues Renfroe supported with citation to record evidence in her summary-judgment response were not material. She attacked, for example, Parker's testimony regarding his state of mind at the scene and his competence. *See*, *e.g.*, Pl.'s Resp. [40] at 6 (disputing whether Parker "feared for his life"); *id.* at 7 (noting that Parker had not renewed his driver's license). But "[t]he reasonableness inquiry in an excessive force case is an objective one." *Graham v. Connor*, 490 U.S. 386, 397 (1989). Parker's

3. State-Law Claims

Turning to the state-law claims, the Court ruled that Renfroe failed to address, and therefore abandoned, her individual-capacity state-law claims. *See* June 7, 2019 Order [46] at 910. Renfroe says this was error because "[t]he only issue before the Court at this stage is and has been the affirmative defense of qualified immunity," which does not apply to claims under state tort law. Pl.'s Am. Mem. [57] at 9. She further claims that she never had an opportunity to address those claims. *Id.* at 9–10.

This issue is a little messy. In Defendants' summary-judgment motion, they plainly sought "summary judgment in their favor as to the *individual liability claims* asserted against them." Defs.' Mot. [17] at 1 (emphasis added). That would include individual-capacity state-law claims, which Defendants argued at length in their supporting summary-judgment memorandum. *See* Defs.' Mem. [19] at 19–24. Defendants did not, however, move for dismissal of the official-capacity claims and instead sought *sua sponte* dismissal in the body of their summary-judgment memorandum. *Id.* at 24.

Renfroe never substantively responded as to the individual- or official-capacity state-law claims. But she did file a separate motion to strike [38] with a

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state of mind or the status of his driver's license are irrelevant. *Id.* "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

supporting memorandum [39] that the Court granted. When it did so, the Court was candidly focused on the only argument Renfroe made in her supporting memorandum and held that "Defendants' request for summary judgment on the official-capacity claims in their memorandum failed to comply with the Court's rules" requiring such prayers to be filed in a motion. June 7, 2019 Order [46] at 10. But because Renfroe failed to address the individual-capacity state-law claims Defendants did move to dismiss, the Court concluded that she had abandoned those claims.

This was error. Although it would have been helpful for Renfroe to make her legal arguments in her memorandum—and perhaps file a Rule 56(d) motion—her motion to strike sought to strike Defendants' motion as it related to the individual-capacity state-law claims because the magistrate judge had stayed those issues. Nov. 27, 2018 Order [9] at 1 (staying all proceedings "except where it is related to the issue of qualified immunity"). Thus, Renfroe attempted to preserve the state-law claims and limit Defendants' summary-judgment motion to the qualified-immunity defense applicable to the federal claims. This is not a case where she simply abandoned a pleaded claim by failing to address it at all. *See Vela v. City of Hous.*, 276 F.3d 659, 678 (5th Cir. 2001). Accordingly, the Court grants her motion to vacate the ruling on the state-law individual-capacity claims.

4. Separation of Powers

The final issue is whether the Court ignored Renfroe's argument that qualified immunity violates separation of powers. Though relegated to a footnote, the Court did address it, holding: "Renfroe argues that the qualified-immunity doctrine 'violates the separation of powers,' so the Court should not apply it. Pl.'s Mem. [41] at 19. But this Court must follow binding precedent, and the Supreme Court continues to apply qualified immunity. *See Kisela v. Hughes*, 138 S. Ct. 1148 (2018)." Order [46] at 6 n.3. The Court did not ignore her argument, and the holding remains correct.

B. Rule 56(d) Motion [52]

Although the Court held that Defendants' official-capacity arguments were procedurally defective, they nevertheless raised a threshold legal question. Accordingly, the Order included the following:

> The Court hereby gives Renfroe notice, under Federal Rule of Civil Procedure 56(f), that it will consider Defendants' summary-judgment arguments with respect to the official-capacity claims, especially in light of the Court's conclusion that no constitutional violation occurred. *See Whitley v. Hanna*, 726 F.3d 631, 648 (5th Cir. 2013) ("All of Whitley's inadequate supervision, failure to train, and policy, practice, or custom claims fail without an underlying constitutional violation.") (citing *Bustos v. Martini Club, Inc.*, 599 F.3d 458, 467 (5th Cir. 2010)).

June 7, 2019 Order [46] at 10.

Instead of addressing this question, Renfroe responded with a motion under Federal Rule of Civil Procedure 56(d), which provides:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
>
> (2) allow time to obtain affidavits or declarations or to take discovery; or
>
> (3) issue any other appropriate order.

Motions under this rule "are 'broadly favored and should be liberally granted,'" but a nonmovant 'may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts.'" *Roby v. Livingston*, 600 F.3d 552, 561 (5th Cir. 2010) (quoting *Culwell v. City of Forth Worth*, 468 F.3d 868, 871 (5th Cir. 2006); *SEC v. Spence & Green Chem. Co.*, 612 F.2d 896, 901 (5th Cir. 1980)). "Rather, a request to stay summary judgment under Rule 56([d]) must 'set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion.'" *Id.* (quoting *C.B. Trucking, Inc. v. Waste Mgmt. Inc.*, 137 F.3d 41, 44 (1st Cir. 1998)).

Renfroe does not identify "specified facts, susceptible of collection within a reasonable time frame, [that]

probably exist" which would "influence the outcome of the pending summary judgment motion." *Id.* Instead, without citation to any authority, she says the "justification requirement . . . is not applicable here" because discovery has been limited to immunity-related discovery. Bell Aff. [52-1] ¶ 1. She also argues that "[w]ith no discovery on the official capacity claims, it is premature for this Court to consider the defendants' summary judgment motion on the official capacity claims." Pl.'s Mem. [53] at 2.

To begin, "[d]iscovery is not a prerequisite to the disposition of a motion for summary judgment." *Skiba v. Jacobs Entm't, Inc.*, 587 F. App'x 136, 138 (5th Cir. 2014). Moreover, the question the Court posed is purely legal: Can Renfroe prevail on an official-capacity claim under § 1983 without showing an underlying constitutional violation? Renfroe never explains the discovery she needs or how it will help her overcome that legal issue. She has not complied with Rule 56(d)'s requirements.

Accordingly, Renfroe's motion under Rule 56(d) is denied. She is directed to file a response within seven days explaining why her official-capacity claims under § 1983 should not be dismissed. Failure to do so will result in an order dismissing the § 1983 official-capacity claims. Defendants may file a reply within seven days after Renfroe files her response.

III. Conclusion

The Court has considered all arguments. Those not addressed would not have changed the outcome. For the foregoing reasons, Plaintiff's Motion for Continuance [52] is denied. Her Motion to Alter or Amend [55] is granted as to the state-law claims but otherwise denied. Plaintiff shall substantively respond to the show-cause order on her § 1983 official-capacity claims within seven days of the entry of this Order.

SO ORDERED AND ADJUDGED this the 13th day of August, 2019.

s/ *Daniel P. Jordan III*
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

AMANDA KAY RENFROE, INDIVIDUALLY AND AS THE NEXT FRIEND OF S.W.R.	PLAINTIFF
V.	CIVIL ACTION NO. 3:18-CV-609-DPJ-LRA
ROBERT DENVER PARKER AND RANDALL TUCKER	DEFENDANTS

CONSOLIDATED WITH

THE ESTATE OF MICHAEL WAYNE RENFROE AND AMANDA KAY RENFROE	PLAINTIFFS
V.	CIVIL ACTION NO. 3:19-CV-396-DPJ-LRA
ROBERT DENVER PARKER AND SHERIFF RANDALL TUCKER	DEFENDANTS

FINAL JUDGMENT

(Filed Aug. 22, 2019)

For the reasons set forth in the June 7, 2019 Order [46], the August 13, 2019 Order [63], and the Order entered this date, judgment is hereby entered in Defendants' favor on the federal-law claims asserted against them, and those claims are dismissed with prejudice. The state-law claims are dismissed without prejudice under 28 U.S.C. § 1367(c).

SO ORDERED AND ADJUDGED this the 22nd day of August, 2019.

s/ *Daniel P. Jordan III*
CHIEF UNITED STATES DISTRICT JUDGE

United States Court of Appeals
for the Fifth Circuit

No. 19-60677

AMANDA KAY RENFROE, INDIVIDUALLY, AS THE WIDOW OF MICHAEL WAYNE RENFROE, DECEASED; AND AS THE NATURAL MOTHER AND ADULT NEXT FRIEND OF S.W.R., HER MINOR CHILD, WHO ARE THE SOLE HEIRS AND WRONGFUL DEATH BENEFICIARIES OF MICHAEL WAYNE RENFROE, DECEASED,

Plaintiff—Appellant,

versus

ROBERT DENVER PARKER; RANDALL TUCKER,

Defendants—Appellees,

THE ESTATE OF MICHAEL WAYNE RENFROE, AND AMANDA KAY REFROE, IN HER OFFICIAL CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF MICHAEL WAYNE RENFROE,

Plaintiff—Appellant,

versus

ROBERT DENVER PARKER, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; SHERIFF RANDALL TUCKER, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:18-CV-609
USDC No. 3:19-CV-396

(Filed Oct. 14, 2020)

ON PETITION FOR REHEARING EN BANC

(Opinion 09/10/2020, 5 CIR., ___, ___ F.3D ___)

Before KING, GRAVES, and OLDHAM, *Circuit Judges.*

PER CURIAM:

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

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

FIFTH CIRCUIT PATTERN JURY INSTRUCTION

10.1 42 U.S.C. Section 1983 (Unlawful Arrest—Unlawful Search—Excessive Force)

Plaintiff [name] claims that Defendant [name] violated [one or more] the following constitutional right:

1. the constitutional protection from unreasonable arrest or "seizure";

2. the constitutional protection from unreasonable search of one's home or dwelling; [and/or]

3. the constitutional protection from the use of excessive force during an arrest.

To recover damages for this alleged constitutional violation, Plaintiff [name] must prove by a preponderance of the evidence that:

1. Defendant [name] committed an act that violated the constitutional rights Plaintiff [name] claims were violated;[1] and

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[1] Whether the defendant was a state actor or acted "under color of law" are obviously essential elements. But these elements are often conceded or established before trial. If so, eliminating reference to them avoids unnecessary confusion. If not conceded, or if the court wishes to include them, then the second element should read as follows: "That in so doing Defendant [name] acted 'under color' of the authority of the State of ___." Further instructions defining these elements are found in Pattern Jury Instruction 10.2.

2. Defendant [name]'s acts were the cause of Plaintiff [name]'s damages.[2, 3]

The first right Plaintiff [name] claims Defendant [name] violated is the Fourth Amendment right to be protected from an unreasonable seizure.[4] Plaintiff

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[2] In an appropriate case, the court may wish to instruct the jury that actual compensable injury is not necessary and that nominal or punitive damages may be available for the deprivation of a constitutional right. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978). There are also cases in which a nominal-damages instruction would be appropriate but not a punitive-damages instruction. *See Williams v. Kaufman Cnty.*, 352 F.3d 994, 1015 (5th Cir. 2003) (observing that punitive damages may be awarded "only when the defendant's conduct is motivated by evil intent or demonstrates reckless or callous indifference to a person's constitutional rights") (citations and quotations omitted).

[3] If further instruction on this point is necessary, the court may use the following language:

> The plaintiff must prove by a preponderance of the evidence that the act or failure to act by the defendant was a cause-in-fact of the damage plaintiff suffered. An act or a failure to act is a cause-in-fact of an injury or damages if it appears from the evidence that the act or omission played a substantial part in bringing about or actually causing the injury or damages. The plaintiff must also prove by a preponderance of the evidence that the act or failure to act by the defendant was a proximate cause of the damage plaintiff suffered. An act or omission is a proximate cause of the plaintiff's injuries or damages if it appears from the evidence that the injury or damage was a reasonably foreseeable consequence of the act or omission.

[4] *See Albright v. Oliver*, 510 U.S. 266, 270–71 (1994) (rejecting a Fourteenth Amendment due process analysis applied to malicious prosecution because the Fourth Amendment more specifically addresses the issue); *see also Roe v. Tex. Dep't of*

[name] claims that the way Defendant [name] arrested [him/her] on [date] violated [his/her] constitutional rights. To establish this claim, Plaintiff [name] must show that the arrest was unreasonable.[5]

A warrantless arrest such as the one involved in this case is considered unreasonable under the Fourth Amendment when, at the moment of the arrest, there is no probable cause for the defendant to reasonably believe that a crime has been or is being committed.[6] Probable cause does not require proof beyond a reasonable doubt, but only a showing of a fair probability of criminal activity.[7] It must be more than bare suspicion, but need not reach the 50% mark.[8]

Finally, the reasonableness of an arrest must be judged based on what a reasonable officer would do under the circumstances, and does not consider

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Protective & Regulatory Servs., 299 F.3d 395, 411 & n.22 (5th Cir. 2002) (applying *Albright* to unlawful search claim)

[5] The text of Section 1983 does not expressly state that the defendant's acts must be intentional. That said, the Fifth Circuit has observed: "The Supreme Court and this circuit have long held that Fourth Amendment violations occur only through intentional conduct." Watson v. Bryant, 532 F. App'x. 453, 457 (5th Cir. 2013). If there is an issue whether the acts were intentional, the court may consider cases like *Brower v. Cnty. of Inyo*, 489 U.S. 593, 597 (1989) and *Young v. City of Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985).

[6] *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004).

[7] McGaughy v. City of Hous., 77 F. App'x. 280, 282 (5th Cir. 2003) (citing *United States v. Brown*, 941 F.2d 1300, 1302 (5th Cir. 1991)).

[8] *United States v. Garcia*, 179 F.3d 265, 269 (5th Cir. 1999).

Defendant [name]'s state of mind. The question is whether a reasonable officer would believe that a crime was, or was being, committed based on the facts available to that officer at the time of the arrest.[9, 10, 11, 12]

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[9] *Devenpeck*, 543 U.S. at 152; *Evett v. DETNTFF*, 330 F.3d 681, 688 (5th Cir. 2003).

[10] Probable cause is the touchstone of a false-arrest claim. *See Haggerty v. Tex. S. Univ.*, 391 F.3d 653, 655 (5th Cir. 2004) ("To ultimately prevail on his section 1983 false arrest/false imprisonment claim, [plaintiff] must show that [defendant] did not have probable cause to arrest him."). But "Rh) the extent that the underlying facts are undisputed, [the court] may resolve questions of probable cause as questions of law." *Piazza v. Mayne*, 217 F.3d 239, 246 (5th Cir. 2000). This instruction applies when there is a material dispute of historical fact that precludes a legal ruling on probable cause. *See Harper v. Harris Cnty.*, 21 F.3d 597, 602 (5th Cir. 1994) (affirming decision to send probable cause issue to jury and noting that although the issue can be a legal question, "such is not the case where there exist material factual disputes. . . ."). When lack of probable cause has been conceded, the instruction is not necessary. *Ware v. Reed*, 709 F.2d 345, 349 n.7 (5th Cir. 1983). Other jurisdictions treat this as a mixed question of law and fact that would be decided on special interrogatories.

[11] Some cases may present the question whether the plaintiff was actually seized, which invokes additional tests. *See*, *e.g, Ware*, 709 F.2d at 349–50. Similarly, questions may exist whether there was an arrest or an investigatory stop as addressed in *Terry v. Ohio*, 392 U.S. 1 (1968). *See*, *e.g.*, *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 209 (5th Cir. 2009). If the latter, then probable cause is not required, and "an officer who lacks probable cause but who can 'point to specific and articulable facts' that 'reasonably warrant' the inference that 'a particular person' is committing a crime may briefly detain that person in order to 'investigate the circumstances that provoke suspicion.' " *Club Retro, L.L.C.*, 568 F.3d at 209 (citing *Terry*, 392 U.S. at 21).

[12] Differences in context, such as whether the arrest was with or without a warrant, or whether the arrest was inside the

To help you determine whether Defendant [name] had probable cause to arrest Plaintiff [name], I will now instruct you on the elements of the crime for which [he/she] was arrested. *(Specify state criminal statute for underlying offense.)*

If you find that Plaintiff [name] has proved by a preponderance of the evidence that Defendant [name] lacked probable cause to make the arrest on [date], then Defendant [name] violated Plaintiff [name]'s constitutional right to be free from unreasonable arrest or "seizure" [and your verdict will be for Plaintiff [name] on this claim] *or* [and you must then consider whether Defendant [name] is entitled to qualified immunity, which is a bar to liability that I will explain later] *(give first bracketed language if there is no qualified-immunity issue; give second if there is such an issue along with the qualified-immunity instruction at Pattern Jury Instruction 10.3).* If Plaintiff [name] failed to make this showing, then the arrest was constitutional, and your verdict will be for Defendant [name] on the unreasonable-arrest claim.

The second right Plaintiff [name] claims Defendant [name] violated is Plaintiff [name]'s Fourth Amendment right to be protected from unreasonable

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home or in a different location, can change the analysis. *See*, *e.g.*, *Groh v. Ramirez*, 540 U.S. 551, 558 (2004) (discussing need to specify items to be seized); *Kalina v. Fletcher*, 522 U.S. 118, 129–30 (1997) (discussing probable cause for issuing warrant).

searches of [his/her] home.[13, 14] The Fourth Amendment to the Constitution of the United States protects against "unreasonable searches," and the right to be free from unreasonable government intrusion in one's own home is at the very core of the Fourth Amendment's protection. Warrantless searches of a person's home are presumed to be unreasonable unless: (1) the government obtains consent to search; or (2) probable cause and exigent circumstances justify the search.[15, 16]

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[13] This instruction addresses home searches. Different rules apply in other settings like schools, *see*, *e.g.*, *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 370–71 129 S. Ct. 2633, 2639 (2009) (applying "reasonable suspicion" standard to searches by school officials); government workplaces, *see*, *e.g.*, *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010); or vehicles, *see*, *e.g.*, *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) ("[I]n cases where there was probable cause to search a vehicle 'a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained.' " (emphasis omitted)); and for searches incident to a lawful arrest, *see*, *e.g.*, *United States v. Curtis*, 635 F.3d 704, 711–12 (5th Cir.), *cert. denied*, 132 S. Ct. 191, 2011 WL 4532104 (Oct. 3, 2011).

[14] This instruction does not address seizures pursuant to warrants. *See*, *e.g.*, *Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010) (addressing chain of causation with warrants); Hernandez v. Terrones, 397 F. App'x. 954, 967 (5th Cir. 2010) (addressing false statements in supporting affidavits).

[15] *Groh*, 540 U.S. at 564; *see also Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 420 (5th Cir. 2008) (citation omitted). There is no need to instruct the jury on both consent and exigent circumstances if one of the exceptions is inapplicable.

[16] Although consent and exigent circumstances are the most frequent exceptions, the court should consider whether the special needs doctrine applies. *See*, *e.g.*, *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (permitting exceptions to the warrant and probable-cause requirements for a search when special needs, beyond

The burden is on Plaintiff [name] to prove that the search was unreasonable.

The first question is whether there was consent to search. A valid consent to search must be freely and voluntarily given and the individual who gives consent must have authority to do so. Silence or passivity cannot form the basis for consent to enter. An occupant's silence, passivity, or other indication of acquiescence to a show of lawful authority is not enough to show voluntary consent.[17] Officers may search only areas for which consent was given, and may not search areas for which no consent was given.[18, 19]

If there is no consent, a warrantless search is still permissible if probable cause and exigent circumstances exist. Probable cause for a warrantless search

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the normal needs of law enforcement, make those requirements impracticable) (cited in *Illinois v. Caballes*, 543 U.S. 405, 425 (2005)).

[17] *Roe*, 299 F.3d at 402 & n.5; *Gates*, 537 F.3d at 420–21.

[18] *United States v. Solis*, 299 F.3d 420, 436 (5th Cir. 2002).

[19] There are a variety of issues that may require further instruction. For example, if authority is given by someone other than the plaintiff, it may be necessary to give further instructions consistent with *Georgia v. Randolph*, 547 U.S. 103, 109 (2006). If voluntariness is disputed, the jury may need to be instructed on the six nonexclusive factors set out in *United States v. Kelley:*

> (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

981 F.2d 1464, 1470 (5th Cir. 1993).

exists when the facts and circumstances within an officer's knowledge, and of which [he/she] had reasonably trustworthy information, are sufficient for a reasonable officer to believe that an offense has been or is being committed, and that evidence bearing on that offense will be found in the place to be searched.[20] Whether probable cause exists is based on what a reasonable officer would do under the circumstances and does not consider Defendant [name]'s state of mind.

Exigent circumstances exist when the situation makes the needs of law enforcement so compelling that the warrantless search is objectively reasonable.[21] One such exigency is [specify relevant example of such a circumstance, such as the need to prevent the imminent destruction of evidence].[22, 23]

If you find that Plaintiff [name] has proved by a preponderance of the evidence that Defendant [name] conducted an unreasonable search of Plaintiff [name]'s home, then Defendant [name] violated Plaintiff Enamel's constitutional rights [and your verdict will be for Plaintiff [name] on this claim] *or* [and you must

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[20] *Safford Unified Sch. Dist. No. 1*, 557 U.S. at 370–71.

[21] *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (citation omitted); *see also United States v. Menchaca-Castruita*, 587 F.3d 283, 289–90 (5th Cir. 2009) (providing nonexhaustive list).

[22] There are, of course, other examples of exigent circumstances, many of which are summarized in *Brigham City*, 547 U.S. at 403. The instruction should list the exigency that best fits the facts of the case.

[23] If exigent circumstances are raised by the evidence, an instruction that the police cannot create the exigency may be appropriate. *Kentucky v. King*, 131 S. Ct. 1849, 1856–57 (2011).

then consider whether Defendant [name] is entitled to qualified immunity, which is a bar to liability that I will explain later] *(give first bracketed language if there is no qualified-immunity issue; give second if there is such an issue along with the qualified immunity-instruction at Pattern Jury Instruction 10.3).* If Plaintiff [name] failed to make this showing, then the search was not unconstitutional, and your verdict will be for Defendant [name] on the unreasonable-search claim.

Finally, Plaintiff [name] claims Defendant [name] violated the Fourth Amendment by using excessive force in making the arrest on [date]. The Constitution prohibits the use of unreasonable or excessive force while making an arrest, even when the arrest is otherwise proper. To prevail on a Fourth Amendment excessive-force claim, Plaintiff [name] must prove the following by a preponderance of the evidence:

1. an injury;[24]

2. that the injury resulted directly[25] from the use of force that was excessive to the need; and

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[24] In many cases, a sufficient injury may be undisputed. But with lesser injuries, the court should consider the Fifth Circuit's analysis in cases like Brown v. Lynch, 524 F. App'x. 69, 79 (5th Cir. 2013) ("And as long as a plaintiff has suffered 'some injury,' even relatively insignificant injuries and purely psychological injuries will prove cognizable when resulting from an officer's unreasonably excessive force.") (citing primarily *Ikerd v. Blair*, 101 F.3d 430, 434–35 (5th Cir.1996); *Flores v. City of Palacios*, 381 F.3d 391, 399 (5th Cir. 2004)).

[25] In *Johnson v. Morel*, the Fifth Circuit stated that the injury must result "directly *and only*" from the use of excessive

3. that the excessiveness of the force was objectively unreasonable.[26]

To determine whether the force used was reasonable under the Fourth Amendment, you must carefully balance the nature and quality of the intrusion on Plaintiff Enamel's right to be protected from excessive force against the government's right to use some degree of physical coercion or threat of coercion to make an arrest. Not every push or shove, even if it may later seem unnecessary in hindsight, violates the Fourth Amendment. In deciding this issue, you must pay careful attention to the facts and circumstances, including the severity of the crime at issue, whether [Plaintiff [name]] [the suspect] posed an immediate threat to the safety of the officers or others, and whether [he/she] was actively resisting or attempting to evade arrest.[27, 28]

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force. 876 F.2d 477, 480 (5th Cir. 1989) (emphasis added). That language routinely appears in Fifth Circuit cases. *See*, *e.g.*, *Hogan v. Cunningham*, 722 F.3d 725, 734 (5th Cir. 2013). Despite this history, the Committee omitted the word "only" because the language does not carry the meaning that a lay juror would give it. In *Dunn v. Denk*, the Fifth Circuit explained that the "direct-and-only" language was not meant to suggest that a plaintiff who was uniquely susceptible to injury could not recover. 79 F.3d 401, 403 (5th Cir. 1996). The court explained that the *Johnson* language merely establishes that "compensation be for an injury caused by the excessive force and not a reasonable force."

[26] *Carnaby v. City of Hous.*, 636 F.3d 183, 187 (5th Cir. 2011).

[27] *See generally Graham v. Connor*, 490 U.S. 386, 396 (1989).

[28] This instruction should be revised in a deadly force case. *See*, *e.g.*, *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). The "[u]se of deadly force is not unreasonable when an officer would have reason to believe that the suspect poses a threat of serious harm to

Finally, [as with the other rights I have discussed], the reasonableness of a particular use of force is based on what a reasonable officer would do under the circumstances and not on this defendant's state of mind. You must decide whether a reasonable officer on the scene would view the force as reasonable, without the benefit of 20/20 hindsight. This inquiry must take into account the fact that police officers are sometimes 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.[29]

If you find that Plaintiff [name] has proved by a preponderance of the evidence that the force used was objectively unreasonable, then Defendant [name] violated Plaintiff [name]'s Fourth Amendment protection from excessive force [and your verdict will be for Plaintiff [name] on this claim] *or* [and you must then consider whether Defendant [name] is entitled to qualified immunity, which is a bar to liability that I will explain later] *(give first bracketed language if there is no qualified-immunity issue; give second if there is such an issue along with the qualified-immunity instruction at Pattern Jury Instruction 10.3).* If Plaintiff [name] failed to make this showing, then the force was not unconstitutional, and your verdict will be for Defendant [name] on the excessive-force claim.

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the officer or others." *Mace v. City of Palestine*, 333 F.3d 621, 624 (5th Cir. 2003).

[29] *See generally Graham*, 490 U.S. at 396.

[Insert qualified-immunity instruction (Pattern Jury Instruction 10.3) if appropriate.[30]*]*

[Insert supervisor I municipal-liability instruction (Pattern Jury Instruction 10.4) if appropriate.]

[Insert standard damages instructions and emotional-distress instructions (Pattern Jury Instruction 10.12) if appropriate.]

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[30] The qualified-immunity issue "ordinarily should be decided by the court long before trial. . . ." *McCoy v. Hernandez*, 203 F.3d 371, 376 (5th Cir. 2000). But "if the issue is not decided until trial the defense goes to the jury which must then determine the objective legal reasonableness of the officers' conduct." *McCoy*, 203 F.3d at 376 (citing *Snyder v. Trepagnier*, 142 F.3d 791, 799 (5th Cir. 1998)).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI

NORTHERN DIVISION

Case No: 3:18-cv-00609-DPJ-LRA

AMANDA KAY RENFROE, individually, as the widow of MICHAEL WAYNE RENFROE, deceased; and as the natural mother and adult next friend of S.W.R., her minor child, who are the sole heirs and wrongful death beneficiaries of MICHAEL WAYNE RENFROE, deceased Plaintiffs, v. ROBERT DENVER PARKER, RANDALL TUCKER, and DOES 1-100, Defendants.	EXPERT WITNESS REPORT By ROY G. TAYLOR, Ph.D.(c)

Retention

My name is Roy G. Taylor and I was retained by the Plaintiff in this case to review the police use of force and other procedures utilized by Deputy Robert D. Parker and the policies and procedures of the Madison County Sheriff, Randall Tucker, Defendants on June 8, 2018 which resulted in the shooting death of Mr. Michael W. Renfroe, Plaintiff,

and to render my expert opinion as to whether the Defendants acted in accordance with established law enforcement standards.

General Qualifications

I currently serve as the Chief of Police for Capitol Special Police and have been in this position since 2002 as well as the Chief of Police for Blue Ridge Public Safety since 2014. During my thirty-nine-year law enforcement career, I served as a Chief of Police in three North Carolina cities, the State's psychiatric hospital, as well as the National Geo-Spatial Intelligence Agency (NGA) in the National Capitol Region. I also served on the FBI Joint Terrorism Task Force for three years conducting investigations.

I recently served, for two years, as a National Guard, MP, Lt. Colonel assigned as Provost Marshal for Joint Task Force Civil-Support. In this role, I was the Chief Law Enforcement Officer for any military operations which take place in the continental United States in the event of an enemy attack involving chemical, biological, or nuclear devices. Presently, I am a Lt. Colonel assigned to the 138th Military Police Detachment at Fort Bragg, NC. One of my primary duties is overseeing the humane treatment of enemy prisoners of war and civilian internees in accordance with the Geneva Conventions for the US Army.

I served as an adjunct faculty member in the criminal justice program at Wake Technical College located in Raleigh, North Carolina; and

South-Eastern Community College located in Whiteville, North Carolina.

I hold several law enforcement certificates, including the Advanced Certificate from the State of North Carolina and General Certificates from Virginia, Maryland and Ohio. I am currently certified by the North Carolina Criminal Justice Training and Standards Commission as a General Law Enforcement and Firearms Instructor. I am also certified as a TASER Instructor and have been since 2005. Between 1990 and 2004 I instructed in over one hundred Basic Law Enforcement Training Academies across the State of North Carolina specializing in use of force, high risk traffic stops, officer survival, physical fitness, hazardous materials and first responder courses.

I completed my bachelor's degree at Mount Olive College, Mt. Olive, North Carolina and my master's degree at East Carolina University, Greenville, North Carolina. I am currently enrolled as a Ph.D candidate in the Criminal Justice and have completed all course work at Walden University.

Specific Qualifications to Provide Opinions on This Case

During my thirty-nine-year law enforcement career and my twenty-three years as a law enforcement executive and trainer, I have reviewed more than one hundred police misconduct cases.

I have trained hundreds of law enforcement officers on the legal and professional standards

regulating law enforcement operations and investigations.

Specifically, as a certified firearms instructor, I possess knowledge regarding the procedures recognized in the law enforcement profession in 2018 on the use of deadly force.

I am familiar with the proper methods used to train police officers and the recognized standards needed for their ongoing firearms qualification requirement.

I am familiar with how officers are taught to deploy in high-risk situations involving unarmed subjects and the tactics they typically use. My complete CV is included in Appendix A.

These subjects are all matters beyond the knowledge of a typical juror and sufficiently tied to the facts of this case to be relevant and of assistance to the jury in understanding the evidence and resolving factual disputes.

Objectivity

During the past four years my expert witness services has been approximately 95% plaintiffs and 5% defendants. A list of this experience is attached as Appendix B to this report.

Fees

My fee for the analysis in this case was $5,000.00. The flat fee was based upon a $150.00 hourly rate and an estimate that it would require approximately thirty-three hours of work to review the materials provided and to prepare a report of final opinions.

Items Reviewed and Relied Upon in Development of Preliminary Opinions

Before developing my preliminary opinions in this case, I reviewed the materials listed in Appendix C attached to this report. The materials reviewed are of the type typically relied upon by consultants and experts when conducting an analysis of police-involved incidents and provided me with enough relevant data to develop my preliminary opinions to a reasonable degree of professional certainty.

Methodology Utilized in Developing Opinions

I have reviewed the U.S. Supreme Court decisions *Daubert v. Merrill Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and in *Kumho Tire Company v. Carmichael*, 526 U.S. 137, 147 119 S. Ct. 1167 (1999) which established the standards for scientific, non-scientific, technical and specialized knowledge expert witnesses. It is my understanding that a non-scientific expert must be qualified to offer expert testimony by knowledge, skill, experience, training, or education. I have provided in this report both my general and specific qualifications I

believe prove my qualifications to offer expert testimony in this case.

It is also my understanding an expert's testimony must be relevant to the specific facts of an incident under consideration and be of such a specialized nature that it would be beyond the knowledge of a typical juror. An expert's testimony must also be of assistance to the jury in understanding the evidence and issues presented to them. I believe my testimony regarding how officers are trained, professional standards for police response and the protocols for police use of deadly force and other practices, principles and protocols recognized, relied upon, and employed in the law enforcement profession on the date of this incident are all areas of testimony which would assist the jury in understanding the evidence presented to them and is testimony relevant to the facts of this case.

Specifically, as a certified firearms instructor, I possess knowledge regarding the procedures recognized in the law enforcement profession in 2018 on the use of deadly force.

I am familiar with the proper methods used to train police officers and the recognized standards needed for their ongoing continuing education regarding the use of force.

I am familiar with how officers are taught to deploy in high-risk situations involving unarmed subjects and the tactics they typically use.

The methodology used and conclusions reached by an expert must also be reliable. To ensure my methodology was reliable, I did not assign

credibility to any witness, reviewed sufficient data to reach conclusions to a reasonable degree of professional certainty, developed a set of material and relevant facts only after a review of all materials provided, and assumed those facts to be true solely for the purpose of analysis. I then analyzed those facts against a backdrop of the professional standards for police practices, principles and protocols recognized, relied upon, and employed in the law enforcement profession on the date of this incident.

The methodology, I used in this case, is the same which I have utilized for several years and has been accepted by presiding judges in previous cases in which I have testified. The methodology is consistent with the methods used by other experts in the field of law enforcement when analyzing police procedures.

Summary of Relevant and Material Facts Assumed to Be True for Purposes of Analysis

The facts I assumed to be true for purposes of analysis, in this case, are outlined in Appendix D attached to this report. If asked to consider a different set of facts, I will analyze those facts and render opinions to the best of my ability.

Opinion

The basis and reasons for my preliminary opinions are premised upon my experience as a law enforcement officer and police firearms instructor; my education and training in law enforcement; my knowledge of law enforcement standards; my knowledge of law enforcement training and protocols for conducting high risk apprehensions; my knowledge of law enforcement training and protocols on the use of force; analysis and study in the field through consulting professional literature, and the facts of this case as determined by a comprehensive review of the materials listed in Appendix C.

My opinions are based on a synthesis of the above. I hold the following preliminary opinions to a reasonable degree of professional certainty.

1. On Jane 8th, 2018 Amanda Renfroe was the passenger in a white Chevrolet pickup truck her husband Michael was driving. Michael had been experiencing delusions and exhibiting strange behaviors that day. Both Amanda and her mother-in-law had contacted the Madison County Sheriff's Office for assistance in getting Michael mental health services. The Sheriff's office informed them that since Michael was not a resident of Macon County they could not be of any assistance and would have to contact the Chancery Court in Hinds County.

2. At approximately 10:00 PM, Michael pulled into a residence located at 974 Old Natchez Trace Rd. Canton, MS. According to Amanda, Michael believed he could see into the future.[i] Micheal told

her that this was a future home of their cousins and he wanted to take a look at some of the things in their yard.

3. Michael got out of the truck and had a wooden staff in his hand. At some point the home owner, Mr. Willard McDaniel, came out of the house and challenged Michael. Michael began swinging the stick around in an attempt to "spoke" the man, who in return loaded a round in a shotgun and fired it. Michael ran and got back into the truck and fled the area.[ii]

4. Michael was driving on Old Natchez Trace Road and was holding the wooden staff outside of the truck. At some point the stick contacted the ground causing Michael to drop it. He turned around in an attempt to locate it. Once he was back in the general area he stopped the truck and got out to look for his staff. At that point another truck was approaching with bright headlights. Amanda stated she thought it was the man who had just shot at them.[iii]

5. Deputy Robert D. Parker, who at the time had approximately 36 months of law enforcement experience, was responding to a reported breaking and entering in progress at 974 Old Natchez Trace Rd. The caller advised that her husband had shot at the subjects and they had fled the area in a white or green Ford F150 pickup truck with an ATV in the bed. Deputy Parker wrote in the incident report that when he arrived in the general area he turned off his vehicle's blue lights and siren. He stated this was a rural area with no traffic.[iv]

6. Deputy Parker wrote he observed a vehicle ahead of him traveling at a high rate of speed. He stated as he came around a turn in the road he saw a white Chevrolet pickup truck stopped on the right side of the roadway and the driver getting out. Deputy Parker stopped his vehicle approximately 50 feet from the rear of the truck and started backing up as the driver of the truck was walking toward him.[v]

7. Deputy Parker radios in his location and description of what is taking place. However, he does not activate his patrol vehicle's warning lights even though he is stopped in the middle of an unlit rural paved road. His failure to do so endangers himself to approaching traffic and does not identify him as a law enforcement officer to Michael and Amanda Renfroe. Turning on one switch could have remedied this situation.

8. The patrol vehicles onboard video camera recording shows Michael Renfroe get down on his hands and knees at 22:16:18. The only audible command recorded was "driver" by Deputy Parker.[vi] At 22:18:32 Amanda gets out of the truck and starts walking toward where Michael is in the roadway.

9. At 22:18:39 Michael Renfroe stands up and starts running toward the unknown individual who is stopped in the roadway. Michael is barefooted and wearing only a pair of pajama pants. Deputy Parker never identifies himself as a law enforcement officer during this encounter.

10. At 22:18:45 Deputy Parker uses the laser sight on his Taser, a conducted energy weapon, to aim it at Mr. Renfroe. Deputy Parker fires the Taser and a

reaction to the darts striking Mr. Renfroe can be seen prior to his leaving the view of the video camera.[vii]

11. The sounds of what appears to be a struggle can be heard on the video and at 22:18:51 the first of four gunshots can be heard, ending at 22:18:52. Deputy Parker did not issue any commands or warnings prior to shooting Mr. Renfroe.

12. Amanda Renfroe runs to comfort her husband who is lying on the ground bleeding. Deputy Parker then activates the patrol vehicles blue lights at 22:19:33. Amanda attempts to continue rendering aid to Mr. Renfroe, but is ordered to get away from him and sit on the pavement, where Deputy Parker has her at gun point.[viii]

13. Deputy Parker asked Amanda for her and her husband's name, which she answers. He then began asking accusatory questions about their attempting to break into the house on Old Natchez Trace Road. Amanda denied the allegations. At no point did Deputy Parker advise Amanda of her Miranda Rights.[ix]

14. Amanda asked Deputy Parker why he shot Michael. Deputy Parker replied I tried to tase him, but he started hitting me.[x]

15. Deputy Fox was the first to arrive on scene at approximately 22:24. He immediately handcuffed Amanda and then pushed her to the ground where she injured her mouth when it hit the pavement. Deputy Fox then placed her in the back of Deputy Parker's patrol vehicle.[xi]

16. Deputy Fox, Millican, and Garcia then approached Renfroe's truck to make sure no one else was inside of it. Once they cleared it Deputy Garcia walked back to Deputy Parker. Deputy Parker asked him if they should start rendering aid. Deputy Garcia stated that aid wouldn't do any good.[xii]

17. Deputy Parker then started relaying to Deputy Garcia what had happened. He stated Mr. Renfroe had run toward him so he tased him and it stopped him for a second. But, Renfroe then struck him upside the head. Deputy Parker said he pushed off and stepped back. Renfroe kept coming and said "I'm going to kill you mother flicker." Deputy Parker stated; "I put three into him."[xiii]

18. At 22:38:40 Deputy Parker begins telling his version of the incident to his supervisor MSgt. Chastain. Deputy Parker recounts throwing down his Taser and attempting to hit Mr. Renfroe with the vehicle's driver's door. Mr. Renfroe came around the door and hit him beside the head. Deputy Parker said he was able to get away from him and then "drew down, backed up, and started firing." In neither of his verbal accounts does he mention Mr. Renfroe putting his hands around Deputy Parker's throat, being in fear of losing his life, or of receiving serious bodily injury to justify his use of deadly force.[xiv]

19. Force is defined as the exercise of strength, energy or power to impose one's will. The use of force is either appropriate or inappropriate. The most common definition of appropriate force is that which is reasonably necessary to affect an arrest or overcome resistance. It is important to

understand that appropriate force does not require the least amount of force but rather only a reasonable amount. Accordingly, there is also no requirement to begin with lesser force and gravitate to higher levels.

20. Inappropriate force generally falls into two distinct categories: excessive force and unreasonable force. Excessive force is that which is deemed to be more severe than necessary in either kind or duration. Excessive force by kind inflicts more pain, suffering or injury than is deemed proper to accomplish the law enforcement objective. This almost always entails choosing the wrong weapon. Excessive force by duration is when force is applied longer than is reasonable. Hitting a suspect with a baton may be necessary and reasonable, for example, but would be excessive when applied longer than is required to achieve the objective. Unreasonable force is the use of any force when it is unjustified. The most common mistake associated with complaints of unnecessary force is lack of urgency. In such cases the situation simply did not merit the use of force at the time it was applied, even when it might have been called for eventually.

21. Law enforcement officers are instructed in their basic law enforcement training on the use of force and that the U.S. Supreme Court ruled "All claims that law enforcement officers have used force – deadly or not – during an arrest, investigatory stop, or other seizure . . . will be analyzed under the Fourth Amendment reasonableness standard."[xv]

22. Since 1989 the standard established by the United States Supreme Court is *Graham v. Connor*, which has been used in basic law enforcement training programs to instruct officers on the use of force since that time. Officers are taught the Supreme Court stated, "the test of reasonableness requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Further, officers are instructed in use of force training programs that the Court stated "the question is. . . . whether the totality of the circumstances justifies a particular sort of seizure."

23. Law enforcement officers are also taught when an officer's action is questioned following a use of force, that an assessment be made as to (1) whether the subject had an apparent ability/capability to carry out a threat; (2) whether the subject was able to use that ability/capability to carry out the threat; and (3) whether the subject, by words or deeds, demonstrated an intent to carry out the threat.

24. The Madison County Sheriff Randy Tucker's Use of Force policy is outdated and does not authorize the use of the Taser. His policy limits the types of non-deadly force weapons Deputies may use to: police baton, side handle baton, flashlight, and OC pepper mace spray. The policy also authorizes the use of weaponless defense.[xvi]

25. The Use of Force policy directs Deputies to identify themselves as law enforcement officers and state their intent to shoot, where feasible.[xvii] On June 8, 2018 Deputy Parker failed to identify himself or notify Mr. Renfroe of his intent to shoot. Either of these notifications may have prevented the unnecessary escalation of force.

26. It is my opinion Deputy Parker's use of deadly force against Mr. Michael Renfroe on June 8, 2018 was unnecessary and objectively unreasonable and resulted in his death. Deputy Parker's decision to shoot violated well-established law enforcement use of force training and standards and was a greater level of force than any other reasonable officer would have used under the same or similar circumstances in 2018.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Respectfully Submitted,

/s/ Roy G. Taylor

Roy G. Taylor, Ph.D.(c)

3/26/2019

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[i] Amanda Kay Renfroe recorded statement to MBI June 9, 2018 32:50

[ii] Amanda Kay Renfroe recorded statement to MBI June 9, 2018

[iii] Amanda Kay Renfroe recorded statement to MBI June 9, 2018

[iv] Madison Co. Sheriff's Office Incident Report #S018007940, dated June 8, 2018

[v] Deputy Parker dashcam video June 8, 2018 22:18:00

[vi] Deputy Parker dashcam video June 8, 2018 22:18:26

[vii] Deputy Parker dashcam video June 8, 2018 22:18:46

[viii] Deputy Parker dashcam video June 8, 2018 22:21:30
[ix] Deputy Parker dashcam video June 8, 2018 22:22:00
[x] Deputy Parker dashcam video June 8, 2018 22:22:00
[xi] Amanda Kay Renfroe recorded statement to MBI June 9, 2018
[xii] Deputy Parker dashcam video June 8, 2018 22:25:50
[xiii] Deputy Parker dashcam video June 8, 2018 22:26:09
[xiv] Deputy Parker dashcam video June 8, 2018 22:38:40
[xv] *Graham v. Connor*, 490 U.S. 386 (1989)
[xvi] Madison Co. Sheriff's Office Use of Force policy, Training & Qualifications C(2)
[xvii] Madison Co. Sheriff's Office Use of Force policy, Procedures A(2)

RENFROE EXPERT MATERIALS AND FACTS – APPEND TO EXPERT REPORT

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APPENDIX C

MATERIALS REVIEWED

1. Madison Co. Sheriff's Office Incident Report # S018007940, dated June 8, 2018
2. Audio recorded statement of Amanda Kay Renfroe, dated June 9, 2018
3. Certified dash cam video copy 267, Deputy Robert Parker
4. Certified dash cam video copy 268, Deputy Perry Ables
5. Certified dash cam video copy 269, Interview of Mr. & Mrs. Willard McDaniel
6. Certified dash cam video copy 273, Deputy Glenn Fox
7. Initial Disclosures of Defendant Robert Parker
8. Initial Disclosures of Defendant Sheriff Randy Parker
9. CAD Detailed Report, June 8, 2018
10. Madison County Sheriff's Office Use of Force policy
11. Graham v. Connor, 490 U.S. 386 (1989)
12. Deposition of Amanda Renfroe, dated February 27, 2019

13. Declaration of Mark Dunston, dated January 28, 2019

14. Deposition of Robert Parker, dated February 27, 2019

15. Deposition of Sheriff Randall Tucker, dated February 27, 2019

APPENDIX D

FACTS ASSUMED TO BE TRUE

1. Deputy Robert D. Parker was an on-duty law enforcement officer with approximately 36 months of experience on June 8, 2018

2. Michael W. Renfroe was a U.S. citizen and resident of Hinds County, MS.

3. Michael Renfroe had been experiencing some type of psychotic episodes causing him to exhibit strange behaviors on June 8, 2018

4. Michael Renfroe stopped at 974 Old Natchez Trace Rd. Canton, MS

5. The homeowner Mr. Willard McDaniel challenged Mr. Renfroe to determine why he was on the property. Ultimately, Mr. McDaniel fired a shotgun to scare Mr. Renfroe

6. Michael Renfroe was driving a white Chevrolet pickup truck on Old Natchez Trace Rd. in Canton, MS which is an unlit rural road. Amanda Renfroe was a passenger in the front seat around 10:15 PM on June 8, 2018

7. Mr. Renfroe dropped a wooden staff he had been holding out of the truck's window and turned around to retrieve it.

8. Upon stopping along the right side of the roadway Mr. Renfroe got out of the truck. Simultaneously, Deputy Parker observed the truck and stopped his patrol vehicle in the roadway approximately 50 feet behind Mr. Renfroe's truck

9. Deputy Parker radioed the dispatcher of his location and a description of what was occurring. He did not activate the emergency warning lights on his vehicle

10. Michael Renfroe got down on his hands and knees in the roadway

11. The only clothing Michael Renfroe had on was a pair of pajama bottoms

12. Mr. Renfroe told Amanda to get out of the truck

13. Michael Renfroe got up off the roadway and ran toward Deputy Parker who was standing behind the driver's door of his patrol vehicle

14. Deputy Parker attempted to shoot Mr. Renfroe with a Taser

15. A struggle between Deputy Parker and Mr. Renfroe ensued for approximately six seconds before Deputy Parker shot Mr. Renfroe four times with his department issued pistol

16. Mr. Renfroe died from his injuries

DISPUTED FACTS

1. Amanda Renfroe stated that Michael Renfroe was lying on the ground when Deputy Parker shot the last two rounds into him.

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