IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19-40121

KENNETH RATLIFF,

Plaintiff - Appellant,

v.

ARANSAS COUNTY, TEXAS; COLBY SCUDDER, Individually; RAYMOND SHEFFIELD, Individually,

Defendants - Appellees.

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

---

(Filed Jan. 15, 2020)

Before JOLLY, SMITH, and COSTA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge.

Kenneth Ratliff was shot five times when he refused to drop his weapon during an armed confrontation with two sheriff's deputies in Aransas County, Texas. He survived and was later acquitted of criminal assault. He proceeded to sue both deputies, as well as the county, under 42 U.S.C. § 1983, alleging that the deputies used unreasonable and excessive force in violation of the Fourth Amendment. The district court dismissed Ratliff's "official custom" and "failure to train"

claims against Aransas County, finding that Ratliff's pleadings failed plausibly to establish municipal liability under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). Later, the court awarded summary judgment to the deputies, holding that Ratliff had failed to rebut their qualified immunity defense. Ratliff appeals; we affirm.

I.

At approximately 3:00 a.m., on March 24, 2015, Aransas County sheriff's deputies were dispatched to a residence in Rockport, Texas, where Kenneth Ratliff was living with Tanya Vannatter, his fiancée. The deputies, Colby Scudder and Raymond Sheffield, had been requested by Vannatter, who reported in a 911 call that Ratliff had beaten her earlier in the evening.

When the deputies arrived, Vannatter explained that Ratliff had been drinking "all day and all night," and that, when she caught him sending text messages to another woman, he went "ballistic." More specifically, Vannatter said that Ratliff had thrown her to the ground, punched her "everywhere," and choked her with such force that she thought she would die. She was reluctant to press charges. But she did request that the deputies ask Ratliff to leave home voluntarily.

As Vannatter and the deputies walked toward Ratliff's front porch, Ratliff began shouting, "Get the f*** off my property." Ratliff was holding a loaded, semi-automatic pistol, but he had not chambered a round. The parties dispute whether the pistol was ever

pointed at the deputies, but it is undisputed that the deputies issued five orders to disarm moments before the shooting. Ratliff responded, "shoot me . . . shoot me" and "hey, you're on my property." Deputy Scudder fired nine shots, and Ratliff sustained five gunshot wounds. The whole encounter lasted about twenty-five seconds. The deputies called an ambulance immediately, and paramedics arrived in time to tend to Ratliff, who survived.

II.

Texas authorities charged Ratliff with aggravated assault on a police officer, but he was later acquitted by a jury. Ratliff then sued Deputy Scudder, Deputy Sheffield, and Aransas County under 42 U.S.C. § 1983, alleging that Deputy Scudder violated clearly established law by using deadly force, that Deputy Sheffield violated clearly established law by failing to prevent deadly force, and that Aransas County should be held responsible because the deputies' actions reflect the county's "customary practice[,] . . . policy or procedure."[1] The district court quickly dismissed Ratliff's claim against the county, however, holding that Ratliff had failed to plead sufficiently specific facts in support

[1] Ratliff's complaint also contained a "malicious prosecution" claim that the district court dismissed for failure to "tie [the allegedly malicious prosecution] to rights locatable in constitutional text." *Cf. Castellano v. Fragozo*, 352 F.3d 939, 945 (5th Cir. 2003) (en banc). Ratliff does not challenge the dismissal of that claim on appeal.

of his "official custom" and "failure to train" theories of *Monell* liability.

Then, on a motion for summary judgment, the district court also disposed of Ratliff's excessive force claims against the deputies. The district court found that Deputy's Scudder's use of deadly force was not objectively unreasonable under the circumstances and that Ratliff could not therefore meet his burden to rebut the defense of qualified immunity. That finding was also fatal to Ratliff's claim against Deputy Sheffield. Ratliff's entire suit was dismissed with prejudice. This appeal followed.

III.

Ratliff raises three issues on appeal. He argues that the district court erred: (1) by granting defendants' motion to dismiss the *Monell* claim against Aransas County, (2) by excluding testimony given by Ratliff in his earlier criminal trial from the summary judgment record in this civil action, and (3) by awarding summary judgment to the deputies on qualified immunity grounds. We will address each issue in turn.

A.

We first consider Ratliff's challenge to the dismissal of his *Monell* claim. Ratliff argues that his pleadings satisfy both the familiar pleading standard established by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and a lower-than-normal pleading standard

that, according to Ratliff, applies in the *Monell* context under *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). He can prevail on neither count.

Initially, we note that the ordinary *Twombly* pleading standard applies. It is, of course, true that *Leatherman*, a pre-*Twombly* case, held that courts must not apply a "heightened" pleading standard to *Monell* claims. *See id.* at 168. Although Ratliff argues otherwise, however, *Leatherman* did not require courts to accept "generic or boilerplate" pleadings in this case or in any other context. Indeed, our precedents make clear that the *Twombly* standard applies to municipal liability claims. *See Peña v. City of Rio Grande City*, 879 F.3d 613, 621–22 (5th Cir. 2018); *Doe ex rel. Magee v. Covington Cty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 866 n.10 (5th Cir. 2012) (en banc). "To survive a motion to dismiss," Ratliff's *Monell* pleadings "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted).

Reviewing *de novo*, we find no error in the district court's conclusion that Ratliff has failed to produce sufficient pleadings. To state a *Monell* claim against Aransas County, Ratliff was required to plead facts that plausibly establish: "a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001). The district court held that Ratliff's complaint fails to establish an official custom or policy of excessive force

because "[t]he only facts [that Ratliff] allege[d] with any specificity . . . relate to his shooting." This assessment is correct.

"[P]lausibly to plead a practice 'so persistent and widespread as to practically have the force of law,' [Ratliff] must do more than describe the incident that gave rise to his injury." *Peña*, 879 F.3d at 622. Ratliff's complaint states that "the assault, beating, and severe injury to citizens, with little or no justification, is a persistent, widespread practice of County employees—namely officers/deputies—that, although not authorized by officially adopted policy, is so common and well settled as to constitute a custom that fairly represents official county policy." But this allegation does not contain any specific facts. Instead, the complaint's only specific facts appear in the section laying out the events that gave rise to this action. Thus, Ratliff's complaint clearly does not satisfy *Twombly* or *Iqbal* with respect to the allegation that excessive force is an Aransas County "custom."

In addition to this theory of widespread and customary police brutality, Ratliff also alleged that "Defendant County is liable for [the] inadequate training of police officers." To prevail on a failure-to-train theory, Ratliff must plead facts plausibly establishing "(1) that the municipality's training procedures were inadequate, (2) that the municipality was deliberately indifferent in adopting its training policy, and (3) that the inadequate training policy directly caused the violations in question." *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 170 (5th Cir. 2010).

Ratliff has failed to carry this burden. Although the district court focused on the first two failure-to-train elements, "we may affirm a district court's [Federal Rule of Civil Procedure] 12(b)(6) dismissal on any grounds raised below and supported by the record." *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007). Before the district court, the defendants argued that Ratliff's failure-to-train pleadings were insufficient with respect to the element of causation. It is clear that this argument is meritorious. Ratliff's complaint states in conclusory fashion that a "deficiency in training actually caused Defendants Scudder and Sheffield to violate Plaintiff's constitutional rights." But, absent specific allegations supporting a plausible causation inference, this legal conclusion does not state a claim for relief and warrants dismissal under Rule 12(b)(6).

In short, we hold that the district court did not err in dismissing Ratliff's claim against Aransas County and, consequently, affirm its judgment dismissing the county from this case.

B.

We next examine Ratliff's argument that the district court erred by excluding testimony that Ratliff gave in his earlier criminal trial. He offered the testimony because of a failing memory and to rebut the deputies' qualified immunity defense in this § 1983 case. This previous testimony was attached, as part of a forty-page exhibit, to Ratliff's response to the defendants' summary judgment motion. The exhibit also

included the testimony of other trial witnesses, including Vannatter and Deputy Scudder. The defendants objected only to Ratliff's testimony, arguing that such testimony was inadmissible hearsay to which no exception applied. The district court sustained the objection in a footnote but did not provide analysis or reasoning.

On appeal, Ratliff does not explain why any of the excluded testimony would have been relevant to the issues raised at summary judgment. The testimony could have evidenced only two plausibly-relevant facts: (1) that Ratliff did not know who was approaching his residence when he yelled, "Get the f*** off my property," and (2) that Ratliff did not "raise [his] gun and point it" at anyone, instead holding it "in [his] right hand . . . down [at his] side" for the duration of his encounter with the deputies.

"[A]n appeal of a summary judgment presenting evidentiary issues raises two levels of inquiry." *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 916 (5th Cir. 1992) (quotation omitted). First, we review the district court's evidentiary rulings for abuse of discretion. *Id.* Then, once the summary judgment record is "define[d]," we review *de novo* whether summary judgment was appropriately granted. *Id.* Indeed, here, we cannot determine whether the district court's summary judgment order was erroneous until we have "defined" the summary judgment record, *i.e.*, until we have ruled on Ratliff's challenge to the exclusion of his earlier criminal testimony. We thus address Ratliff's

evidentiary arguments first, before turning to the merits of the district court's summary judgment order.

We first entertain the defendants' argument that any error in excluding Ratliff's prior testimony was harmless. If it were, we may assume that the exclusion was erroneous and affirm nevertheless. *Saratoga Res., Inc. v. Lexington Ins. Co.*, 642 F. App'x 359, 363 n.10 (5th Cir. 2016) (citing *Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co.*, 174 F.3d 653 (5th Cir. 1999)). An error is harmless unless it affects "substantial rights." Fed. R. Civ. P. 61. Ratliff, as the "party asserting . . . error," bears the burden of proving such prejudice. *Ball v. LeBlanc*, 792 F.3d 584, 591 (5th Cir. 2015).

But no prejudice has been shown. As we have already said, Ratliff's appellate brief does not even explain why the excluded testimony was relevant, let alone demonstrate that its exclusion affected his "substantial rights." Fed. R. Civ. P. 61. On the contrary, none of the points, which we may assume from the excluded testimony, was relevant to the district court's decision to enter summary judgment. Ratliff's testimony that he did not know who was approaching his home on the night of the shooting was irrelevant because, in the context of qualified immunity, the district court assessed the "reasonableness of [Deputy Scudder's] use of force . . . from the perspective of a reasonable officer on the scene," not from Ratliff's perspective. Similarly, "the direction of [Ratliff's] gun" was immaterial to the district court's analysis: the district court reasoned that, irrespective of the gun's direction,

Deputy Scudder's force was justified because "other facts [had] establish[ed] that the suspect was a threat to the officer[s]," which would include the fact that Ratliff had been accused of a violent crime, the fact that Ratliff was drunk and confrontational, and the fact that Ratliff had ignored five orders to drop his weapon.[2]

To sum up, we find that, even if the district court erred by excluding testimony from Ratliff's criminal trial, such error was harmless and the testimony's exclusion thus furnishes no basis for reversal.

C.

Finally, we consider the substantive merits of Ratliff's appeal: whether the district court erred by accepting the deputies' qualified immunity defense and awarding them summary judgment. "We review a grant of summary judgment *de novo*, viewing all evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor." *Gonzalez v. Huerta*, 826 F.3d 854, 856 (5th Cir. 2016) (quotation omitted).

Typically, to prevail on a motion for summary judgment, the moving party must show "that there is no genuine dispute as to any material fact." Fed. R. Civ.

---

[2] As we shall explain later, our cases support the district court's conclusion that, because Ratliff ignored five orders to disarm and engaged in threatening behavior, Deputy Scudder's force was not unreasonable even assuming that Ratliff never raised his gun. *See Garza v. Briones*, 943 F.3d 740, 747 (5th Cir. 2019).

P. 56(a). However, "[a] good-faith assertion of qualified immunity alters the usual summary judgment burden of proof, shifting it to the plaintiff to show that the defense is not available." *Orr v. Copeland*, 844 F.3d 484, 490 (5th Cir. 2016) (quotation omitted).

So, here, Ratliff was required to adduce summary judgment evidence indicating that the deputies' actions "violate[d] clearly established . . . constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quotation omitted). To determine whether he has done so, we will assume genuinely disputed facts in his favor and engage in a two-pronged inquiry. "The first [prong] asks whether the facts . . . show [that] the officer's conduct violated a [constitutional or statutory] right." *Tolan v. Cotton*, 572 U.S. 650, 655–56 (2014) (brackets and ellipsis added). The second "asks whether the right in question was 'clearly established' at the time of the violation." *Id.* at 656. For a right to be clearly established, "its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quotation omitted).

The district court focused exclusively on the first prong of the qualified immunity analysis, concluding that the right at issue here, Ratliff's Fourth Amendment right to be free from unreasonable and excessive force, was not violated when Deputy Scudder opened fire. *See Cleveland v. Bell*, 938 F.3d 672, 676 (5th Cir. 2019) ("If the plaintiff fails at either step, [a] federal court can grant qualified immunity by addressing

either step or both of them."). To establish a Fourth Amendment violation in this context, Ratliff must establish "(1) [an] injury (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Freeman v. Gore*, 483 F.3d 404, 416 (5th Cir. 2007). Only the second and third of these elements are at issue. The question is whether Deputy Scudder's resort to deadly force was unreasonable and excessive when the facts are viewed "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989).

Our recent opinion in *Garza v. Briones* speaks to this question. Prior to *Garza*, our cases had clearly established that deadly force is not unreasonable when an armed suspect has ignored multiple orders to disarm and has either pointed his weapon at a person or used the weapon in such a manner as to make a threatening gesture. *See*, *e.g.*, *Ramirez v. Knoulton*, 542 F.3d 124, 127–31 (5th Cir. 2008) (officer's use of deadly force was not a Fourth Amendment violation where an armed suspect failed to comply with an order to drop his weapon and then "brought his hands together in front of his waist" as if "in preparation to aim [his gun] at the officers"); *see also Mace v. City of Palestine*, 333 F.3d 621, 624–25 (5th Cir. 2003) (deadly force was not objectively unreasonable when a suspect had "brandish[ed] an eighteen to twenty inch sword" and failed to "respond to commands to drop his sword or to stop moving toward [police] officers"); *Ballard v. Burton*,

444 F.3d 391, 402–03 (5th Cir. 2006) (deadly force was not unreasonable when a suspect had "refused to put down his rifle, discharged the rifle into the air several times while near the officers, and pointed it in the general direction of [the] officers," even though the suspect was not pointing his gun at anyone when he was shot).

Garza further adds to this line of cases. In *Garza*, police officers received reports that a man was "sitting alone in front of [a] truck stop's bar playing with a pistol and holding what appeared to be a wine bottle and a plastic bag." 943 F.3d at 743. When the officers arrived, they discovered a suspect holding a gun, later revealed to be a BB gun. *Id.* One of the officers ordered the suspect to drop the weapon, but he "did not do so and instead continued to move the firearm around in different directions while making facial gestures." *Id.* "At that time, [the suspect] did not have his finger on the trigger and was not pointing the gun at anyone." *Id.* Nevertheless, the suspect was later shot and killed. *Id.* The administrator of the suspect's estate sued the officers under § 1983, alleging that the officers' resort to deadly force was unreasonable, excessive, and a violation of the Fourth Amendment. *Id.* at 744.

We rejected those allegations. We held that, when "confronting an unpredictable man armed with a dangerous weapon," law enforcement officers "may use deadly force . . . without violating the Fourth Amendment." *Id.* at 745. The plaintiff in *Garza* argued, as Ratliff argues now, that "a reasonable jury could find that [the suspect] never pointed his gun at the officers." *Id.* at 746. In support of this argument, the plaintiff relied on an

affidavit from one of the officer-defendants, which stated that the suspect "did not at any time point the gun [at the] cops." *Id.* at 747. Although we found that video evidence had conclusively contradicted the affiant's statement, we explained that this fact was not essential to the outcome and further held that a "reasonable officer in any of the defendants' shoes would have believed that [the suspect] posed a serious threat regardless of the direction [of his] gun." *Id.*

Thus, in *Garza*, we found that it is not unreasonable for law enforcement officers to use deadly force against an armed suspect, irrespective of the pointed direction of that suspect's weapon, when the suspect has ignored orders to drop the weapon and has displayed erratic or aggressive behavior indicating that he may pose an imminent threat. We can concede that, here, unlike in *Garza*, the video evidence is inconclusive with respect to the direction of Ratliff's gun. Moreover, we are willing to accept that the gun's direction is genuinely disputed. But we cannot agree that the pointed direction of Ratliff's gun is material in the context of these facts. Once Ratliff had ignored repeated warnings to drop his weapon, the deputies here, like the officers in *Garza*, had ample reason to fear for their safety.[3]

---

[3] The deputies had been told that Ratliff was drunk and that he had nearly killed a person earlier in the night. When they arrived on the scene, Ratliff dared the deputies to shoot him, cursed at the deputies to get off his property, and ignored the deputies' lawful commands to disarm. Although we accept that it is genuinely disputed whether Ratliff knew that he was dealing

Thus, we concur in the district court's conclusion that the deputies were entitled to qualified immunity. Ratliff simply has not met his burden to establish a Fourth Amendment violation in the form of unreasonable and excessive force, much less a violation that every reasonable officer in Deputy Scudder's position would appreciate. *See Hope*, 536 U.S. at 739. The district court was correct to enter summary judgment in favor of both deputies.[4]

IV.

In sum, we hold that the district court committed no reversible error in its dismissal of Ratliff's *Monell* claim against Aransas County, nor in its decision to exclude testimony given in Ratliff's criminal trial, nor in its decision to award summary judgment to both

---

with law enforcement, we again note that facts about *Ratliff's* knowledge are beside the point. We examine the reasonableness of Deputy Scudder's force "from the perspective of a reasonable officer on the scene." *Graham*, 490 U.S. at 396. There is no genuine dispute about whether Deputy Scudder could reasonably have believed that Ratliff knew he was confronting the police. After all, the deputies were in uniform and, although it was dark, the area was illuminated by lights from Deputy Sheffield's squad car.

[4] In his initial brief on appeal, Ratliff does not challenge the district court's dismissal of the claim against Deputy Sheffield, other than to generally assert that summary judgment should not have been awarded to "Appellees." As such, he has waived on appeal any argument that the district court improperly dismissed this claim. *McKay v. Novartis Pharm. Corp.*, 751 F.3d 694, 702 n.6 (5th Cir. 2014) (issues not raised and argued in an appellant's initial brief are abandoned).

deputies under the doctrine of qualified immunity. The district court's judgment is therefore, in all respects,

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-40121

D.C. Docket No. 2:17-CV-106

KENNETH RATLIFF,

Plaintiff - Appellant

v.

ARANSAS COUNTY, TEXAS; COLBY SCUDDER, Individually; RAYMOND SHEFFIELD, Individually,

Defendants - Appellees

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

Before JOLLY, SMITH, and COSTA, Circuit Judges.

JUDGMENT

(Filed Jan. 15, 2020)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellant pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

KENNETH RATLIFF, Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 2:17-CV-106
ARANSAS COUNTY, TEXAS, *et al*, Defendants.	§	

ORDER ON MOTION FOR SUMMARY JUDGMENT

(Filed Jan. 9, 2019)

Plaintiff Kenneth Ratliff (Ratliff) brings this action against Defendants Colby Scudder (Deputy Scudder) and Raymond Sheffield (Deputy Sheffield), deputies with the Aransas County Sheriff's Department, alleging excessive force in violation of Ratliff's constitutional rights under 42 U.S.C. § 1983. Defendants have moved for summary judgment based on qualified immunity.[1] For the following reasons, the Court GRANTS Defendant's motion for summary judgment.

---

[1] Defendants' Motion for Summary Judgment Based on Qualified Immunity (D.E. 30); Plaintiff's Response to Defendants' Motion for Summary Judgment (D.E. 47); Defendants' Responses to Plaintiff's Objections to Defendants' Summary Judgment Evidence (D.E. 49); Defendants' Objections to Plaintiff's Summary Judgment Evidence (D.E. 50); Plaintiff's Response to Defendants' Objections to Plaintiff's Summary Judgment Evidence (D.E. 51);

FACTS

This lawsuit arises from events that took place in the early hours of March 24, 2015. Kenneth Ratliff had spent the previous day fishing with friends and had a few beers. He then stopped by a local bar for more drinks before heading home around 2:00 a.m. During the next hour, Ratliff got into a dispute with his girlfriend, Tanya Vannatter (Vannatter), ending in Ratliff telling her to leave. As she stormed out of the house, Vannatter told Ratliff, "you're going to pay for this motherf***er." Fearing that Vannatter's family may come to confront him, Ratliff armed himself with a gun and sat on his porch.

Vannatter ran to a neighbor's house and called 911 because Ratliff "had been hitting" her. Deputy Scudder and Deputy Sheffield reported to the scene separately and talked to Vannatter outside the neighbor's house. Vannatter told the deputies that Ratliff had been drinking all day and when he came home from the bar, he "went f***in' ballistic." D.E. 30-1. She recounted that Ratliff had pushed her around, placed her in a headlock, and strangled her twice. As Ratliff strangled her, Vannatter thought she was going to die. D.E. 30-1. Deputy Scudder asked Vannatter if she wanted to

---

Defendants' Reply to Plaintiff's Response to Defendants' Objections to Plaintiff's Summary Judgment Evidence (D.E. 52). Defendant filed an objection to Plaintiff's summary judgment evidence, claiming that Plaintiff's testimony in his criminal trial is inadmissible hearsay. The Court SUSTAINS this objection. The Court has also reviewed Plaintiff's objections to Defendants' evidence listed in the response. The Court has not relied on this evidence so Plaintiff's objections are DENIED as moot.

press charges against Ratliff. She said no, but she wanted to check on her 11-year-old son, who was still in the house with Ratliff. Deputy Scudder told her they could ask Ratliff to leave long enough for Vannatter to gather her belongings and her son. Accompanied by Vannatter, Deputy Sheffield and Deputy Scudder began walking toward Ratliff's house.

It was pitch-dark as they approached Ratliff's home. The street was poorly lit and Ratliff's porch light was turned off. Deputy Scudder had parked his car with the headlights shining away from Ratliff's house and Deputy Sheffield had parked his car in front of the neighbor's house. D.E. 30-4, p. 1. The only light came from Deputy Sheffield's headlights, which barely reached the end of Ratliff's driveway.

Ratliff testified in his deposition that he does not remember the details of what happened next. He only recalls hearing voices in his front yard and shouting at them. The evidence, including the video footage, reveals that as the deputies approached his house, Ratliff yelled "get the f*** off my property!" Vannatter instantly warned the deputies that Ratliff had a gun.[2] D.E. 30-4, p. 2. Deputy Scudder immediately shouted at Ratliff to drop it and Deputy Sheffield shouted at Ratliff, "I'm going to f***ing shoot you, Motherf**ker!" D.E. 30-1. Deputy Scudder saw Ratliff with a pistol and drew his weapon, which had a flashlight, and pointed

[2] Deputy Sheffield testified that he heard Vannatter say "Watch out. He may have a gun." D.E. 47-3, p. 24. Deputy Scudder stated that Vannatter said Ratliff had a gun. D.E. 30-4, p. 2.

it at Ratliff. The deputies continued to shout at Ratliff to put his gun down and Ratliff yelled back, "Shoot me!" The porch was about 90 feet from the deputies at this point.

The deputies shouted at Ratliff five times to put his weapon down. Deputy Scudder knew from training that an armed person could raise a gun, point it at an officer, and fire it before an officer has time to react. D.E. 30-4, p. 2. As Ratliff yelled once again that it was his property, Deputy Scudder fired his gun and shot Ratliff until he fell to the ground.

Approximately 16 seconds elapsed between the time Vannatter warned the deputies about Ratliff's gun and the moment Deputy Scudder started shooting. The deputies never announced themselves as the police to Ratliff during the encounter. Ratliff survived and was charged with assaulting Vannatter, and threatening Vannatter and the deputies with a deadly weapon. Ratliff was later acquitted of the charges.

Ratliff sued Deputy Scudder, Deputy Sheffield, and Aransas County for excessive force in violation of his Fourth Amendment rights as well as for malicious prosecution.[3] Deputy Scudder and Deputy Sheffield seek summary judgment on the Fourth Amendment claims based on a qualified immunity defense.

---

[3] Ratliff's claims against Aransas County and the claims of malicious prosecution against Deputy Scudder and Deputy Sheffield were previously dismissed. D.E. 24.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "A fact issue is 'material' if its resolution could affect the outcome of the action." *Poole v. City of Shreveport*, 691 F.3d 624, 627 (5th Cir. 2012) (citing *Hamilton v. Segue Software, Inc.*, 232 F.3d 473, 477 (5th Cir. 2000)). The nonmoving party cannot avoid summary judgment by resting on mere conclusory allegations or denials in its pleadings. *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 417 (5th Cir. 2016) (internal quotation marks and citation omitted). However, the evidence must be viewed, and all justifiable inferences drawn, in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The video recordings of Deputy Scudder and Deputy Sheffield's body cameras in this case affect the standard of review. A court can "assign greater weight, even at the summary judgment stage, to the facts evident from video recordings taken at the scene." *Newman v. Guedry*, 703 F.3d 757, 761 (5th Cir. 2012) (internal citation omitted). "When one party's description of the facts is discredited by the record, we need not take his word for it but should view 'the facts in the light depicted by the videotape.'" *Id.* (quoting *Scott v. Harris*, 550 U.S. 372, 380–81 (2007)).

DISCUSSION

A plaintiff stating a claim under 42 U.S.C. § 1983 must demonstrate a violation of the Constitution or federal law committed by someone acting under color of state law. *Bailey v. Preston*, 702 F. App'x 210, 212 (5th Cir. 2017) (citing *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 252-53 (5th Cir. 2005)). It is undisputed that Deputy Scudder and Deputy Sheffield were both acting under color of state law. Thus, the question is whether the deputies violated Ratliff's constitutional rights.

Claims under § 1983 may be brought against persons in their individual or official capacities, or against a governmental entity. *Goodman v. Harris Cnty.*, 571 F.3d 388, 395 (5th Cir. 2009) (citing *Bd. of Cnty. Commis of Bryan Cty. v. Brown*, 520 U.S. 397, 403 (1997)). Personal-capacity suits seek to impose liability on a governmental official as an individual, and the official can assert the defense of qualified immunity as a shield to liability. *Goodman*, 571 F.3d at 395. (internal citations omitted). Ratliff sued Deputy Scudder and Deputy Sheffield in their personal capacities, and they have raised the defense of qualified immunity.

The qualified immunity defense alters the summary judgment burden of proof. The plaintiff bears the burden to rebut its applicability. *Clayton v. Columbia Cas. Co.*, 547 F. App'x 645, 649 (5th Cir. 2013) (internal citation omitted). The plaintiff must show that (1) the defendant's conduct violated a constitutional or statutory right, and (2) the defendant's actions were

objectively unreasonable in the light of clearly established law at the time of the conduct in question. *Id.* The defendant is entitled to summary judgment if there is no genuine issue of material fact on either element. *Reyes v. Bridgewater*, 362 Fed. App'x. 403, 406 (5th Cir. 2010). This two-prong standard is demanding because qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). The plaintiff does not need to present "absolute proof" to overcome summary judgment but must offer more than "mere allegations." *Ontiveros v. City of Rosenberg, Tex.*, 564 F.3d 379, 382 (5th Cir. 2009) (citing *Reese v. Anderson*, 926 F.2d 494, 499 (5th Cir. 1991)).

A. Excessive Force Claim

Ratliff claims that Deputy Scudder used excessive force in violation of Ratliff's constitutional rights. To overcome qualified immunity on the excessive force claim, a plaintiff must show "(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Poole v. City of Shreveport*, 691 F.3d 624, 628 (5th Cir. 2012) (citing *Ontiveros*, 564 F.3d at 382). The inquiries on the second and third elements are often intertwined. *Id.* It is undisputed that Ratliff suffered an injury. Thus, the Court need only determine whether the force was clearly excessive and clearly unreasonable.

"[T]he excessive force inquiry is confined to whether the officer was in danger at the moment of the threat that resulted in the officer's shooting." *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014) (citing *Bazan ex rel. Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 493 (5th Cir. 2001)). "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." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)). The court must give an "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 1152. Factors to consider include "'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (citing *Graham*, 490 U.S. at 396).

First, viewing the summary judgment evidence from the perspective of the deputies, the Court finds that Ratliff was accused of committing a serious crime shortly before the shooting. Deputy Scudder and Deputy Sheffield arrived at Ratliff's home in response to Vannatter's 911 call reporting an assault. The deputies were told that Ratliff had thrown her to the ground and strangled her so hard that Vannatter thought she was going to die. Ratliff argues that Vannatter's calm

demeanor and refusal to press charges against him diminishes the severity of the alleged assault. Regardless of how Vannatter felt after the alleged assault, the deputies approached Ratliff knowing that he had been accused of committing a serious crime of assault.

Next, the Court considers Deputy Scudder's belief that he was in danger at the time of the shooting. A deputy's use of deadly force is presumptively reasonable when the deputy has reason to believe that the suspect poses a threat of serious harm to the officer or to others. *Ontiveros*, 564 F.3d at 382 (citing *Mace v. City of Palestine*, 333 F.3d 621, 623 (5th Cir. 2003)). Deputy Scudder was told that Ratliff had been drinking all day, he had assaulted Vannater, and a child remained in the house. During the confrontation, Ratliff held a gun and refused to drop it. D.E. 30-4, p. 2. The Court finds that Deputy Scudder had a reasonable belief that Ratliff posed an immediate danger.

Ratliff claims that Deputy Scudder's testimony is inconsistent with Deputy Sheffield and Vannater's testimony about whether Deputy Scudder saw Ratliff raise his gun because Deputy Sheffield and Vannatter testified that they did not see the gun. Ratliff also contends that Deputy Scudder fired at him almost instantaneously after Vannatter said he had a gun. However, the audio from the video footage shows that the deputies both told Ratliff to drop the gun five times.

The Fifth Circuit has held that the direction of a suspect's gun is immaterial to the reasonable force inquiry if other facts establish that the suspect was a

threat to the officer or others. *See Ballard v. Burton*, 444 F.3d 391, 403 (5th Cir. 2006) ("regardless of the direction in which [suspect] pointed the rifle just before he was shot, a reasonable officer in these circumstances would have reason to believe that [suspect] posed a threat of serious harm to himself or to other officers."); *see also Buchanan v. Gulfport Police Dep't*, 530 F. App'x 307, 313–14 (5th Cir. 2013) ("[M]ultiple warnings and [suspect's] repeated failure to comply with police instructions would be enough to overcome [suspect's] claim of excessive force for the tasing."); *see also Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991) ("[Officer] had repeatedly warned [suspect] to raise his hands and was now faced with a situation in which another warning could (it appeared at the time) cost [his] life . . . "). The Court finds that Deputy Scudder had a reasonable belief that he was in danger at the moment of the threat that resulted in Deputy Scudder shooting Ratliff. Thus, Deputy Scudder's use of force was not clearly excessive or unreasonable. Because Plaintiff has failed to show a violation of a constitutional right, the Court need not consider whether Deputy Scudder's actions were unreasonable in light of clearly established law. Plaintiff has failed to rebut Deputy Scudder's qualified immunity claim.

Ratliff argues that Deputy Sheffield is liable for Deputy Scudder's use of excessive force, relying on *Haye v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995). *Haye* states that "an officer who is present at the scene and does not take reasonable measures to protect a suspect from another officer's use of excessive force

may be liable under section 1983." *Id*. (internal citations omitted). Because the Court has found that Deputy Scudder's use of force was not clearly excessive or unreasonable, Ratliff's claim against Deputy Sheffield also fails.

CONCLUSION

For the above-stated reasons, Defendants Colby Scudder and Raymond Sheffield's motion for summary judgment (D.E. 30) is GRANTED and Plaintiff Kenneth Ratliff's claims are DISMISSED WITH PREJUDICE.

ORDERED this 9th day of January, 2019.

/s/ Nelva Gonzales Ramos
NELVA GONZALES RAMOS
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

KENNETH RATLIFF, Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 2:17-CV-106
ARANSAS COUNTY, TEXAS, *et al*, Defendants.	§	

FINAL JUDGMENT

(Filed Jan. 9, 2019)

Pursuant to the Court's Order on Motion for Summary Judgment (D.E. 53), the Court enters final judgment dismissing this action with prejudice.

ORDERED this 9th day of January, 2019.

/s/ Nelva Gonzales Ramos
NELVA GONZALES RAMOS
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

KENNETH RATLIFF, Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 2:17-CV-106
ARANSAS COUNTY, TEXAS, *et al*, Defendants.	§	

ORDER GRANTING MOTION TO DISMISS

(Filed Sep. 27, 2017)

In this case, Plaintiff Kenneth Ratliff asserts various claims under 42 U.S.C. § 1983 against Defendants' Aransas County (the County), Colby Scudder (Scudder), and Raymond Sheffield (Sheffield). Pending before the Court is Defendants' motion under Rule 12(b)(6) to dismiss Plaintiff's municipal liability and malicious prosecution claims (D.E. 11).[1] For the reasons set forth below, Defendants' motion is GRANTED.

[1] Defendants have not moved to dismiss Plaintiffs' excessive force claims against Scudder and Sheffield.

PLAINTIFF'S ALLEGATIONS[2]

The catalyst for the events giving rise to this lawsuit was an argument between Plaintiff and his fiancée on the night of March 24, 2017. D.E. 1, p. 2. Plaintiff's fiancée fled to a neighbor's house on an adjacent street and contacted law enforcement, reporting that Plaintiff had assaulted her. *Id.* at 2–3. Defendants Scudder and Sheffield, deputy sheriffs with the Aransas County Sheriff's Department, arrived separately at the neighbor's house. *Id.* Neither officer turned on his overhead lights or sirens while driving there. *Id*. The officers parked around the corner, so neither squad car was easily visible from Plaintiff's home. *Id*.

Plaintiff did not know that his fiancée had called the police. *Id.* at 3. Fearing a confrontation with his fiancée's family, Plaintiff armed himself with a gun and sat on his porch. *Id.*

As they walked toward Plaintiff's porch, Scudder and Sheffield shined a bright light in Plaintiff's direction, which prevented him from seeing who was arriving, particularly as it was a cloudy night and there are no street lights near Plaintiff's home. *Id.* According to Plaintiff, neither officer identified himself as law enforcement. *Id.* When the officers saw that Plaintiff was armed, Scudder yelled "put the gun down," and Sheffield yelled "mother f***** I'll shoot you." *Id.* Without allowing Plaintiff time to disarm himself, Scudder fired

---

[2] Plaintiff's factual allegations are taken as true under the standard of review for a Rule 12(b)(6) motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

nine shots from his service weapon, hitting Plaintiff five times. *Id.* Plaintiff alleges that he never raised his weapon or threatened the officers. *Id*. In connection with the incident, Plaintiff was charged with two counts of aggravated assault on a police officer and acquitted after a jury trial. *Id*.

Plaintiff asserts claims under 42 U.S.C. § 1983 against both deputies and the County. He contends that the deputies' actions constituted excessive force in violation of the Fourth Amendment. *Id.* at 5. He alleges that Aransas County is liable because it (1) sanctions a custom or policy of using excessive force (and/or failed to adopt a policy precluding the use of excessive force); and (2) failed to adequately train its law enforcement personnel regarding the use of excessive force. *Id.* at 5–6. He also claims that all Defendants are liable for malicious prosecution. *Id.* at 8. Defendants seek dismissal of the malicious prosecution claims and all claims against Aransas County.

STANDARD OF REVIEW

The standard under Rule 12(b)(6) is devised to balance a party's right to redress against the interests of all parties and the court in minimizing expenditure of time, money, and resources devoted to meritless claims. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Furthermore, "Pleadings must be construed so as to do justice." Fed. R. Civ. P. 8(e). The requirement that

the pleader show that he is entitled to relief requires "more than labels and conclusions[;] a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

Factual allegations are required, sufficient to raise the entitlement to relief above the level of mere speculation. *Twombly*, 550 U.S. at 555. Those factual allegations must then be taken as true, even if doubtful. *Id*. In other words, the pleader must make allegations that take the claim from conclusory to factual and beyond possible to plausible. *Id*. at 556. The *Twombly* Court stated, "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

The Supreme Court, elaborating on *Twombly*, stated, "The plausibility standard is not akin to a probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Where a complaint pleads facts that are 'merely consistent with' defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.' " *Id.* at 678 (quoting *Twombly*, 550 U.S. at 557). Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Ashcroft*, 556 U.S. at 678.

ANALYSIS

A. Aransas County Liability

Defendants seek Aransas County's dismissal from this action because Plaintiff has not adequately pled facts that support the elements of municipal liability, as required by Rule 8(a), *Twombly*, and *Iqbal*. The elements of municipal liability (a *Monell* claim) are: (1) a policymaker; (2) an official policy or custom; and (3) "a violation of constitutional rights whose 'moving force' is the policy or custom." *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)).

Plaintiff first contends that, pursuant to *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), his municipal liability claim should be considered under a lower-than-normal pleading standard. *See* D.E. 23, pp. 4–6. In support, he cites a handful of district court decisions purportedly holding that "generic or boilerplate" allegations of municipal liability are sufficient to survive a motion to dismiss. *Id*. at 7–8 (citations omitted). This Court has previously addressed and rejected these arguments and distinguished the same cases on which Plaintiff now relies. *See Gonzales v. Nueces Cnty., Tex.*, 227 F. Supp. 3d 698, 703–04 (S.D. Tex. 2017); *see also Speck v. Wiginton*, 606 Fed. App'x 733, 735–36 (5th Cir. 2015) (district court correctly analyzed motion to dismiss § 1983 claims under Rule 8 as interpreted by *Twombly* and *Iqbal*). *Leatherman* prohibits using a heightened pleading standard for municipal liability claims; it

does not require a lower pleading standard for municipal liability claims. *Leatherman*, 507 U.S. at 168. As such, the Court will apply the familiar *Twombly/Iqbal* analysis.

Plaintiff alleges that the County "sanctioned the custom, practice and/or policy or procedure" of excessive force, and that a "persistent, widespread practice" of unconstitutional conduct by County agents "is so common and well settled as to constitute a custom that fairly represents official county policy." D.E. 1, p. 6. In support of this claim, Plaintiff alludes to "numerous prior incidents of police officers using excessive force upon citizens," which he claims show an "unspoken policy of assaulting citizens . . . that reflects deliberate indifference to" their constitutional rights. *Id*. Plaintiff contends further that, "[i]n the alternative, Defendant County is liable under § 1983 for failure to adopt a policy precluding officers from beating/assaulting citizens because such failure to adopt such a policy is one of intentional choice." *Id*.

Accepting Plaintiff's allegations as true, they nonetheless fall short of alleging an "official custom or policy" of excessive force as necessary to state a *Monell* claim. *See Piotrowski*, 237 F.3d at 579. An official policy or custom may be shown either by reference to "'an actual policy, regulation or decision,'" or "an informal custom that represents municipal policy." *Quinn v. Guerrero*, 863 F.3d 353, 364–65 (5th Cir. 2017) (quoting *Sanders-Burns v. City of Plano*, 594 F.3d 366, 380 (5th Cir. 2010)). "The description of a policy or custom and its relationship to the underlying constitutional

violation . . . cannot be conclusory; it must contain specific facts." *Spiller v. City of Tex. City, Police Dep't*, 130 F.3d 162, 167 (5th Cir. 1997).

Plaintiff has not alleged any facts regarding the County's formal policy relating to the use of force, but rather contends that the use of excessive force by County agents is so prevalent as to represent official County policy. *See* D.E. 1, pp. 5–6. The only facts he alleges with any specificity, however, relate to his shooting. "'[I]solated unconstitutional actions by municipal employees will almost never trigger liability.'"[3] *Culbertson v. Lykos*, 790 F.3d 608, 628 (5th Cir. 2015) (quoting *Piotrowski*, 237 F.3d at 578). The Complaint makes vague reference to "numerous prior incidents of police officers using excessive force," but alleges no facts relating to any of these incidents. *See* D.E. 1, p. 6. Thus Plaintiff has not identified a County custom or policy as needed to state a *Monell* claim. *See Culbertson*, 790 F.3d at 629 (affirming dismissal of municipal liability claim because allegations were "limited to the events surrounding the plaintiffs"); *see also Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 850–51 (5th Cir. 2009) (27 alleged instances of excessive force in three years insufficient to establish custom or policy for purposes of municipal liability).

Plaintiff also has failed to state a claim for failure to train. To state such a claim, Plaintiff must allege:

---

[3] An exception, not relevant here, provides that "[a] policy may also be shown through a single incident but only if the person making the decision had final policy-making power." *Quinn*, 863 F.3d at 365.

"'(1) inadequate training procedures; (2) that inadequate training caused the [deputies] to [use excessive force]; and (3) the deliberate indifference of municipal policymakers.'" *Quinn*, 863 F.3d at 365 (quoting *Pineda v. City of Houston*, 291 F.3d 325, 332 (5th Cir. 2002)). "Defects in a particular training program must be specifically alleged." *Quinn*, 863 F.3d at 365. As for the deliberate indifference requirement, "[i]t must be 'obvious' to the municipality that the alleged unconstitutional conduct was the 'highly predictable consequence' of not training or supervising its municipal actors." *Culbertson*, 790 F.3d at 625 (quoting *Peterson*, 588 F.3d at 849–50).

Here, Plaintiff alleges in conclusory fashion that the County's training program "fails to teach new police persons that beating and/or using excessive force against citizens violates citizens' constitutional rights and/or in failing to recognize serious medical issues." D.E. 1, p. 6. He does not plead any specific defects in the County's training program, or allege that unconstitutional uses of force are so frequent that the County's maintenance of its training regimen constitutes deliberate indifference to its citizens' constitutional rights. Therefore, the allegations are insufficient to state a claim for failure to train.

Accordingly, the municipal liability claims asserted against Aransas County are DISMISSED.

B. Malicious Prosecution

Plaintiff's malicious prosecution claim stems from his acquittal from two counts of aggravated assault on a police officer. D.E. 1, p. 3. He alleges that, under the color of state law, Defendants "maliciously charged Plaintiff with assault on a police officer and tendered false information concerning said charge to the prosecutor which leads [sic] that person to believe that probable cause exists when there is none." *Id*. at 8. He further contends that the Defendants "testified and submitted information in aid of such prosecution." *Id*.

Defendants seek dismissal of Plaintiff's malicious prosecution claim, arguing that *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003) (en banc) held that "there is no viable 'freestanding' section 1983 claim based solely on malicious prosecution." D.E. 11, p. 10. The Court agrees that Defendants are entitled to dismissal of this claim, which is hereby DISMISSED.

However, *Castellano* does not foreclose any possibility of Plaintiff ever stating a constitutional claim arising out of his criminal case. Indeed, *Castellano* noted that "[t]he initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection—the Fourth Amendment if the accused is seized and arrested, for example, or other constitutionally secured rights if a case is further pursued." *Castellano*, 352 F.3d at 953. Per *Castellano*, to state a claim under § 1983, a plaintiff must tie the alleged deprivations to "rights locatable in constitutional text," rather than a freestanding

claim for malicious prosecution. *Id*. at 953–54; *see also id.* at 955 ("The manufacturing of evidence and the state's use of that evidence along with perjured testimony to obtain Castellano's wrongful conviction indisputably denied him rights secured by the Due Process Clause."); *Cole v. Carson*, 802 F.3d 752, 773 (5th Cir. 2015) ("Where police intentionally fabricate evidence and successfully get someone falsely charged with a felony as cover for their colleagues' actions, and the Fourth Amendment is unavailing, there may be a due process violation."), *cert. granted and judgment vacated on other grounds sub nom. Hunter v. Cole*, 137 S. Ct. 497 (2016).

The Court will not opine whether Plaintiff could ever state a § 1983 claim for events relating to his prosecution. Plaintiff's threadbare allegation of malicious prosecution does not identify the constitutional right he seeks to vindicate, as is required by *Castellano*. As such, his malicious prosecution claim is DISMISSED.

C. Leave to Amend

Plaintiff included in his response a generic request for leave to amend should the Court find his pleading deficient. D.E. 23, p. 12. He has not indicated what facts he would plead should leave to amend be granted. The Court will permit Plaintiff to file a renewed motion for leave to amend, with the proposed amended pleading attached as an exhibit, on or before October 6, 2017.

CONCLUSION

For the reasons set forth above, the Court GRANTS the motion to dismiss (D.E. 11) and DISMISSES (1) all claims against Aransas County; and (2) Plaintiff's claim for malicious prosecution. Plaintiff's excessive force claims against Scudder and Sheffield remain active.

The Court DENIES Plaintiff's motion for leave to amend his complaint appearing in his response (D.E. 23, p. 12) and ORDERS that, on or before October 6, 2017, Plaintiff may file a renewed motion for leave to amend, attaching his proposed amended pleading.

ORDERED this 27th day of September, 2017.

/s/ Nelva Gonzales Ramos
NELVA GONZALES RAMOS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-40121

KENNETH RATLIFF,

Plaintiff - Appellant

v.

ARANSAS COUNTY, TEXAS; COLBY SCUDDER, Individually; RAYMOND SHEFFIELD, Individually,

Defendants - Appellees

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

ON PETITION FOR REHEARING EN BANC

(Filed Mar. 24, 2020)

(Opinion 1/15/2020, 5 Cir., _____, _____ F.3d _____)

Before JOLLY, SMITH, and COSTA, 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.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
UNITED STATES
CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

KENNETH RATLIFF	§	
vs.	§	
	§	
	§	**CIVIL ACTION**
ARANSAS COUNTY, TEXAS;	§	**NO. 2:17-cv-106**
COLBY SCUDDER,	§	
***Individually*; and**	§	**JURY**
RAYMOND SHEFFIELD,	§	
Individually	§	
	§	

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT:

NOW COMS Plaintiff, Kenneth Ratliff, bringing this his *Plaintiff's Original Complaint*, praying for damages against the Aransas County, Texas, Colby Scudder, *Individually*, and Raymond Lee Sheffield, *Individually*, as said Defendants, jointly and severally, have denied Kenneth Ratliff his rights guaranteed by the Constitution and laws of the United States of America and the State of Texas.

JURISDICTION AND VENUE

1. This court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C.

§ 1343(3) (civil rights). This court also has supplemental jurisdiction pursuant to 28 U.S.C.S. § 1367 to hear the state claims that will be set forth in this complaint. Venue is proper in the Southern District of Texas, Corpus Christi Division, as such is the district where the claim arose in accordance with 29 U.S.C. § 1391(b).

PARTIES

2. Plaintiff Kenneth Ratliff is a resident of Aransas County, Texas.

3. Defendant Aransas County, Texas, can be served with citation upon County Court at Law Judge Richard Bianchi, 301 N. Live Oak St., 301 N. Live Oak St., Rockport, Texas 78382.

4. Defendant Colby Scudder (hereinafter "Scudder") was at all times material to this suit in the employment of the ARANSAS COUNTY SHERIFF'S DEPARTMENT. Each of the acts complained of herein arises from the conduct of Defendant Scudder while acting under color of state law, and was committed during his employment with the ARANSAS COUNTY SHERIFF'S DEPARTMENT. Defendant Scudder can be served with citation at his place of employment, SAGINAW POLICE DEPARTMENT, 505 W. McLeroy Boulevard, Saginaw, Texas 76179.

5. Defendant Raymond Sheffield (hereinafter "Sheffield") was at all times material to this suit the ARANSAS COUNTY SHERIFF'S DEPARTMENT. Each of the acts complained of herein arises from the conduct of

Defendant Sheffield while acting under color of state law, and was committed during his employment with the ARANSAS COUNTY SHERIFF'S DEPARTMENT. Defendant Sheffield can be served with citation at his place of employment, ARANSAS COUNTY SHERIFF'S DEPARTMENT, 301 N. Live Oak St., Rockport, Texas 78382.

FACTS

6. On March 24, 2017, Plaintiff and his fiancé had an argument. Plaintiff's fiancé, in an attempt to have Plaintiff removed from the house, went to a neihbor's house, which is on an adjacent street, and called for assistance from the Aransas County Sheriff's Department.

7. Defendant Scudder wsa the first to arrive at the Plaintiff's neighbor's house and questioned Plaintiff's fiancé. Thereafter, Defendant Sheffield arrived on the scene. Neither Defendant approached the scene with their lights and sirens on and they did not park on Plaintiff's actual street. Plaintiff's fiancé, who was not distraught at all, claimed that Plaintiff had physically assaulted her and in an attempt to have Plaintiff removed from the residence, stated that Plaintiff "tried to choke her to where she could not breathe." Based on these accustaions, Defendants Scudder and Sheffield walked to Plaintiff's residence where Plaintiff was on the porch. Plaintiff had previous altercations with his fiancé and her family had made prevous threats against him. Plaintiff had no idea that his fiancé had called the police and was of the belief that she had

called her family, who are well known for violent behaviors, to "sick them on him."

8. Because of the past threats and because Plaintiff was in fear that his fiancé's family members were coming to his residence to hurt him, he armed himself. It was a very dark and cloudy night and there are no street lights by Plaintiff's residence. As Defendant Scudder and Sheffield approached the property, they did not identify themselves, and shined a bright light directly in Plaintiff's eyes thereby further blinding him. Defendant Scudder, seeing that Plaintiff had a gun started shouting "put the gun down," at which time Defendant Sheffield yelled "mother fucker I'll shoot you." Defendant Scudder then immediately and without any justification for doing so, unloaded nine shots at Plaintiff, five of which hit their mark. Defendant's called EMS and the Halo Flight could not fly because of the cloudy and overcast weather. EMS rushed Plaitniff to Christus Spohn Memorial Hospital in Corpus Christi, Texas. At no time did Plaintiff raise his weapon from his side and/or threaten anyone.

9. Adding insult to injury, Defendants thereafter charged Plaintiff with two counts of Aggravated Assault on a Police Officer, which charges Plaintiff was acquitted by a jury of his peers.

10. Defendant Scudder's acts complained of herein amounts to an excessive use of force. Said excessive use of force is objectively unreasonable as no reasonable police officer and/or law enforcement officer given the same or similar circumstances would have initiated

such a brutal and life threatening attack on any person being detained..

11. At all pertinent times, Defendants Aransas County, Texas and/or the Aransas County Sheriff's Department authorized and/or ratified the wrongful and tortious acts and/or omissions described herein.

CLAIM FOR RELIEF – §1983

12. The Civil Rights of 1871, now codified as 42 U.S.C.S. §1983 as federal law provides: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any laws, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C.S. §1983.

13. The state action requirement for standing under 42 U.S.C.S. §1983 has more commonly been referred to as "color of state law," from the statute itself. Plaintiff is informed and believes, and thereupon allege that in committing said acts and/or omissions, Defendants were the agent and employee of each other Defendant and were acting within such agency and employment and that each Defendant was acting under color of state law.

14. 42 U.S.C.S. § 1983 requires that the conduct complained of must have deprived the person of some privilege or immunity secured by the Constitution or laws of the United States. As such, Plaintiff alleges that Defendants, jointly and/or severally deprived him of his Fourth Amendment rights and those rights, privileges, and immunities secured by the Fifth and Eighth Amendments to the Constitution incorporated and applied to the states through the Fourteenth Amendment. Defendants violated this provision by the following actions and/or omissions, *inter alia*:

a) by using excessive force and/or deadly force in the course of Defendants' attempted custody/detention of Plaintiff, in violation of the Fourth Amendment and its "reasonableness" standard. Said actions resulted directly and only from the use of force that was clearly excessive to the need, and the excessiveness of which was objectively unreasonable;

b) by failing to intervene, where such intervention would have prevented the injuries of Plaintiff; and

c) by falsely and maliciously charging Plaintiff with the commission of a crime without probable cause to believe that such crime had occurred.

15. **§ 1983 – Excessive Force**. Plaintiff pleads that Defendants used excessive force and/or deadly force in the course of the officer's supposed arrest, and/or investigatory stop, and/or other "seizure" of free citizens, such as Plaintiff, in violation of the Fourth Amendment

and its "reasonableness" standard. Plaintiff therefore pleads that he was unlawfully assaulted/shot by Defendants Scudder and Sheffield. Said actions resulted directly and only from the use of force that was clearly excessive to the need, and the excessiveness of which was objectively unreasonable.

16. Such actions and/or omissions are "objectively unreasonable" in light of the facts and circumstances confronting Plaintiff without regard to his underlying intent or motivation. Clearly, careful attention to the facts and circumstances of this particular case demonstrates the unreasonableness of said actions. For these reasons, it is objectively unreasonable for Defendants Scudder and Sheffield to shoot (and/or failing to prevent the other from shooting) Plaintiff.

17. **§ 1983 – Municipal liability.** It is also well-established that counties are liable under 42 U.S.C.S. § 1983 for constitutional torts that are in compliance with the county's customs, practices, policies or procedures. A county is liable for constitutional deprivations visited pursuant to governmental custom even though such custom has not received formal approval through the body's official decision making channels. In this case, Defendant County is liable because it sanctioned the custom, practice and/or policy or procedure of illegal seizures, excessive force. Defendants Scudder and Sheffield's actions were a customary practice and/or policy or procedure that was sanctioned by Defendant County out of which deprived Plaintiff of his civil rights by statute and by both the Texas and United States Constitutions. Liability for Defendant County is

established under § 1983 because the assault, beating, and severe injury to citizens, with little or no justification, is a persistent, widespread practice of County employees – namely officers/deputies – that, although not authorized by officially adopted policy, is so common and well settled as to constitute a custom that fairly represents official county policy. Defendant County's actual or constructive knowledge of this practice, custom, and/or policy or procedure and of numerous prior incidents of police officers using excessive force upon citizens establishes custom and accession to that custom by the their policy makers. Defendant County's unspoken policy of assaulting citizens is a decision that reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory rights will follow the decision. In the alternative, Defendant County is liable under § 1983 for failure to adopt a policy precluding officers from beating/assaulting citizens because such failure to adopt such a policy is one of intentional choice.

18. Moreover, Defendant County is liable for inadequate training of police officers under § 1983. Liability attaches to Defendant County because its failure to train amounts to deliberate indifference to the rights of the persons with whom these officers come in contact. In particular, Plaintiff alleges that the training program in relation to the tasks the particular officer must perform is inadequate in the respect that the program fails to teach new police persons that beating and/or using excessive force against citizens violates citizens' constitutional rights and/or in failing to

recognize serious medical issues. As such, the deficiency in training actually caused Defendants Scudder and Sheffield to violate Plaintiff's constitutional rights.

19. **§ 1983 – Qualified Good Faith Immunity**. Qualified good faith immunity stands for the proposition that even though the civil rights of a complainant may have been violated, if the officer engaged in the conduct in good faith there is no liability for that individual. The standard by which an officer's entitlement to good faith qualified immunity is objective not subjective. Defendants Scudder and Sheffield' actions judged by such objective standard protects, "all but the plainly incompetent or those who knowingly violate the law." The determination of objective reasonableness must be based on a version of the facts most favorable to the Plaintiff. To the extent that credibility questions exist, a fact-finder continues to be necessary. In the instant case, Plaintiff alleges that Defendants Scudder and Sheffield are not entitled to claim "qualified good faith immunity." Importantly, Defendants Scudder and Sheffield never had a good faith belief in their conduct because they acted in a manner demonstrating that they were plainly incompetent and knowingly violated Plaintiff's civil rights. When the facts are taken in the light most favorable to the Plaintiff, it is clear that Plaintiff was merely standing on his porch when he was assaulted by Defendants Scudder and Sheffield. Any reason given by Defendants Scudder and Sheffield for their unlawful actions and/or omissions does not warrant the application of qualified good

faith immunity because they were never in danger nor were any other persons in the vicinity in danger of Plaintiff. Plaintiff has asserted violations of his constitutional rights, and these rights were clearly established at the time of Defendant Scudder and Sheffield' actions. Moreover, Defendants Scudder and Sheffield' actions were objectively unreasonable in the sense that they knew or reasonably should have known that the actions taken within their authority or responsibility would violate the constitutional rights of Plaintiff.

20. **§ 1983 – Malicious Prosecution**. Plaintiff also pleads a cause of action for malicious prosecution under § 1983. Defendants, acting under color of state authority, maliciously charged Plaintiff with assault on a police officer and tendered false information concerning said charge to the prosecutor which leads that person to believe that probable cause exists when there is none. Additionally, Plaintiff can demonstrate that the prosecution that is central to his civil lawsuit terminated in his favor after a jury trial in which he was acquitted by a jury of his peers. Defendants not only caused the prosecution to be brought, but also testified and submitted information in aid of such prosecution. Defendants acted without probable cause and with malice and caused Plaintiff to expend funds in hiring an attorney and further caused Plaintiff to suffer mental anguish damages.

DAMAGES

21. As a result of the foregoing unlawful and wrongful acts of Defendants, jointly and severally, Plaintiff has been caused to suffer general damages which include but are not limited to the following: both physical and emotional injury, including but not limited to – pain and suffering, emotional and mental distress, and personal humiliation and shock, along with severe emotional distress.

22. Said injuries have caused Plaintiff to incur special damages which include but are not limited to: past and future medical expenses, past and future lost income, lost wages and the occurrence of attorneys' fees associated with criminal charges.

23. Pursuant to the Civil Rights Attorney's Fees Award Act, 42 U.S.C.S. § 1988, a prevailing party in a § 1983 case is entitled to recover his attorney's fees. Hence, Plaintiff further prays for all costs and attorney fees.

24. In addition, Plaintiff prays for punitive damages against the individual Defendants. Punitive damages are designed to punish and deter persons such as Defendants who have engaged in egregious wrongdoing. Punitive damages may be assessed under § 1983 when a Defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally-protected rights of others. While municipal defendants are absolutely immune from § 1983 awards of punitive damages, such damages may be awarded against a public employee or

official in their individual capacity. Therefore, Plaintiff alleges and prays for punitive damages against the individual Defendants, as such Defendants actually knew that their conduct was unconstitutional, and/or was callously indifferent to its legality.

WHEREFORE PREMISES CONSIDERED, Plaintiff prays that upon trial of the merits, he recover compensatory damages against Defendants, jointly and severally; that Plaintiff also recover punitive damages against the individual Defendant in an amount to punish and/or deter and to make an example of that Defendants in order to prevent similar future conduct; and, that Plaintiff recover against each Defendant all reasonable and necessary attorney's fees, court costs and expenses in regards to the present suit in litigation. Moreover, Plaintiff prays for all prejudgement and post judgement interest that can be assessed against the Defendants in the event of recovery; and that Plaintiff recovers against each Defendant any and all other general or specific relief to which he may prove himself justly entitled.

Respectfully submitted,

GALE LAW GROUP, PLLC
711 N. Carancahua St., Suite 514
Corpus Christi, Texas 78401
Mailing Address:
P.O. Box 2591
Corpus Christi, Texas 78403
Telephone: (361)808-4444
Telecopier: (361)242-4139

By: */s/ Christopher J. Gale*
Christopher J. Gale
Chris@GaleLawGroup.com
Texas Bar No. 00793766
Southern District Bar No. 27257
Attorney-in-Charge for Plaintiff

/s/ Amie Augenstein
Amie Augenstein
Amie@GaleLawGroup.com
Texas Bar No. 24085184
Southern District Bar No. 2236723
Attorney for Plaintiff

Demand for Jury Trial

Plaintiff hereby demands trial by jury pursuant to Fed.R.Civ.P. 8(b).