# APPENDIX

# APPENDIX

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## APPENDIX A

**[DO NOT PUBLISH]**

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

**No. 19-14530**
**Non-Argument Calendar**

**D.C. Docket No. 2:18-cv-14367-DMM**

**[Filed: September 23, 2020]**

DUDLEY TEEL,

Plaintiff-Appellant,

versus

DEPUTY SHERIFF JONATHAN LOZADA,
in his individual capacity,
SHERIFF DERYL LOAR,
in his individual and official capacities,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(September 23, 2020)

Before MARTIN, ROSENBAUM and JILL PRYOR, Circuit Judges.

PER CURIAM:

Officer Jonathan Lozada of the Indian River County Sheriff's Office responded to a mental health crisis call at Dr. Dudley Teel's residence. Dr. Teel's wife, Susan, was threatening to kill herself. After a brief encounter, Officer Lozada fatally shot Mrs. Teel. Dr. Teel, as the personal representative of his wife's estate, brought a claim under 42 U.S.C. § 1983 against Officer Lozada for excessive use of force. He brought a *Monell* claim[1] against Sheriff Deryl Loar and state-law wrongful death claims against both defendants.

Dr. Teel now appeals the district court's order granting summary judgment in favor of Officer Lozada and Sheriff Loar on the ground that Officer Lozada's use of force was reasonable under the circumstances. Viewing the facts in the light most favorable to Dr. Teel, we disagree with that determination. We hold that the circumstances of Officer Lozada's encounter with Mrs. Teel violated Mrs. Teel's clearly established constitutional right to be free from the excessive use of force. We therefore reverse the district court's judgment in part, vacate it in part, and remand for further proceedings.

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

## I. FACTUAL BACKGROUND

The facts elicited during discovery are as follows.[2] The Indian River County Sheriff's Office dispatch notified officers that a 911 call came through describing a person—later determined to be Mrs. Teel—who had "possibly cut herself," was "under the influence of alcohol," and had a knife. Doc. 39-4 at 2–3.[3] She had in fact cut herself: Dr. Teel, an emergency medical doctor, testified that he discovered his wife in their master bedroom, where she had slit both of her wrists, "was bleeding out," and needed to go to the hospital. Doc. 46-10 at 78.

Officer Samuel Earman, on patrol in the area, responded as the primary officer en route, and Officer Lozada, also on patrol at the time, responded that he would provide backup. Officer Lozada, however, arrived first to the Teels' home, and he did not wait for Officer Earman to arrive. (Officer Earman would arrive minutes after Officer Lozada and hear gunshots from the threshold of the house.) Officer Lozada knocked on the front door. When no one answered, he opened the front door, which was unlocked, and saw Dr. Teel

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[2] On review of a motion for summary judgment, we view the facts in the light most favorable to the plaintiff. *Lee v. Ferraro*, 284 F.3d 1188, 1190 (11th Cir. 2002). In recounting the facts, we note where facts are disputed and at this stage resolve the disputes in Dr. Teel's favor. We emphasize, however, "that the facts, as accepted at the summary judgment stage of the proceedings, may not be the actual facts of the case." *Priester v. City of Riviera Beach*, 208 F.3d 919, 925 n.3 (11th Cir. 2000) (internal quotation marks omitted).

[3] "Doc." numbers refer to the district court's docket entries.

walking down the stairs towards the door. He and Dr. Teel spoke for about a minute. Dr. Teel told Officer Lozada that his wife was upstairs, was trying to kill herself, was under the influence of narcotics and/or alcohol, and was armed with a knife that Dr. Teel had unsuccessfully attempted to take away. Officer Lozada observed what he believed to be blood on Dr. Teel's shirt. He understood that Mrs. Teel had not tried to harm Dr. Teel. Officer Lozada concedes that before encountering Mrs. Teel, he had no objective facts indicating that she was a danger to anyone other than herself.

Officer Lozada then entered the home, told Dr. Teel to stay downstairs, and climbed the stairs toward the master bedroom. As Officer Lozada advanced up the stairs, he drew his gun and held it to his chest.

When Officer Lozada reached a sitting room at the top of the stairs, he saw Mrs. Teel in the next room, the master bedroom, wearing a bathrobe and lying quietly on a canopy bed with her feet dangling from it. Between Officer Lozada and Mrs. Teel was the doorway to the bedroom, a chest at the foot of the bed, and most of the bed, which had large round columns supporting the canopy. Officer Lozada paused for 2 to 3 seconds at the top of the stairs and then walked to the doorway of the bedroom. He observed that Mrs. Teel's hands were tucked behind her back. At this point, Officer Lozada testified, he still knew of no fact suggesting that Mrs. Teel would present a threat to anyone but herself.

Officer Lozada did not observe any blood on Mrs. Teel's body.[4]

Officer Lozada announced himself and said in an assertive tone, "Susan, Sheriff's Office. Let me see your hands." Doc. 29-1 at 10. Mrs. Teel complied with the order. She brought both hands from behind her back, revealing a kitchen knife with an eight-inch blade in her left hand. Mrs. Teel was 60 years old, 5'2" tall, and 120 pounds. She stood from the bed and, standing with the canopy bed between her and officer Lozada, held the knife with the blade pointed down over her head. Officer Lozada took "two or three" steps inside the

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[4] Officer Lozada testified that nothing about the scene he encountered upstairs indicated that Mrs. Teel was in physical distress. Credibility determinations are for a jury to make, but we cannot help but notice that some of Officer Lozada's statements seem inconsistent with the rest of the evidence, including his own version of the events. Mrs. Teel had cut her wrists and neck and was bleeding so severely that her husband, an emergency medical doctor, believed she might die from blood loss. An Indian County Sheriff's Office investigator who was at the scene immediately following the shooting observed that "blood was all over the rug and couch" in the sitting room, Doc. 39-5 at 3, a fact that is consistent with Dr. Teel's recollection that after cutting herself, Mrs. Teel ran from the bedroom to the sitting room couch, where she sat while he called for help. Officer Lozada testified that he observed the couch as he walked through the sitting room en route to the bedroom. He shot Mrs. Teel in the bedroom and possibly again in the doorway between the bedroom and sitting room, and she fell in the doorway, making it exceptionally unlikely that the sitting room couch was covered with blood from the shooting alone. Moreover, Officer Lozada testified that he did not look at Mrs. Teel's arms during the encounter and so did not observe blood on them, despite also testifying that Mrs. Teel walked towards him holding a knife over her head.

bedroom. Doc. 39-1 at 112. Mrs. Teel remained on the other side of the bed from Officer Lozada for 8 to 10 seconds. During that time, he gave her no instruction or warning. He said nothing to her at all.

After the 8 to 10 second pause, Mrs. Teel began walking "gradual[ly]" in Officer Lozada's direction. *Id.* at 102. The sequence of events that occurred next is not precisely clear, but it is undisputed that the events happened quickly. As Mrs. Teel was walking around the bed, she said "Fuck you. Kill me." Doc. 39-2:17. Officer Lozada then pointed his gun at Mrs. Teel. He also took a step back and radioed emergency traffic reporting that Mrs. Teel had a knife. Mrs. Teel said, "Come on, just do it." *Id.* at 9, 53. Officer Lozada then said to Mrs. Teel, "don't come." Doc. 39-4 at 3. By this point, only four minutes had passed since Officer Lozada's arrival at the Teel residence.

Mrs. Teel never made a sudden movement or ran or lunged at Officer Lozada. Nor did she point the knife in his direction. Officer Lozada never instructed Mrs. Teel to drop the knife, never clearly instructed her to stop moving, and never warned that he would shoot her if she failed to comply. When asked why he did not issue warnings or tell Mrs. Teel to drop the knife or stop moving, Officer Lozada testified that he "was on the radio with dispatch to let them know with the emergency traffic and that she was armed," and "by the time [he] was doing that, [he] looked up" and Mrs. Teel "was right there." Doc. 39-1 at 106. Officer Lozada admitted that he had the option of fully retreating, leaving the bedroom and even walking down the stairs if Mrs. Teel continued to advance; he chose not to.

Instead, Officer Lozada fired his gun at Mrs. Teel. It is not clear from the record how far Officer Lozada was from Mrs. Teel at the time he shot her. Officer Lozada testified to various distances, ranging from 6 to 10 feet. Because on review of summary judgment orders we must view the facts in the light most favorable to the plaintiff, we accept the longer of these distances. Officer Lozada could tell his bullet hit Mrs. Teel because her body shuddered. He testified that she kept walking in his direction at the "same speed," a gradual pace. *Id.* at 115. Officer Lozada stepped back again. Two seconds after he fired the first shot, he fired again. Two seconds after that, when Mrs. Teel did not stop moving in his direction, Officer Lozada fired at her a third time. Mrs. Teel fell. In addition to his gun, Officer Lozada was armed with pepper spray and a taser, yet he used neither. He testified that since he had already shown Mrs. Teel his gun, he was "not going to deescalate to non-lethal." *Id.* at 124.

Officer Lozada radioed for emergency medical services, telling dispatch that shots had been fired. Four minutes had passed since Officer Lozada arrived at the residence. Officer Earman had by that point entered the home; he was at the base of the stairs yelling Officer Lozada's name. Mrs. Teel's body was lying in the doorway of the bedroom. Officers and Dr. Teel attempted to render aid, but, approximately nine minutes after he shot her, Mrs. Teel succumbed to her wounds. The Sheriff's Office's investigation revealed that Officer Lozada had shot Mrs. Teel once in the chest and twice in the abdomen.

Dr. Teel sued Officer Lozada under 42 U.S.C. § 1983 for excessive force and under Florida's Wrongful Death Act. He also sued Sheriff Loar of the Indian River County Sheriff's Office under § 1983 and *Monell v. Department of Social Services*, 436 U.S. 658 (1978), for failing to adequately train, supervise, or direct deputy sheriffs in citizen encounters and for violation of the Fourteenth Amendment's right to due process. He sued Sheriff Loar under Florida's Wrongful Death Act as well.

At the close of discovery, Officer Lozada and Sheriff Loar moved for summary judgment. The district court granted their motions. As to the excessive force claim, the district court determined that Officer Lozada's use of deadly force was constitutionally permissible because Mrs. Teel walked toward him armed with a knife and was "relatively close" to Officer Lozada. Doc. 59 at 8. Finding no constitutional violation, the district court did not determine whether Mrs. Teel's clearly established rights were violated. Because the court had found that Officer Lozada's use of force was not excessive, it also granted summary judgment to Officer Lozada and Sheriff Loar on the remaining claims.

This is Dr. Teel's appeal.

## II. STANDARD OF REVIEW

We review *de novo* a grant of summary judgment based on qualified immunity. *Cantu v. City of Dothan*, No. 18-15071, __ F.3d __, 2020 WL 5270645, at *8 (11th Cir. Sept. 3, 2020). "When considering a motion for summary judgment, including one asserting qualified immunity, courts must construe the facts and draw all

inferences in the light most favorable to the nonmoving party and when conflicts arise between the facts evidenced by the parties, they must credit the nonmoving party's version." *Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1252 (11th Cir. 2013) (alteration adopted) (internal quotation marks omitted). "[C]redibility determinations and the weighing of evidence are jury functions, not those of a judge." *Id.* (internal quotation marks omitted).

"Summary judgment is appropriate if the evidence before the court shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *McCullough v. Antolini*, 559 F.3d 1201, 1204 (11th Cir. 2009) (internal quotation marks omitted). Conversely, "[e]ven where the parties agree on the facts, if reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment." *Glasscox v. Argo*, 903 F.3d 1207, 1212 (11th Cir. 2018) (internal quotation marks omitted).

## III. DISCUSSION

"A government official asserting a qualified immunity defense bears the initial burden of showing he was acting within his discretionary authority." *Glasscox*, 903 F.3d at 1213 (internal quotation marks omitted). After he makes this showing—and here, it is undisputed that Officer Lozada was acting within his discretionary authority—the burden shifts to the plaintiff to show that "(1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252,

1264 (11th Cir. 2004). Viewing the evidence in the light most favorable to Dr. Teel and drawing all reasonable inferences in his favor, we conclude that Dr. Teel met his burden to show that Officer Lozada violated Mrs. Teel's constitutional right to be free from the excessive use of force. We also conclude that the law was clearly established at the time of the encounter that the force Officer Lozada employed was excessive. The district court erred in concluding otherwise.

The district court's adjudication of each of Dr. Teel's remaining claims hinged on its determination that Officer Lozada did not use excessive force. Because we reject that conclusion, we vacate the court's judgment on Dr. Teel's other claims against Officer Lozada and on his claims against Sheriff Loar and remand for further proceedings.[5]

### A. The Constitutional Violation

The Fourth Amendment's guarantee against unreasonable searches and seizures includes the right to be free from the excessive use of force. U.S. Const. amend. IV, *see Graham v. Connor*, 490 U.S. 386, 394–95 (1989). "In determining whether [an officer's] force was reasonable, we must determine whether a

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[5] "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to [our] discretion, . . . to be exercised on the facts of individual cases." *Singleton v. Wulft*, 428 U.S. 106, 121 (1976); *see Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 609 (11th Cir. 1991) (electing not to consider, in the first instance, whether a party had met its summary judgment burden). Although there are circumstances in which we are "justified in resolving an issue not passed on below," we do not think this is such a case. *Singleton*, 428 U.S. at 121.

reasonable officer would believe that this level of force is necessary in the situation at hand." *Mercado v. City of Orlando*, 407 F.3d 1152, 1157 (11th Cir. 2005) (internal quotation marks omitted). We ascertain the objective reasonableness of a seizure by balancing the "nature and quality of the intrusion" against the "governmental interest at stake." *Graham*, 490 U.S. at 396 (internal quotation marks omitted).

Turning to the nature and quality of the intrusion in this case, we recognize that "[t]he intrusiveness of a seizure by means of deadly force is unmatched." *Tennessee v. Garner*, 471 U.S. 1, 9 (1985). Officer Lozada's gunshots were fatal. Thus, we weigh heavily the nature and quality of the intrusion and next consider the governmental interest at stake.

*Graham* generally requires that we weigh the governmental interest at stake by examining the totality of the circumstances, including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [she] is actively resisting arrest or attempting to evade arrest by flight," keeping in mind that the reasonableness of a "particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. The use of deadly force is reasonable only if "the suspect poses a significant threat of death or serious physical injury to the officer or others." *Garner*, 471 U.S. at 3.

As in *Mercado*, "[b]ecause this situation does not involve a criminal arrest, our facts do not fit neatly within the *Graham* framework." 407 F.3d at 1157.

Indeed, "because Florida does not recognize attempted suicide as a crime, it is impossible for this [C]ourt to measure the 'severity of the crime at issue.'" *Id.* (citation omitted) (quoting *Graham*, 490 U.S. at 396). We have little trouble, then, concluding that this *Graham* factor weighs in favor of Dr. Teel. *See id.* at 1157–58.

We next consider the extent to which Mrs. Teel placed herself or others in danger. *See id.* Mrs. Teel indisputably was a threat to herself, "and Florida law recognizes a 'compelling interest in preventing suicide.'" *Id.* (quoting *Krischer v. McIver*, 697 So. 2d 97, 103 (Fla. 1997)). Critically, however, we conclude that there is a genuine dispute as to whether Mrs. Teel posed a significant, immediate threat to Officer Lozada's safety. Mrs. Teel was armed with a knife and walking in his direction. These two facts drove the district court to conclude that Officer Lozada's use of force was constitutional.[6] But the district court failed to sufficiently account for additional material facts. Officer Lozada understood that Mrs. Teel had not threatened her husband or anyone else. She did not verbally threaten Officer Lozada and was not pointing the knife at him. *See Tolan v. Cotton*, 572 U.S. 650, 658 (2014) (rejecting court's determination that plaintiff's admonition to "Get your fucking hands off my mom" was a verbal threat, explaining that "a jury could reasonably infer that his words, in context, did not amount to a statement of intent to inflict harm," especially given testimony that plaintiff "was not

[6] The district court also relied in part on the fact that Mrs. Teel told Officer Lozada "Come on, do it." Doc. 59 at 8.

screaming"). When he shot her without any warning, Mrs. Teel was 10 feet away. *See Mercado*, 407 F.3d at 1154–55, 1160–61 (concluding that an officer who fired a Sage Launcher from six feet at a suicidal man pointing a knife at his chest violated the man's clearly established Fourth Amendment right to be free from excessive force); *see also Perez v. Suszczynski*, 809 F.3d 1213, 1220 (11th Cir. 2016) (explaining that "guns are different when it comes to the level and immediacy of the threat—for instance, a person standing six feet away from an officer with a knife may present a different threat than a person six feet away with a gun"). Her walk was gradual, and she never picked up pace or made any sudden movement.[7] She was diminutive in size.

Perhaps most tellingly, Officer Lozada also was "aware [and conceded] that alternative actions"—retreating into the sitting room or down the stairs to meet up with Officer Earman or using a non-lethal method to subdue Mrs. Teel—"were available means of resolving the situation." *Mercado*, 407 F.3d at 1158. A reasonable officer in his shoes would have been aware of the same alternatives. Yet Officer Lozada did none of these things. His explanation was that since he had

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[7] We reject Officer Lozada's argument that Mrs. Teel was approaching him "in a threatening manner" Appellee's Br. at 27, because we are here on an appeal from a summary judgment order and a jury reasonably could conclude otherwise considering the totality of the circumstances. It is true that Officer Lozada testified he was afraid for his life. But Officer Lozada's beliefs about his "life being in danger are just that—his beliefs. They are not 'facts and circumstances' that we may rely on to objectively determine the reasonableness of his actions." *Perez*, 809 F.3d at 1219–20.

drawn his gun—on his way up the stairs, before he had any reason to believe Mrs. Teel was a danger to anyone but herself—he would not de-escalate to less-than-lethal force. When we view the evidence in the light most favorable to Dr. Teel, we conclude that this factor weighs against Officer Lozada.[8]

Finally, we consider that Mrs. Teel "was not actively resisting arrest, and there is no evidence that [she] struggled with" Officer Lozada. *Id.* at 1157. In *Mercado*, we found that this factor weighed in the plaintiff's favor even though the officer ordered the plaintiff to drop the knife he was aiming at himself. We explained that "[a]rguably, Mercado did not have time to obey [the officer's] order . . . because [the officer] discharged the [weapon] within seconds of making this request." *Id.* Here, Mrs. Teel complied with Officer Lozada's order that she show her hands. She showed him a knife, but Officer Lozada never ordered her to drop it. He never ordered her to stop where she was or

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[8] *Shaw v. City of Selma*, 884 F.3d 1093 (11th Cir. 2018), which the district court cited in support of its decision, is readily distinguishable. There, officers responded to a 911 call about a man carrying a hatchet. *Id.* at 1096–97. The man was well-known to at least one of the officers for aggressive behavior, and the officers instructed him to drop his weapon at least 26 times. *Id.* at 1097–98. The man was less than five feet from an officer and approaching when the officer shot him once, and he died from his injury. *Id.* Here, viewing the evidence in the light most favorable to Dr. Teel, Officer Lozada had no prior information that Mrs. Teel may be aggressive and yet he shot her three times, without giving her any warning, from more than four times the distance in *Shaw*.

The unpublished decisions the district court cited are also readily distinguishable and, in any event, do not bind us here.

put her hands down, despite having 10 seconds to do so while she stood from the bed and paused. And he failed to issue any warning after she began walking in his direction; instead he interrupted his dialogue with her to use his radio. The Fourth Amendment does not require an officer to issue a warning if he lacks time to do so, but a jury could infer that Officer Lozada had time, yet failed, to warn Mrs. Teel. *See Vaughan v. Cox*, 343 F.3d 1323, 1330–31 (11th Cir. 2003). This *Graham* factor also weighs against Officer Lozada.

This case "is not one in which deadly force was used to prevent the escape of a suspect who had committed a violent or otherwise serious crime or who might harm others if not apprehended." *Cantu*, 2020 WL 5270645, at *9. Rather, although Mrs. Teel had committed no crime, and was not an immediate threat to him, Officer Lozada—without issuing a command or warning—shot her three times, killing her. Viewing the evidence and, critically to this case, drawing all inferences in favor of Dr. Teel, we conclude that "[a]ll of the factors articulated in *Graham* weigh in favor of" Dr. Teel, *Mercado*, 407 F.3d at 1157,[9] and so Officer Lozada used excessive force against Mrs. Teel. The district court erred in concluding otherwise.

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[9] Officer Lozada suggests that he had probable cause to take Mrs. Teel into custody for involuntary commitment because of her suicide attempt and that Mrs. Teel resisted his efforts. The same could be said of the plaintiff and officers in *Mercado*, and yet it did not affect our analysis in that case. We follow *Mercado* here.

### B. Clearly Established Law

Officer Lozada argues that even if he used excessive force, he did not violate clearly established law. Specifically, he argues that no factually similar case clearly established that his conduct was unconstitutional.[10] Even if he is correct, summary judgment was unwarranted.

In general, "[t]o determine whether a right was clearly established, we look to binding decisions of the Supreme Court of the United States, this Court, and the highest court of the relevant state (here, Florida)." *Glasscox*, 903 F.3d at 1217. We ask whether it would be "sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, 128 S. Ct. 577, 589 (2018) (internal quotation marks omitted). We undertake this inquiry "in light of the specific context of the case, not as a broad general proposition." *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (internal quotation marks omitted). "To be clearly established, a legal principle must be 'settled law,' meaning that it is not merely suggested, but rather 'is dictated by controlling authority or a robust consensus of cases of persuasive

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[10] Office Lozada also argues that "it was not clearly established that Lozada had to give a warning before using deadly force." Appellee's Br. at 23. He is right that an officer is not required to give a warning under all circumstances; however, it *is* clearly established that an officer must give a warning before using deadly force when a warning is feasible. *See Cantu*, 2020 WL 5270645, at *9 (citing *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985)). Here, as explained above, a jury could reasonably find that it was feasible for Officer Lozada to give a warning.

authority.'" *Glasscox*, 903 F.3d at 1217 (quoting *Wesby*, 138 S. Ct. at 589–90). "Close similarity of the facts between the cases is 'especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'" *Cantu*, 2020 WL 5270645, at *12 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)).

Importantly, however, "the rule requiring particularized case law to establish clearly the law in excessive force cases" has a "narrow exception," *Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000), known as the "obvious clarity" rule, *Oliver v. Fiorino*, 586 F.3d 898, 907 (11th Cir. 2009). Under this exception, "[e]ven without a close fit," a plaintiff "can clear the clearly established law hurdle and defeat a qualified immunity defense by showing that the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official." *Cantu*, 2020 WL 5270645, at *12 (internal quotation marks omitted). "To come within the narrow exception, a plaintiff must show that the official's conduct was so far beyond the hazy border between excessive and acceptable force that the official had to know he was violating the Constitution even without caselaw on point." *Priester*, 208 F.3d at 926 (alteration adopted) (internal quotation marks omitted). "This test entails determining whether application of the excessive force standard would inevitably lead every reasonable officer in the Defendant['s] position to

conclude the force was unlawful." *Id.* (alterations adopted) (internal quotation marks omitted).

Under the unique circumstances here, it would be obviously clear to any reasonable officer that the display of force was excessive. As in *Mercado*, when the evidence is viewed and inferences are drawn in favor of Dr. Teel, "this is one of the cases that lie so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law." *Mercado*, 407 F.3d at 1160 (internal quotation marks omitted). "We have repeatedly held that police officers cannot use force that is wholly unnecessary to any legitimate law enforcement purpose." *Id.* (internal quotation marks omitted).

Officer Lozada's use of force was wholly unnecessary to any legitimate purpose here. As we have explained, Mrs. Teel was not suspected of committing any crime. *See Cantu*, 2020 WL 5270645, at *14. She was suicidal; the purpose of the family's 911 call was to keep her alive, and that should have been the purpose of Officer Lozada's interaction with her given his testimony that he believed her to be a threat only to herself. *See Mercado*, 407 F.3d at 1160. Yet Officer Lozada drew his gun even before he encountered Mrs. Teel, pointed the gun at her before she came near him, and fired at her without warning. Mrs. Teel was not pointing the knife at Officer Lozada or charging at him. By his own testimony she was coming toward him slowly, and he had the opportunity to retreat beyond her reach but simply chose to shoot her instead. Moreover, viewing the evidence in the light

most favorable to Dr. Teel, Officer Lozada had time to warn Mrs. Teel, or even to direct her clearly to disarm herself but failed to do so. *See Cantu*, 2020 WL 5270645, at *14. Given these facts, we conclude that Officer Lozada did not need "case law to know that by intentionally shooting [Mrs. Teel three times], he was violating [her] Fourth Amendment rights." *Mercado*, 407 F.3d at 1160.

Officer Lozada notes that he was trained on a "21-foot rule scenario," in which a charging attacker with a knife could cover 21 feet in the time it would take to draw a firearm. Doc. 38-1 at 120–21. He suggests that it cannot be clearly established that the use of a firearm within the range of 21 feet would be excessive force. Even assuming the rationale for this 21-foot rule is accurate, it is inapplicable here. Officer Lozada testified that in the training scenario, the person armed with a knife is "running towards" the officer. *Id.* at 131. Mrs. Teel, who was bleeding profusely from cuts in her arms and neck, was walking gradually—not running—toward Officer Lozada, so any conclusions we could draw about a charging assailant do not apply here.

In this case, "[q]ualified immunity does not apply at the summary judgment stage given the light in which we must view the evidence now." *Cantu*, 2020 WL 5270645, at *14. Although Officer Lozada "may yet prevail on [qualified immunity] grounds at or after trial on a motion for a judgment as a matter of law," *Cottrell v. Caldwell*, 85 F.3d 1480, 1487 (11th Cir. 1996) (internal quotation marks omitted), Dr. Teel is entitled to a trial on his excessive force claim.

## IV. CONCLUSION

Taking the facts in the light most favorable to Dr. Teel, a reasonable jury could find that Officer Lozada violated Mrs. Teel's clearly established constitutional right to be free from the excessive use of force. Officer Lozada therefore is not entitled to summary judgment based on qualified immunity. We reverse the district court's judgment in this respect. Our decision on Dr. Teel's Fourth Amendment excessive force claim undermines the district court's reasoning for rejecting his remaining claims, but we decline to address alternative arguments as to those claims in the first instance. We vacate the district court's judgment as to those claims. This case is remanded for further proceedings.

**REVERSED IN PART, VACATED IN PART, AND REMANDED.**

## APPENDIX B

**UNITED STATES DISTRICT**
**SOUTHERN DISTRICT OF FLORIDA**
**Case No. 18-14367-CIV-MIDDLEBROOKS/ BRANNON**

**[Filed: October 17, 2019]**

DUDLEY TEEL, as Personal Representative of the Estate of SUSAN TEEL, deceased,

Plaintiff,

v.

DEPUTY SHERIFF JONATHAN LOZADA, in his individual capacity, and SHERIFF DERYL LOAR, in his individual and official capacities,

Defendants.

**ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

THIS CAUSE comes before the Court on Defendants' Motions for Summary Judgment. On August 16, 2019, Defendant Deputy Sheriff Jonathan Lozada (Defendant Lozada), in his individual capacity, filed a Motion for Summary Judgment (DE 29) as to

Counts I and IV of Plaintiff Dudley Teel's ("Plaintiff") Complaint (DE 1). This Motion became fully ripe on September 12, 2019. (DE 43). On September 6, 2019, Defendant Deryl Loar ("Defendant Loar"), in his official capacity as Sheriff of Indian River County,[1] filed a Motion for Summary Judgment (DE 40) as to Counts II and III of Plaintiff's Complaint. This Motion became fully ripe on September 27, 2019. (DE 50).

## BACKGROUND

This case is about the fatal shooting of Susan Teel ("Mrs. Teel") by Defendant Lozada. On the evening of July 26, 2017, Mrs. Teel's daughter called 911 stating that her mother had attempted suicide. (DE 29 at ¶ 1, 5, 6). The dispatcher announced over the radio that Mrs. Teel had possibly cut herself and was under the influence of alcohol. (DE 29 at ¶6). Defendant Lozada, who was on patrol at that time, responded to this dispatch. (DE 29 at ¶ 7).

When Defendant arrived at the Teel residence, he spoke briefly with Mrs. Teel's husband, Dr. Dudley Teel, while standing in the doorway of their home. (DE 29 at ¶ 8). Dr. Teel explained that Mrs. Teel was upstairs and was trying to kill herself with a knife. (DE 29 at ¶ 10). Defendant noticed that there was fresh blood on Dr. Teel's clothing. (DE 29 at ¶ 9).

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[1] Despite the style stating that Sheriff Loar is named in both his individual and official capacities, the substantive allegations contained within the Complaint indicate that he is named in his official capacity only. (DE 1 at ¶¶ 13, 68)

Upon entering the house, before heading upstairs, Defendant drew his gun. Once Defendant reached the top of the stairs, Defendant saw Mrs. Teel. (DE 29 at ¶ 11). Mrs. Teel was wearing a large red bathrobe and laying on the bed in the master bedroom. (DE 29 at ¶ 12). While standing at the threshold of Mrs. Teel's bedroom, Defendant called out "Sheriff's Office, let me see your hands." (DE 29 at 13, citing Lozada Deposition 110:25-111:1). Defendant then took two or three steps into the bedroom. (DE 39 ¶ 13(b), citing Lozada Deposition 110:17-111:11).

Once Mrs. Teel arose from the bed, Defendant saw that Mrs. Teel was holding a knife. (DE 29 at ¶ 14). Mrs. Teel held the knife in the air "pointed down over her own head." (DE 39 at ¶ 14).

Mrs. Teel began walking towards Defendant Lozada. (DE 29 ¶ 14). In response, Defendant took a step backwards. (Lozada Deposition 113:12-13). As Mrs. Teel walked, she said "Fuck you. Kill me." (DE 29 ¶ 14). By this point, Defendant had aimed his gun at Mrs. Teel. (DE 29 at ¶ 15). Defendant Lozada got on his radio and said "Indian River, she's got a knife. Give me 11330" (emergency traffic). (DE 29 at ¶ 15). Ms. Teel continued to "take steps towards" Defendant and said "Come on, just do it." (DE 29 at ¶ 15, 16).

Defendant fired his gun at Mrs. Teel and hit her. (DE 29 at ¶ 16). Mrs. Teel continued towards Defendant Lozada and he fired again, hitting Mrs. Teel again. (DE 29 at ¶ 16). Defendant then backed up into the doorway of the master bedroom and out into an adjacent sitting room located at the top of the stairs. (DE 29 at ¶ 16). Mrs. Teel continued to walk towards

Defendant Lozada with the knife. (DE 29 at ¶ 16). There, Defendant Lozada shot Mrs. Teel for the third and final time. (DE 29 at ¶ 16). Mrs. Teel collapsed in the doorway, where she died. (DE 29 at ¶ 16; DE 39 at ¶ 16).

Defendant Lozada at no point told Mrs. Teel to drop her knife or warned her that he would use deadly force against her. (DE 39 at ¶ 16). Defendant Lozada had non-lethal weapons with him at the time, including pepper spray and a taser gun. (DE 39 at ¶ 39).

The Parties dispute exactly how far Mrs. Teel was from Defendant Lozada when he began shooting. (DE 29 at ¶ 16). Defendant Lozada testified he could not recall how many steps Mrs. Teel made before he discharged his weapon. (Exhibit A, Lozada deposition, 113:25 - 114:4). Defendant Lozada makes no claims about the size of the bedroom, but only indicates that this was the "master bedroom." (DE 29 at ¶ 1). Defendant Lozada also makes no claims about how quickly Mrs. Teel was walking.

Mr. Teel now brings this case against Defendant Lozada in his individual capacity and Defendant Loar in his official capacity seeking damages for violation of Mrs. Teel's Fourth and Fourteenth Amendment rights under 42 U.S.C. §1983 and for violation of the Florida Wrongful Death Act. (DE 1).

## STANDARD

"The court shall grant summary judgment 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).

"Genuine disputes are those in which the evidence is such that a reasonable jury could return a verdict for the non-movant." *Ellis v. England*, 432 F.3d 1321, 1325-26 (11th Cir. 2005). "For factual issues to be considered genuine, they must have a real basis in the record." *Id.* at 1326 (internal citation omitted). "For instance, mere conclusions and unsupported factual allegations are legally insufficient to defeat a summary judgment motion." *Id.* (internal citation omitted). "Moreover, statements in affidavits that are based, in part, upon information and belief, cannot raise genuine issues of fact, and thus also cannot defeat a motion for summary judgment." *Id.* (internal citations omitted).

The movant "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)(1)(A)). "When the *nonmoving* party has the burden of proof at trial, the moving party is not required to 'support its motion with affidavits or other similar material negating the opponent's claim,' in order to discharge this 'initial responsibility.'" *United States v. Four Parcels of Real Prop. in Greene & Tuscaloosa Ctys. in State of Ala.*, 941 F.2d 1428, 1437–38 (11th Cir. 1991). "Instead, the moving party simply may 'show'—that is, point out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 1438 (citation omitted). "Alternatively, the moving party may support its motion for summary judgment with

affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial." *Id.* (citation omitted). "If the moving party shows the absence of a triable issue of fact by either method, the burden on summary judgment shifts to the nonmoving party, who must show that a genuine issue remains for trial." *Id.* (citation omitted). "If the nonmoving party fails to 'make a sufficient showing on an essential element of her case with respect to which she has the burden of proof,' the moving party is entitled to summary judgment." *Id.* (citation omitted). At the summary judgment stage, courts construe the facts in the light most favorable to the non-movant, and any doubts should be resolved against the moving party. *Davis v. Williams*, 451 F.3d 759, 761 (11th Cir. 2006); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

## DISCUSSION

### A. Count I: Excessive Use of Force

Plaintiff alleges that Defendant Lozada violated Mrs. Teel's Fourth Amendment rights by using excessive force against her. The Fourth Amendment guarantees the right to be free from unreasonable searches and seizures by the government. Under the Fourth Amendment, a seizure occurs when an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Roberts v. Spielman*, 643 F.3d 899, 905 (11th Cir. 2011) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968)). Thus, the Fourth Amendment's freedom from unreasonable seizures encompasses the right to be free from the use of excessive force in the course of police intervention in

a potential suicide situation. *See Mercado v. City of Orlando*, 407 F.3d 1152, 1156–57 (11th Cir. 2005) (analyzing the police killing of a suicidal victim as a "seizure" under the Fourth Amendment).

Excessive use of force claims are analyzed under the Fourth Amendment's "objective reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 388 (1989). "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the 'nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id*. at 395 (citation omitted). "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." *Id*. (citation omitted). Instead, "its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*. (citation omitted).

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id*. (citation omitted). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97.

The constitutionality of Defendant Lozada's actions are resolved on the basis of the agreed testimony. In Defendant's Statement of Material Facts, the shooting is described as follows:

> Mrs. Teel continues to advance and says "Come on, just do it." During this time, Deputy Lozada starts retreating. He sees Mrs. Teel *continue to approach* him with the raised knife. Feeling that he is in imminent danger of being injured or killed, he fires his gun at her, striking her. However, she *continues to approach*. He then fires a second round which also strikes her, *but she continues to approach*. By this time, Deputy Lozada had backed up into the doorway of the master bedroom and then out into an adjacent sitting room located at the top of the stairs. At this point, he shoots Mrs. Teel a third and final time which causes her to collapse in the doorway of the master bedroom.

(DE 29 at ¶ 16) (emphasis added) (citations omitted). In response to Defendant's statement in paragraph 16, Plaintiff responds:

> Disputed as to Lozada's claim that he was in imminent danger. Lozada admits there was no zone of danger before he came upstairs. And Lozada admits he did not believe his life was in danger before he came into her nedroom [sic] with his gun drawn, after which, she started moving towards him. Lozada never told Mrs.

> Teel to drop the knife prior to discharging his firearm three times. Lozada never gave her a warning.

Perhaps given that Defendant Lozada was the only living person to see these events occur and was not wearing a body camera there could be room for doubt. However, this court is bound by the facts on which the Parties have agreed. On a motion for summary judgment, this court must accept as true material facts which are not disputed. *See generally*, *Celotex Corp. v. Catrett*, 477 U.S. at 323.

Here, Plaintiff does not in any way dispute that Mrs. Teel continued to walk towards Defendant with a knife before each shot that Defendant Lozada fired. Even construing these facts in the light most favorable to Plaintiff, this is a central admission to the disposition of this case; Fourth Amendment excessive force cases often turn on whether the victim was moving towards the officer, particularly if the individual is armed.

For example, in *Clawson v. Rigney*, where the Eleventh Circuit affirmed the denial of the officer's motion for summary judgment, the court devoted considerable attention to the direction in which decedent was moving:

> Nor does the footage show [the decedent] running directly toward [the officer] in a manner that suggested he intended to attack him. He appears to have been moving away from the group of officers in pursuit of him, not purposefully charging at [the officer]. . . [the

> decedent] was running past [the officer], not charging toward him and placing him in imminent danger.

*Clawson v. Rigney*, No. 18-12150, 2019 WL 2480304, at *4 (11th Cir. June 13, 2019). Similarly, in *Mercado v. City of Orlando*, the Eleventh Circuit found that the shooting of a suicidal man violated the constitution because, at the time he was shot, the decedent "was not actively resisting arrest, and there is no evidence that he struggled with the police." *Mercado v. City of Orlando*, 407 F.3d 1152, 1157 (11th Cir. 2005).

The Parties agree that Mrs. Teel was verbally engaging with Defendant Lozada, saying "Come on, do it" and at each relevant instance continued to "approach" him. Given these agreed facts, a reasonable jury could not find that Mrs. Teel was doing anything other than walking at Defendant Lozada. (DE 29 at ¶ 15, 16).

Further, Plaintiff does not dispute that as Mrs. Teel walked towards Defendant Lozada, she kept the knife in her hand the entire time. *McKinney by McKinney v. DeKalb Cty., Ga.*, 997 F.2d 1440, 1443 (11th Cir. 1993) (affirming denial of qualified immunity where decedent had "previously put down his knife"). So long as Mrs. Teel was holding the knife the entire time, the position of the weapon did not matter. *Shaw v. City of Selma*, 884 F.3d 1093, 1100 (11th Cir. 2018) (finding it immaterial whether a hatchet was held by the decedent's "side, behind his back, or above his head" before deadly force was used);

Finally, neither Party disputes that this shooting took place in and immediately outside Mrs. Teel's bedroom. While the exact number of feet are disputed, even taking the facts in the light most favorable to Plaintiff, there can be no doubt that Mrs. Teel was relatively close to Defendant Lozada.

Further, although the Parties agree that Defendant Lozada failed to issue a warning, "an officer's failure to issue a seemingly feasible warning—at least, to a person appearing to be armed—does not, in and of itself, render automatically unreasonable the use of deadly force." *Quiles v. City of Tampa Police Dep't*, 596 F. App'x 816, 820 (11th Cir. 2015).

This case bears a substantial similarity to *Collar v. Austin*, another tragic case involving a police killing. In *Collar*, the Eleventh Circuit affirmed summary judgment in favor of an officer who killed a student at the University of Southern Alabama. There, the decedent was similarly weak; he was a "naked, unarmed, impaired minor." *Collar v. Austin*, No. CV 14-0349-WS-B, 2015 WL 5444347, at *12 (S.D. Ala. Sept. 15, 2015), *aff'd*, 659 F. App'x 557 (11th Cir. 2016). The decedent was also similarly insistent that the officer shoot and kill him; his only words were, "Shoot me" and "Kill me." *Id*. at *12. He also never reached for the officer or his gun. *Id*.

Based on this behavior, Plaintiff's counsel argued that the decedent was "a threat only to himself." *Id*. Indeed, actions that show a person wants to be shot and killed seem to suggest that they have no interest in hurting the officer. However, the Eleventh Circuit found otherwise, reasoning that although judges might

consider an officer's actions to be unreasonable "from the comfort and safety of our chambers . . . [w]e must see the situation through the eyes of the officer on the scene who is hampered by incomplete information and forced to make a split-second decision between action and inaction in circumstances where inaction could prove fatal." *Collar v. Austin*, 659 F. App'x 557, 560 (11th Cir. 2016) (quotations omitted).

Further, the officer in *Collar* never issued a warning before shooting the minor in the abdomen. *Id.* at *13. And the Eleventh Circuit found that a jury could conclude that seconds before the defendant fired, he knew that another officer was nearby. *Collar*, 659 F. App'x at 559. Neither of these facts swayed the court's reasoning.

While *Collar* was analyzed for a violation of clearly established law, rather than a violation of the Fourth Amendment, the lower court found, and the Eleventh Circuit did not dispute, that "the evidence viewed most favorably to the plaintiffs fails to support the proposition that Collar posed no threat of death or serious injury to the defendant." *Collar*, No. CV 14-0349-WS-B, 2015 WL 5444347 at *12. If an individual posed a threat of death or serious bodily harm, then the use of force against them is constitutional. While *Collar* does not mandate a finding that Defendant Lozada's actions did not violate the constitution, given the considerable similarity to the facts of the present case, [2] *Collar* provides significant support.

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[2] While similar, there are significant differences between the present case and *Collar*. For instance, in *Collar* the Eleventh

Based on the agreed facts and applicable precedent, I find that Defendant Lozada did not violate the constitution and thus there is no need for me to discuss the issue of qualified immunity. Had Mrs. Teel stopped walking after any shot, or had she dropped the knife at any point, I might reach a different conclusion, but based on the agreed facts, a reasonable officer would be justified in using deadly force. While I deeply sympathize with the Teel family, I must apply the law as it stands. Therefore, summary judgment is granted for Defendant Lozada as to Count I.

**B. Count IV: Wrongful Death**

In Count IV, Plaintiff alleges that Defendant Lozada is liable for Ms. Teel's wrongful death pursuant to Florida's Wrongful Death Act, Florida Statute § 768.19. (DE 1 at ¶ 90). Defendant Lozada argues that he is entitled to summary judgment on Count IV because the force used was not excessive as a matter of law and therefore was not wrongful. Florida Statute § 776.05 allows an officer to use any force reasonably necessary to defend himself or others from bodily harm while making an arrest. *Ansley v. Heinrich*, 925 F.2d 1339, 1343 (11th Cir. 1991). "[A] presumption of good faith attaches to an officer's use of force in making a

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Circuit engages in a fact-intensive analysis before determining that "a reasonable officer could have concluded that there was not time to attempt to stop the charge with pepper spray," while here a reasonable jury could find that Defendant Lozada had time to use pepper spray. *Collar v. Austin*, 659 F. App'x at 559. However, given the presence of a knife in this case, I find that a reasonable officer could have concluded that pepper spray would provide insufficient protection.

lawful arrest and an officer is liable for damages only where the force used is clearly excessive." *City of Miami v. Sanders*, 672 So. 2d 46, 47 (Fla. 3d DCA 1996).[3]

For the reasons explained in the previous section, I find that Defendant Lozada's use of force was not excessive. *Sullivan v. City of Pembroke Pines*, 161 F. App'x 906, 911 (11th Cir. 2006) (noting that the Fourth Amendment excessive force analysis is "similar [to the] standard set forth under Florida law").

### C. Count II: *Monell* Claim

In Count II, Plaintiff alleges that Defendant Loar violated Mrs. Teel's Fourth and Fourteenth Amendment right in that, among things, he "failed to adequately train or otherwise supervise and direct [Indian River County Sheriff's Office ("IRSCO")] and its deputy sheriffs concerning the rights of the citizens they encounter in their duties," and "failed to direct . . . the proper investigation of the extreme and wanton acts of his deputy sheriffs." (DE 1 at ¶ 67-79).

"Ordinarily, a governmental entity cannot be held liable for the unconstitutional actions of its employees under 42 U.S.C. § 1983." *Simmons v. Bradshaw*, 879 F.3d 1157, 1173 (11th Cir. 2018). "However, a governmental entity can be held liable if a plaintiff can

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[3] This statute has been applied to seizures even if the officer is not actually attempting to affect an arrest. *Mighty v. Miami-Dade Cty.*, No. 14-23285-CIV, 2017 WL 5203001, at *5 (S.D. Fla. Apr. 18, 2017) (discussing the reasonableness of force under § 776.05 even though the victim "was not suspected of any crime").

show that the unconstitutional act at issue is a result of a policy or custom promulgated by the entity." *Id.* (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978)).

To succeed on a *Monell* claim, "a plaintiff must show: (1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004) (citation omitted).

In Defendant Loar's Statement of Material Facts, he adopts Defendant Lozada's Statement of Facts. (DE 41 at 1). In his response, Plaintiff incorporates his Response in Opposition to Defendant Lozada's Statement of Material Facts in Support of Motion for Summary Judgment. (DE 46 at ¶ 46). I found that based on these facts there was no Fourth Amendment violation.

Plaintiff also alleges that Mrs. Teel's Fourteenth Amendment rights were violated including "the right to liberty, the right to be free from use of excessive force, and those fundamental rights of due process, liberty and life as guaranteed by the Constitution." (DE 1 at 58). Plaintiff does not expound upon these allegations in response to Defendant Loar's Motion for Summary Judgment. (DE 45). However, where the Constitution "provides an explicit textual source of constitutional protection" for the violation alleged, such as the Fourth Amendment, the court should apply the analysis that constitutional provision requires, rather than the analysis dictated by "the more generalized notion of

substantive due process." *Graham*, 490 U.S. at 395. Thus, as this is an excessive force inquiry under the Fourth Amendment, the Fourth Amendment analysis is controlling. Therefore, as there is no constitutional violation, summary judgment is granted for Defendant Loar as to Count II.

**D. Count III: Wrongful Death**

Plaintiff alleges that Defendant Loar violated the Florida Wrongful Death Act by negligently retaining Defendant Lozada, negligently allowing him to "interact with members of the public in potentially volatile situations," and negligently allowing him to be the "first responder in an emotionally charged situation in light of his known inability to handle highly emotionally charged situations." (DE 1 at ¶ 86). As explained in *Delaurentos v. Peguero,*

> Florida cases distinguish between (a) acts committed within the scope and course of employment, and (b) acts committed outside the scope of employment. In the first situation, where acts were committed within the course and scope of employment, the basis of employer liability is *respondeat superior*. As to [*respondeat superior*] the negligence of the employer is immaterial since this Court is committed to the rule that if the employee is not liable, the employer is not liable.

47 So. 3d 879, 882 (Fla. Dist. Ct. App. 2010) (quoting *Mallory v. O'Neil*, 69 So.2d 313, 315 (Fla.1954)). Plaintiff concedes that Defendant Loar was acting within the scope of his employment when he shot Mrs.

Teel. (DE 1 at ¶ 81). As previously discussed, Defendant Lozada is not liable; therefore, Defendant Loar is not liable. Thus, Defendant Loar's Motion for Summary Judgment as to Count III is granted.

**CONCLUSION**

Upon careful consideration of the Parties' written submissions, the record, and applicable law pertaining to the claims at issue, it is hereby **ORDERED AND ADJUDGED** that

1) Defendant Lozada's Motion for Summary Judgment as to Counts I and IV (DE 29) is **GRANTED.**

2) Defendant Loar's Motion for Summary Judgment as to Counts II and III (DE 40) is **GRANTED**.

3) Final judgment will be entered by separate Order.

**SIGNED** in Chambers at West Palm Beach, Florida, this 17th day of October, 2019.

/s/ Donald M. Middlebrooks
Donald M. Middlebrooks
United States District Judge

Copies to: Counsel of Record

## APPENDIX C

**UNITED STATES DISTRICT**
**SOUTHERN DISTRICT OF FLORIDA**

**Case No. 18-14367-CIV-MIDDLEBROOKS/ BRANNON**

**[Filed: October 17, 2019]**

| | |
|---|---|
| DUDLEY TEEL, as Personal Representative of the Estate of SUSAN TEEL, deceased, | ) |
| Plaintiff, | ) |
| v. | ) |
| DEPUTY SHERIFF JONATHAN LOZADA, in his individual capacity, and SHERIFF DERYL LOAR, in his individual and official capacities, | ) |
| Defendants. | ) |

**FINAL JUDGMENT**

THIS CAUSE is before the Court pursuant to this Court's previous Order Granting Defendants' Motions for Summary Judgment. (DE 59). Final judgment is entered pursuant to Federal Rule of Civil Procedure 58, as set forth below.

It is hereby **ORDERED and ADJUDGED** that:

(1) Final Judgment is entered in favor of Defendant Jonathan Lozada, and against Plaintiff Dudley Teel as to Count I and Count IV.

(2) Final Judgment is entered in favor of Defendant Deryl Loar and against Plaintiff Dudley Teel as to Count II and Count III.

**SIGNED** in Chambers at West Palm Beach, Florida, this 17th day of October, 2019.

/s/ Donald M. Middlebrooks
Donald M. Middlebrooks
United States District Judge

Copies to: Counsel of Record

## APPENDIX D

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

**No. 19-14530-AA**

**[Filed: November 18, 2020]**

| | |
|---|---|
| DUDLEY TEEL, | ) |
| | ) |
| Plaintiff - Appellant, | ) |
| | ) |
| versus | ) |
| | ) |
| DEPUTY SHERIFF JONATHAN LOZADA, in his individual capacity, | ) |
| SHERIFF DERYL LOAR, in his individual and official capacities, | ) |
| | ) |
| Defendants - Appellees. | ) |
| | ) |

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARTIN, ROSENBAUM and JILL PRYOR, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)