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SUPREME COURT OF NEW JERSEY

A-70 September Term 2018

081982

Bryheim Jamar Baskin,

Plaintiff-Respondent,

v.

Rafael Martinez, City of Camden and
Scott Thompson,

Defendants-Appellants.

On appeal from the Superior Court,

Appellate Division.

Argued	Decided
January 7, 2020	July 9, 2020

Timothy J. Galanaugh, Assistant City Attorney, argued the cause for appellants (Michelle Banks-Spearman, Camden City Attorney, attorney; Timothy J. Galanaugh, on the briefs).

Paul R. Melletz argued the cause for respondent (Gerstein, Grayson, Cohen & Melletz, attorneys; Paul R. Melletz, on the brief).

JUSTICE ALBIN delivered the opinion of the Court.

In this Section 1983 civil rights lawsuit, plaintiff Bryheim Jamar Baskin claims that a justifiable police chase ended in an unjustifiable police shooting -- the

use of excessive force in violation of the Federal Constitution. The issue before us is whether defendant Detective Rafael Martinez, who chased and eventually shot Baskin, is entitled to qualified immunity and therefore dismissal of the lawsuit on summary judgment.

On the summary judgment record before us, certain facts are undisputed. The police gave chase to twenty-year-old Baskin after he crashed his car into an unmarked patrol vehicle occupied by Detective Martinez. Baskin fled on foot armed with a handgun, which he discarded out of Martinez's sight. Then, Baskin found himself trapped in a walled yard with no way to escape. At this point, the accounts given by Baskin and a neighborhood eyewitness, on the one hand, and Detective Martinez, on the other, starkly diverge.

According to Baskin and the eyewitness, Baskin put his hands above his head and turned toward the pursuing police officer. His palms were open. He held no weapon in his hand. He made no gesture that he was reaching for a weapon and, at that moment, he posed no threat. Baskin and the eyewitness state that while Baskin's hands were in the air in a sign of surrender, Detective Martinez shot him in the abdomen, causing serious and permanent injuries.

In contrast, Detective Martinez asserts that when Baskin finally came into sight, Baskin turned and pointed in the detective's direction an object that looked like a gun. Only then, fearing for his life, says Detective Martinez, did he discharge his weapon. Although no handgun was found where Baskin fell, two cell phones were located nearby.

Despite those disputed facts, the trial court granted Detective Martinez qualified immunity and dismissed Baskin's Section 1983 action. A split three-judge Appellate Division panel reversed and reinstated the case. Based on the dissent in the Appellate Division, the issue of whether Detective Martinez is entitled to qualified immunity comes to us on an appeal as of right. N.J. Const. art. VI, § 5, ¶ 1(b); R. 2:2-1(a)(2).

We now affirm the Appellate Division majority. At the summary judgment stage, in deciding the issue of qualified immunity, our jurisprudence requires that the evidence be viewed in the light most favorable to Baskin. Therefore, for summary judgment purposes, we must accept as true the sworn deposition testimony of Baskin and the independent eyewitness, who both stated that Baskin's hands were above his head, in an act of surrender, when Detective Martinez fired the shot. Under that scenario, a police officer would not have had an objectively reasonable basis to use deadly force. The law prohibiting the use of deadly force against a non-threatening and surrendering suspect was clearly established, as evidenced by cases in jurisdictions that have addressed the issue. Thus, Detective Martinez was not entitled to qualified immunity on summary judgment.

The disputed issues of material fact -- whether Detective Martínez's use of deadly force was objectively reasonable -- are for a jury to resolve, not for a court. Accordingly, we remand this matter for further proceedings consistent with this opinion.

I.

A.

In this action brought primarily under 42 U.S.C. § 1983, Baskin alleges that Detective Martinez shot him in the stomach while he was unarmed and in the act of "surrendering" -- "standing with his hands up in the air facing" the detective. In the complaint, Baskin claims that the shooting constituted excessive force in violation of his federal constitutional rights and names as defendants Detective Martinez, the Chief of Police of the Camden Police Department, and the City of Camden. The Section 1983 claim against the chief of police and the city is premised on their alleged failure to provide training and supervision on "the lawful use of an officer's service revolver."[1]

At the completion of discovery, Detective Martinez moved for summary judgment, asserting that his use of deadly force, under all the circumstances, was objectively reasonable, and therefore he was entitled to qualified immunity. Although in deciding the issue of qualified immunity on summary judgment the evidence must be viewed in the light most favorable to Baskin, we present here a more fulsome account of the critical events based on the deposition testimony in the summary judgment record.

Certain facts are essentially undisputed. In the afternoon of September 11, 2012, Detective Martinez and other Camden police officers were on patrol in unmarked vehicles in an area in Camden known for significant drug activity. When

[1] Baskin also asserted common law claims of assault, battery, and negligence.

officers observed Baskin pull out of a parking lot without signaling, one unmarked patrol vehicle maneuvered in front of Baskin's car for the purpose of making a motor vehicle stop. To assist the stop, Detective Martinez, who was in uniform, positioned his unmarked vehicle behind Baskin's. With unmarked police cars in front of and behind him, Baskin suddenly put his car in reverse and collided into Martinez's vehicle.[2] Baskin fled on foot with a handgun tucked in the waistband of his shorts as the officers pursued him, with Martinez yelling a number of times, "police, stop." Martinez followed close behind as Baskin raced through a residential area and leapt over several fences.

During the chase, Martinez saw Baskin drop the handgun, pick it up, and continue to run with the gun in his hand. At that point, Martinez slowed to unholster his weapon. Baskin eventually ran into a walled-in backyard of a residence, where, out of Martinez's sight, he tossed the gun, which landed in the rear of the yard. Cornered, with no apparent means of escape, Baskin ended his flight. What occurred immediately afterward is the subject of dispute.

According to Baskin, when he reached the walled-in backyard and realized he had nowhere to go, he placed his empty hands over his head and remained in that position as Detective Martinez rounded the corner of the house and saw "[him] with [his] hands in the air." Baskin believed that his raised hands signaled that he was

[2] In his deposition testimony, Baskin stated that the area where he was "cut off" by the unmarked vehicle is known for drug activity and shootings. He admitted to having drugs in his car.

surrendering, so he said nothing as Detective Martinez came into sight.[3] The only objects on his person were two cell phones in the pocket of his shorts. Baskin states that, despite keeping his open hands over his head and making no threatening gesture, Detective Martinez shot him in the abdomen, causing grievous and permanent injuries.

Cherron Johnson, an area resident, witnessed the events and corroborated Baskin's account of the last moments of the chase. In her deposition testimony, Johnson stated that she had just arrived home and had stepped out of her car and was talking with a friend when she saw Baskin running with Detective Martinez in pursuit. She explained that when Baskin ran behind the house and reached the wall, he placed his empty hands in the air, and then Detective Martinez shot him. As Johnson described it, Baskin "put his hands up and he turned around. And when he turned around, . . . he just got shot." At one point in her deposition testimony, she stated that Baskin had completely turned around with his hands in the air when Martinez fired the shot,[4] and, at another point, she indicated that "it happened so fast, I'm not sure if he was in the middle of turning around. I know his hands [were] in the air, and you could see him turning around." (emphasis added).

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[3] During his deposition, Baskin was never asked a direct question whether he was facing Martinez when he was shot. In his Material Statement of Facts filed in response to the summary judgment motion, however, Baskin asserted that he "was standing with his hands up in the air facing [Detective] Martinez" when shot -- the same assertion made in his complaint. (emphasis added).

[4] Johnson was asked, "Was he completely turned around and his hands were in the air and that's when he got shot?" She responded, "Right."

She added, "I really didn't think it was right what happened . . . . I just know that I don't think he should have shot the boy."

Detective Martinez gave a very different account from Baskin and Johnson. In his testimony, he explained that, during the chase, he lost sight of Baskin, whom he had last seen carrying a handgun. After carefully and slowly rounding the corner of a home until he gained a full view of the backyard, Martinez observed Baskin standing with his back facing the detective. Martinez stated that Baskin was turning around with his right arm extended straight in front of him, pointing toward Martinez a black object that he believed to be a gun. At that moment, Martinez explained, "I was in fear for my life, and I pulled the trigger and I hit him in the abdomen area."

Immediately afterward, several officers arrived at the scene and retrieved two cell phones near where Baskin fell. Elsewhere in the yard, the officers found a semiautomatic handgun, loaded with eleven hollow-point bullets. Baskin was taken by ambulance to a nearby hospital where he was treated for serious and permanent injuries.[5]

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[5] The Camden County Prosecutor's Office investigated the shooting and concluded that Detective Martinez was justified in using deadly force because he "reasonably believed Bryheim Baskin's actions placed him in imminent danger of death or bodily injury." Baskin pled guilty to four charges relating to the events of that day: second-degree eluding, second-degree unlawful possession of a weapon, third-degree resisting arrest, and possession of less than half an ounce of cocaine with the intent to distribute.

B.

Despite that conflicting testimony, the trial court afforded Detective Martinez qualified immunity and granted summary judgment in his favor, dismissing Baskin's Section 1983 action.[6] The trial court highlighted Detective Martinez's likely perceptions during the chase. Detective Martinez knew that he was pursuing a suspect with a gun and had a right "to protect himself against someone who was known to be armed." In the court's view, even if it were to disregard Martinez's belief that Baskin had an object in his hand, "the fact that [Baskin], when confronted in that alley by the officer, turned towards the officer" entitled Detective Martinez to "qualified immunity." The court concluded that Martinez had an objectively reasonable basis for using deadly force under those circumstances. The court commented, "[w]hat Baskin didn't do was get on the ground, be passive, or anything of that nature." In its final summary judgment assessment, the court hardly acknowledged the testimony of Baskin and Johnson that Baskin's hands were over his head when he was shot.

C.

A split Appellate Division panel reversed in an unpublished opinion. The two-judge majority noted that qualified immunity ordinarily is a question of law to be decided by the court, after viewing the facts in the light most favorable to the plaintiff. The panel majority added, however, that disputed issues of material fact

[6] The trial court did not address Baskin's state law claims, but evidently those claims were dismissed as well.

must be resolved by the jury. The majority faulted the trial court for "improperly weigh[ing] the eyewitness' observations." In its view, Baskin's and Martinez's accounts about "what occurred in the moments just before [Baskin] was shot differ[ed] in material respects."

The majority observed that although Detective Martinez stated that he shot Baskin because Baskin was pointing at him what appeared to be a gun, the trial court accepted that Martinez's use of deadly force would have been justified even if Baskin had no weapon in his hand -- and even if Baskin's hands were raised over his head. According to the majority, whether Baskin pointed an object at Detective Martinez or whether Baskin put his empty hands over his head were "significantly material" facts in dispute that bore on any determination of the objective reasonableness of Martinez's actions and his entitlement to qualified immunity. The majority did not suggest that those were necessarily the only material facts in dispute, emphasizing that the jury would decide any "who-what-when-where-why type of historical fact issues," quoting Brown v. State, 230 N.J. 84, 99 (2017) (quoting Schneider v.Simonini, 163 N.J. 336, 359 (2000)).

The dissenting judge concluded that even taking into account all relevant circumstances in the light most favorable to Baskin, Detective Martinez did not violate Baskin's federal constitutional rights. The dissenting judge particularly focused on the events immediately before the shooting -- the fact that Baskin had crashed his car into a police vehicle and then fled through a residential neighborhood armed with a gun and therefore was a threat to the pursuing officers.

As to the critical moments in the backyard, the dissenting judge credited the account that "Martinez shot Baskin as he turned to face Martinez immediately upon Martinez entering the backyard." She also accepted that in the "split second" that Martinez fired the shot, he "erred" because "Baskin was not holding a gun"; and "for purposes of the motion, [Baskin's hands] were empty." Nevertheless, the dissenting judge asserted, Martinez did not have "to wait for a suspect he knew to be armed and extremely dangerous to swing all the way around and face him so the detective could get a better look at the suspect's hands in the split second before he fired." For that reason, she found that "Detective Martinez's mistake [was] an objectively reasonable one under the 'tense, uncertain, and rapidly evolving' circumstances he faced," quoting Graham v. Connor, 490 U.S. 386, 397 (1989), and therefore would have affirmed the trial court's grant of summary judgment based on qualified immunity.

D.

Defendants filed a notice of appeal as of right based on the dissent in the Appellate Division. See N.J. Const. art. VI, § 5, ¶ 1(b); R. 2:2-1(a)(2). The issue before this Court is limited to the one raised in the dissent -- whether Detective Martinez was entitled to qualified immunity based on the summary judgment record and therefore whether the trial court properly dismissed Baskin's Section 1983 lawsuit against defendants. See R. 2:2-1(a)(2).

E.

The fault line dividing the Appellate Division majority and dissent likewise divides the parties. Baskin urges this Court to affirm the two-judge majority essentially for the reasons given in the majority opinion. Defendants ask this Court to adopt the reasoning of the dissenting judge and to confer on Detective Martinez qualified immunity and dismiss Baskin's Section 1983 lawsuit.

II.

A.

The primary focus of Baskin's lawsuit is his claim brought under 42 U.S.C. § 1983. "Section 1983 provides a cause of action for 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws' by any person acting 'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.'" Gomez v. Toledo, 446 U.S. 635, 638 (1980) (quoting 42 U.S.C. § 1983). Essentially, "Section 1983 is a means of vindicating rights guaranteed in the United States Constitution and federal statutes." Gormley v. Wood-El, 218 N.J. 72, 97 (2014).

The specific constitutional right at issue here is the Fourth Amendment right of every person to be free from "unreasonable" seizures. See U.S. Const. amend. IV (declaring that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated"). The United States Supreme Court in Graham held that the use of excessive force in the course of an arrest constitutes an unreasonable seizure under the

Fourth Amendment. See 490 U.S. at 394.[7]

"While it is not always clear just when minimal police interference becomes a seizure, there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." Tennessee v. Garner, 471 U.S. 1, 7 (1985) (citation omitted); see also Brower v. County of Inyo, 489 U.S. 593, 595 (1989) (noting that "a police officer's fatal shooting of a fleeing suspect constitute[s] a Fourth Amendment 'seizure'" (citing Garner, 471 U.S. at 7)). The United States Supreme Court has recognized that "[t]he intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." Garner, 471 U.S. at 9.

The ultimate issue in analyzing any excessive-use-of-force claim under the Fourth Amendment is whether, from the police officer's perspective, the use of force was objectively reasonable under all the circumstances. Graham, 490 U.S. at 396-97; Saucier v. Katz, 533 U.S. 194, 201-02 (2001), overruled on other grounds by Pearson v. Callahan, 555 U.S. 223 (2009). In making that assessment, a court does not view the events at issue "with the 20/20 vision of hindsight." Graham, 490 U.S.

[7] The Fourth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. Ker v. California, 374 U.S. 23, 33 (1963) (holding that the Fourth "Amendment's proscriptions are enforced against the States through the Fourteenth Amendment" and that "the standard of reasonableness is the same under the Fourth and Fourteenth Amendments").

at 396. "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. Among the factors that should be considered in evaluating the reasonableness of an officer's use of force are "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. at 396.

To be sure, however, the United States Supreme Court has given notice that "[a] police officer may not seize an unarmed, non-dangerous suspect by shooting him dead." Garner, 471 U.S. at 11. A police officer may only use deadly force against a suspect when "the officer reasonably believes that the suspect poses a threat of serious bodily injury to the officer or others." Lamont v. New Jersey, 637 F.3d 177, 185 (3d Cir. 2011) (citing Garner, 471 U.S. at 3, 11; Abraham v. Raso, 183 F.3d 279, 294 (3d Cir. 1999)); see also O'Bert ex rel. Estate of O'Bert v. Vargo, 331 F.3d 29, 36 (2d Cir. 2003) ("It is not objectively reasonable for an officer to use deadly force to apprehend a suspect unless the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.").

With those general principles in mind, we turn to the doctrine of qualified immunity.

B.

The doctrine of qualified immunity generally protects government officials from civil liability for discretionary acts that do "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity is intended to spare deserving public officials of the costs and expenses of litigation and standing trial, and therefore the qualified immunity defense is typically interposed early in the proceedings of a case, Saucier, 533 U.S. at 200-01, such as on a motion for summary judgment, Morillo v. Torres, 222 N.J. 104, 119 (2015). Whether an official is entitled to the shield of qualified immunity ordinarily is a question of law to be decided by the court. Brown, 230 N.J. at 98-99; see also Scott v. Harris, 550 U.S. 372, 381 n.8 (2007) (noting that after the court has "drawn all inferences in favor of the nonmoving party to the extent supportable by the record," the reasonableness of a police officer's actions "is a pure question of law").

In determining whether qualified immunity applies in a particular case, a court ordinarily must address two issues: (1) whether the evidence, viewed in the light most favorable to the plaintiff, establishes that the official violated the plaintiff's constitutional or statutory rights, and (2) whether the right allegedly violated was "clearly established" at the time of the officer's actions. Saucier, 533 U.S. at 201-02; see also Morillo, 222 N.J. at 117-18.[8] "[A] right is clearly

[8] Since Saucier, the Supreme Court has clarified that courts have the discretion to address first the second prong -- whether the right was "clearly established" -- because a determination of that prong may be dispositive of the issue

established" if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 202. In other words, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Gormley, 218 N.J. at 113 (alteration in original) (quoting Anderson v.Creighton, 483 U.S. 635, 640 (1987)); see also Hope v. Pelzer, 536 U.S. 730, 741 (2002) (holding that cases involving "fundamentally similar" or "materially similar" facts are not necessary for a clearly established finding, but rather, the "salient question" is whether the law gave the officer "fair warning" that his conduct was unlawful).

C.

Under the qualified immunity jurisprudence discussed, we are required not only to view the evidence in the light most favorable to Baskin, but also to draw all reasonable inferences in his favor that are supported by the summary judgment record. See Gormley, 218 N.J. at 86 ("[W]e must . . . view the summary-judgment record through the prism of [the plaintiff's] best case, giving [the plaintiff] -- the non-moving party -- the benefit of the most favorable evidence and most favorable inferences drawn from that evidence."). At this stage, we cannot give credence to Detective Martinez's account of the last moments of his encounter with Baskin, and we do not resolve disputed issues of material fact as would a jury. We must accept

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of qualified immunity. See Pearson v. Callahan, 555 U.S. 223, 236-37 (2009). If the right at issue is not clearly established, then the officer alleged to have violated that right will be entitled to qualified immunity. See id. at 243-45.

as true the testimony of Baskin and Johnson that as Detective Martinez rounded the corner of the house, Baskin was standing with his open and empty hands above his head -- not reaching for a weapon or making a threatening gesture. Perhaps, Baskin was in the act of turning at that moment, but even that is a disputed fact. Indeed, by placing his hands above his head and without saying a word, as Baskin claims, he signaled in a language universally understood his intent to surrender.

Our constitutional jurisprudence makes clear what every police officer understands -- it is not objectively reasonable to shoot a person suspected of committing a crime after he has placed his empty hands above his head in an act of surrender. Jurisdictions that have addressed that scenario embrace that simple and seemingly incontrovertible proposition.

In Hemphill v. Schott, the plaintiff in a Section 1983 civil rights action had committed serious crimes, including assault with a deadly weapon, when confronted by a police officer. 141 F.3d 412, 417 (2d Cir. 1998). Accepting as true the plaintiff's "version of the facts" for summary judgment purposes, the United States Court of Appeals for the Second Circuit concluded that the officer's "alleged decision to use potentially deadly force upon a suspect who stopped and raised his arms in the air when commanded to do so [did] not qualify as reasonable" under the circumstances. Ibid. The court reasoned that, although the plaintiff was suspected of committing an "extremely violent" crime, "to allow the nature of the crime alone to justify the use of such severe force would thwart a central purpose of the Fourth Amendment limitations on use of force in making arrests, which is to preserve determination of

guilt and punishment for the judicial system." Ibid. Thus, the court concluded that the plaintiff's "statement of facts, construed most favorably to him, describe[d] a constitutionally unreasonable seizure" and therefore held that the trial court erred in granting summary judgment on qualified immunity grounds. Id. at 417-18.

In Gray-Hopkins v. Prince George's County, a Section 1983 excessive-force case, the summary judgment record presented two starkly different accounts of the shooting death of Hopkins after the police stopped the car in which he was a passenger. 309 F.3d 224, 227-28 (4th Cir. 2002). In the defendants' version, Hopkins grabbed an officer's gun and struggled for control of that gun when another officer fatally shot him. Id. at 228. In the plaintiff's version, Hopkins exited the vehicle and had his hands raised, and at no point threatened the officer or grabbed for his gun when he was shot dead by the other officer. Ibid. The United States Court of Appeals for the Fourth Circuit affirmed the district court's denial of qualified immunity because, based on the evidence supporting plaintiff's version, Hopkins was not resisting arrest or posing a threat to the safety of the officers and had "his hands raised over his head at the time of the fatal shot." Id. at 230-31. On those facts, the court held that "a trier of fact could clearly conclude that a Fourth Amendment violation occurred." Id. at 231.

Other jurisdictions have reached similar conclusions when a suspect had placed his hands in the air in an act of surrender. See, e.g., Henderson as Tr. for Henderson v. City of Woodbury, 909 F.3d 933, 939-40 (8th Cir. 2018) (finding that

the trial court erred by granting qualified immunity because, based on the plaintiff's version of the facts, the suspect "fully and unequivocally surrendered to police, lay still, and was shot and killed anyway" in violation of the suspect's "clearly established constitutional rights"); Longoria v. Pinal County, 873 F.3d 699, 709-11 (9th Cir. 2017) (reversing grant of qualified immunity because material facts were disputed and because the suspect's "Fourth Amendment right not to be shot dead while unarmed, surrounded by law enforcement, and in the process of surrendering [was] clearly established"); Kanae v. Hodson, 294 F. Supp. 2d 1179, 1185-86 (D. Haw. 2003) ("In [the plaintiff's] version of events, [the officer] could see [the plaintiff's] hands in the air and therefore knew that shooting [him] would clearly violate [his] Fourth Amendment rights. Accordingly, the court concludes that [the officer] has not established that he is entitled to summary judgment on qualified immunity grounds." (emphasis added)); see also Ciminillo v. Streicher, 434 F.3d 461, 467-69 (6th Cir. 2006) (denying qualified immunity and noting that courts have found that it is not objectively reasonable to use deadly force even "against a visibly armed plaintiff who had his hands over his head in the surrender position" (internal quotation omitted)).[9]

The law is also clear that a suspect's conduct leading up to his attempt to surrender cannot alone justify shooting the suspect -- using deadly force against him -- when his hands are above his head in an act of submission and he no longer poses a threat. Thus, "an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased."

Lytle v. Bexar County, 560 F.3d 404, 413 (5th Cir. 2009); see also Lamont, 637 F.3d at 184 ("Even where an officer is initially justified in using force, he may not continue to use such force after it has become evident that the threat justifying the force has vanished."); Watermanv. Batton, 393 F.3d 471, 481 (4th Cir. 2005) ("[F]orce justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated."); Ellis v. Wynalda, 999 F.2d 243, 247 (7th Cir. 1993) ("When an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity.").

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[9] A case that reached a different conclusion is not in any way similar to the circumstances here. In Conde ex rel. Estate of Mack v. City of Atlantic City, a police officer responded to a report of a man armed with a gun. 293 F. Supp. 3d 493, 497 (D.N.J. 2017). On his arrival at the scene, the officer commanded Derrick Mack to stop. Id. at 505. Mack turned toward the officer with only one hand raised and the other hand near his waistband area. Id. at 502-03.

Independent eyewitnesses supported the officer's version of events. Id. at 50304. One eyewitness explained that Mack never fully stopped and that "both hands did not come straight up in the air in a surrender posture." Id. at 503.

Instead, Mack's "left [hand] came up first and then the right began to rise as Mack appeared to turn toward the officer." Ibid. It was then that the officer shot Mack, who later died of his wounds. Id. at 497-98, 502. On that summary judgment record, the district court concluded that "the undisputed evidence shows that, at the very least, the possibility existed for Mack to reach into his waistband, where [the officer] and others state he holstered the weapon." Id. at 506. On those facts, the court granted the officer qualified immunity. Id. at 501-02. The summary judgment record here is very different.

III.

The law is not in doubt here, however disputed the facts may be about whether Baskin's hands were empty and up in the air just moments before the shooting. Although for qualified immunity purposes, we must consider the totality of the circumstances through the perspective of an objectively reasonable police officer on the scene -- an officer facing "tense, uncertain, and rapidly evolving" events, Graham, 490 U.S. at 396-97 -- we must also accept Baskin's version of those events that are in dispute and draw all reasonable inferences in his favor. In rendering a decision on qualified immunity, we do not sit as a trier of fact, weighing the evidence and making credibility determinations. That role is exclusively reserved for the jury in our system of justice.

We understand that police officers must often make split-second decisions in highly volatile situations. We do not minimize the challenges or dangers facing a police officer engaged in pursuit of a suspect who is observed carrying a gun. Here, Baskin does not dispute that he attempted to elude the police, crashing his car into Detective Martinez's unmarked patrol vehicle, and that he took flight armed with a gun. We accept that Detective Martinez had a legitimate and obvious basis to be concerned for his safety. During the chase, had Baskin turned toward him with the gun in his hand, Detective Martinez would likely have had an objectively reasonable basis to use deadly force to protect himself from the threat of death or serious bodily injury. However, the justification for use of deadly force at one point in a dangerous encounter does not give an officer the right to shoot a suspect when the use of

deadly force can no longer be justified. See, e.g., Lytle, 560 F.3d at 413. Although police officers would have a right to use deadly force against a suspect during a gun battle, they would not have a right to shoot the suspect after he threw down his weapon, placed his hands over his head, and surrendered. Cf. Lamont, 637 F.3d at 184.

Detective Martinez said that when he rounded the corner of the house, Baskin turned toward him pointing an object that appeared to be a gun. If that account were uncontested, and the object was, say a cell phone, Detective Martinez's objectively reasonable mistake of fact would not preclude his entitlement to qualified immunity. See Saucier, 533 U.S. at 205 ("If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.").

But that account is sharply contested. And as earlier noted, under the qualified immunity and summary judgment standards that govern our review, based on the testimony of Baskin and a neighborhood eyewitness, we must accept that Baskin had his empty hands above his head in a sign of surrender, made no threatening gestures, and no longer posed a threat. Under that scenario, an objectively reasonable police officer would not have had a justification to use deadly force.

The two conflicting accounts of what occurred at the time of the shooting, and any other disputed issues of material fact, must be submitted to a jury for resolution. See Brown, 230 N.J. at 99. After the jury makes its ultimate findings,

the trial court can determine the merits of the application for qualified immunity. See ibid.

IV.

In summary, the law prohibiting the use of deadly force against a surrendering suspect -- one with empty hands in the air and posing no imminent threat -- was clearly established at the time of the events in this case. Based on the facts that we must accept as true for purposes of determining the issue of qualified immunity on the summary judgment record, an objectively reasonable police officer would not have been justified in using deadly force. Therefore, the trial court erred in granting Detective Martinez qualified immunity and dismissing Baskin's Section 1983 lawsuit. Where the ultimate truth lies is a matter for a jury to determine. After the jury makes its fact-findings, Detective Martinez is free to renew his qualified immunity application if there is a basis to do so.

Accordingly, we affirm the judgment of the Appellate Division and remand for proceedings consistent with this opinion.

CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA and TIMPONE join in JUSTICE ALBIN's opinion. JUSTICE SOLOMON filed a dissent, in which JUSTICES PATTERSON and FERNANDEZ-VINA join.

SUPREME COURT OF NEW JERSEY

A-70 September Term 2018

081982

Bryheim Jamar Baskin,

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Rafael Martinez, City of Camden and
Scott Thompson,

Defendants-Appellants.

JUSTICE SOLOMON, dissenting.

This appeal as of right requires the Court to determine whether the Appellate Division correctly reversed the trial court's grant of summary judgment in favor of a police officer who pursued and shot a fleeing suspect. It is undisputed that the suspect possessed a handgun throughout the pursuit and, while out of the officer's view, discarded his weapon in the backyard where he was shot. It is disputed whether the suspect's hands were empty and raised as he turned toward the officer and was shot.

The Appellate Division majority concluded that the contents and position of the suspect's hands were disputed material facts precluding summary judgment. The dissent asserted that the qualified immunity doctrine required that summary judgment be granted in favor of the officer because his actions were reasonable considering the totality of the circumstances, irrespective of the disputed facts. The majority concludes that viewing the disputed facts in the light most favorable to the suspect -- who resisted arrest, crashed into a police car, and fled on foot through a residential neighborhood while armed with a handgun -- the officer's use of deadly force as he turned a blind corner and, for an instant, saw the suspect turn with raised hands, was the result of an unreasonable "mistaken understanding." Saucier v. Katz, 533 U.S. 194, 205 (2001). I disagree. Even if a jury were to resolve the disputed facts in Baskin's favor, Martinez would still be entitled to qualified immunity, and therefore I dissent.

I.

The summary judgment record reveals that early one afternoon, the Camden Police Department deployed its Strategic Multi-Agency Shooting and Homicide Team (the Team), consisting of two unmarked police vehicles and five uniformed police officers, to canvass a high-crime neighborhood where there had been recent shootings. While on patrol, the Team observed plaintiff Bryheim Jamar Baskin enter a vehicle and exit a parking lot without signaling. The Team arranged for one unit to provide backup while the other performed a vehicle stop.

Baskin initially pulled over, but then sped off in reverse and crashed into the backup vehicle occupied by Detective Rafael Martinez and his partner. After the collision, Baskin got out of his car and fled on foot. Martinez gave chase and heard an officer yell "gun." Martinez also observed the butt of a handgun in Baskin's right pocket during the chase.

Followed by other officers, Martinez pursued Baskin through a residential area and over several fences. As Baskin turned down an alley, the handgun fell from his pocket, and Martinez observed Baskin reach down, pick it up, and continue on, pistol in hand. As Martinez moved through the alley, he lost sight of Baskin, who ran into a backyard, where a wall blocked his exit. At that time, Martinez unholstered his service weapon and continued the pursuit. Once Martinez neared the end of the alley, he positioned himself to gain a full view of the backyard, unaware that a wall blocked Baskin's exit. At that moment, Baskin began to turn around. Martinez fired a single round into Baskin's torso.

Baskin was taken by ambulance to a nearby hospital where he was treated for serious and permanent injuries and survived. At the time of Baskin's arrest, he possessed $1000 and less than a half-ounce of cocaine. In addition, the police retrieved two cell phones near where Baskin fell, and a semiautomatic handgun loaded with eleven hollow-point bullets elsewhere in the backyard.

The Camden County Prosecutor's Office (the Prosecutor's Office) investigated the incident. The Prosecutor's Office concluded that Martinez's actions were justified under N.J.S.A. 2C:3-4 and 3-5 because he "reasonably believed Bryheim Baskin's actions placed him in imminent danger of death or bodily injury." The New Jersey Attorney General's Office, Division of Criminal Justice, reviewed the Prosecutor's Office's investigation and agreed with its determination. Baskin was later charged in a fourteen-count indictment and pled guilty to four of the criminal charges filed against him: second-degree eluding an officer, N.J.S.A. 2C:29-2; second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5; third-degree resisting arrest, N.J.S.A. 2C:29-2; and possession with intent to distribute less than half an ounce of cocaine, N.J.S.A. 2C:35-5. Baskin was ultimately sentenced to a four-year term of imprisonment.

During his plea colloquy, Baskin admitted he was aware police officers "pulled up behind [him] and attempted to stop [his] vehicle." Baskin acknowledged that "instead of stopping, [he] attempted to elude those officers by speeding off at a high rate of speed," thereby "creat[ing] a risk of harm or injury to the pursuing officers and also to the population [and] community at large." Baskin also testified that, at times during the pursuit, he looked back to see if the uniformed police officers continued to pursue him.

Thereafter, Baskin filed a complaint under 42 U.S.C. § 1983 (Section 1983) against Martinez, the City of Camden, and the Chief of Police of the Camden Police Department (collectively, defendants). Baskin claimed that

Martinez's use of excessive force at the time of Baskin's apprehension and arrest violated his federal constitutional rights.

Baskin testified in a deposition taken during discovery in the Section 1983 action that his path was blocked by a brick wall at the end of the backyard where he was shot, and that he discarded his handgun in that yard, remained silent, and put his empty, open hands up near his ears to signal his surrender. According to Baskin, he was shot as he turned to face Martinez. An eyewitness, in a statement to police and at her deposition, stated that Baskin was shot when he put his empty hands in the air and began to turn around. No evidence places Baskin's hands above his head when he was shot.

At Martinez's deposition in the Section 1983 action, he testified that he proceeded down the alley believing Baskin was armed. Martinez stated that as Baskin turned around, his arms were extended at a "90-degree angle," "pointing straight in front of him," and that he had a "black object" "[i]n his right hand."

At the conclusion of discovery, the trial court granted defendants' motion for summary judgment, finding that Martinez was entitled to qualified immunity because his use of deadly force was reasonable under the totality of the circumstances. Baskin appealed. The Appellate Division reversed in a split decision. The majority concluded that the contents and position of Baskin's hands during the shooting were disputed issues of material fact precluding summary judgment. The dissenting judge asserted that Martinez is entitled to qualified

immunity because he acted reasonably under the totality of the circumstances, even under Baskin's version of the disputed facts; I agree.

II.

Baskin brought this action under Section 1983, which "provides a cause of action for a person who has been deprived of his or her well-established federal constitutional or statutory rights by any person acting under the color of state law." Schneider v. Simonini, 163 N.J. 336, 353 (2000). A police officer like Martinez, performing his or her official duties, acts under the color of state law. See State v. Crawley, 187 N.J. 440, 460-61 (2006) (holding that a police officer who lawfully performs official functions and acts in objective good faith operates "under color of law in the execution of his duties").

The doctrine of qualified immunity, meanwhile, allows police officers "to perform their duties without being encumbered by the specter of being sued personally for damages, unless their performance is not objectively reasonable." Morillo v. Torres, 222 N.J. 104, 108 (2015). Qualified immunity thus serves as an affirmative defense to shield law enforcement from liability for discretionary actions taken while acting reasonably under the color of state law. Brown v. State, 230 N.J. 84, 97-98 (2017). In this way, "[q]ualified immunity protects all officers 'but the plainly incompetent or those who knowingly violate the law.'" Connor v. Powell, 162 N.J. 397, 409 (2000) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)); see, e.g., Morillo, 222 N.J. at 108 (dismissing civil rights causes of action because "[i]t

cannot be said as a matter of law that no reasonably competent officer would have believed that probable cause existed").

In practice, the "defense of qualified immunity interposes a significant hurdle for plaintiffs seeking to recover for asserted violations of civil rights at the hands of law-enforcement officials." Morillo, 222 N.J. at 116. That hurdle comes into particularly sharp relief at the summary judgment stage. Generally, summary judgment is proper when, viewed in the light most favorable to the non-moving party, "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018) (quoting R. 4:46-2(c)). In the qualified immunity context, "if 'a reasonable officer could have believed that his conduct was justified,' the police officer is entitled to qualified immunity" -- and, thus, summary judgment -- as a matter of law. Conde v. City of Atlantic City, 293 F. Supp. 3d 493, 506 (D.N.J. 2017) (quoting City & County of San Francisco v. Sheehan, 575 U.S. 600, 135 S. Ct. 1765, 1777 (2015)).

Generally, "application of the defense of qualified immunity is a legal question for the court rather than the jury" that should be raised before trial. Brown, 230 N.J. at 98-99; see also Pearson v. Callahan, 555 U.S. 223, 232 (2009) (noting "the importance of resolving immunity questions at the earliest possible stage in litigation" (quoting Hunter v. Bryant, 502 U.S. 224, 227

(1991))). Because the grant of qualified immunity "relieves an eligible defendant from the burden of trial," Brown, 230 N.J. at 99, "a summary judgment motion is an appropriate vehicle for deciding that threshold question of immunity when raised," Morillo, 222 N.J. at 119.

Courts apply a two-pronged test in analyzing whether an officer is entitled to qualified immunity. Bennett v. Murphy, 274 F.3d 133, 136-37 (3d Cir. 2001); see also Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). First, a court must determine whether, "'[t]aken in the light most favorable to the party asserting the injury,'" the facts alleged "show that the challenged conduct violated a statutory or constitutional right. Second, the court must determine 'whether the right was clearly established.'" Morillo, 222 N.J. at 117 (alteration in original) (citation omitted) (quoting Saucier, 533 U.S. at 201). "An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense." Saucier, 533 U.S. at 205.

Courts decide the legal issue of qualified immunity by applying that test when there are no disputed material historical or foundational facts. Morillo, 222 N.J. at 119. Where material facts are in dispute, however, the jury may determine "the who-what-when-where-why type of historical fact issues." Brown, 230 N.J. at 99 (quoting Schneider, 163 N.J. at 359); see Curley v. Klem, 298 F.3d 271, 278 (3d Cir. 2002) ("[T]he existence of disputed, historical facts material to the objective

reasonableness of an officer's conduct will give rise to a jury issue."); see also Hili v. Algor, 85 F. Supp. 2d 391, 401 (D.N.J. 2000) ("[W]here factual issues relevant to the determination of qualified immunity are in dispute, the Court cannot resolve the matter as a question of law."). But cf. Schneider, 163 N.J. at 360 ("hold[ing] that[,] in Section 1983 cases when disputed historical facts are relevant to either probable cause or the existence of a reasonable, but mistaken, belief concerning its existence, the trial court must submit the disputed factual issue to the jury," but finding that trial court's resolution of factual dispute was "harmless error" in light of Court's probable cause analysis).

To resolve whether Martinez acted in an objectively reasonable manner and was thus entitled to qualified immunity as a matter of law or whether a factual dispute required that the case be presented to a jury, we consider the specific contours of Baskin's Section 1983 claim. See Saucier, 533 U.S. at 205 (holding that the qualified immunity inquiry "must accommodate limitless factual circumstances").

III.

The right to be free from "unreasonable searches and seizures" under the Fourth Amendment of the United States Constitution is the well-established constitutional right Baskin asserts was violated in this case. Baskin contends that he had a "clearly established" constitutional right to be free from Martinez's use of deadly force, which was "excessive under objective standards of reasonableness." Id. at 201-02; see also Kopec v. Tate, 361 F.3d 772, 776-78 (3d Cir. 2004) (Fourth

Amendment allows law enforcement to exercise only "objectively reasonable" force in effectuating arrest). Martinez counters that Baskin's constitutional right was not clearly established because "a reasonable officer could have believed that [Martinez's] conduct was justified." Sheehan, 135 S. Ct. at 1777. The Court is obliged to consider what constitutes a "clearly established" right for qualified immunity purposes in general and in the context of an alleged violation of the Fourth Amendment in particular.

A.

Many Section 1983 cases rise or fall on the "clearly established" prong of qualified immunity. See, e.g., Brown, 230 N.J. at 90 (holding officer did not violate clearly-established right given "the lack of clarity in the law"); Morillo, 222 N.J. at 125 ("This was not a setting in which the application of the statutory exemption . . . was 'clearly established' in the framework of our law.").

A clearly established right is one of which the contours are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Saucier, 533 U.S. at 202 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). "The dispositive point in determining whether a right is clearly established is whether a reasonable officer in the same situation clearly would understand that his actions were unlawful." Morillo, 222 N.J. at 118. In other words, "[i]f it would not have been clear to a reasonable officer what the law required under the facts alleged, he is entitled to qualified immunity." Bennett, 274 F.3d at 136-37 (emphasis added).

As such, it is a "longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" White v. Pauly, 580 U.S. ___, 137 S. Ct. 548, 552 (2017) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)). Indeed, "the clearly established law must be 'particularized' to the facts of the case." Ibid. (quoting Anderson, 483 U.S. at 640); see Sheehan, 135 S. Ct. at 1776 ("Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures."). A contrary standard would allow plaintiffs "to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." White, 137 S. Ct. at 552 (quoting Anderson, 483 U.S. at 639).

B.

Importantly, the Supreme Court of the United States has emphasized that the "clearly established" prong's requisite particularity and "specificity [are] especially important in the Fourth Amendment context." Mullenix v. Luna, 577 U.S. ___, 136 S. Ct. 305, 308 (2015).

Once again, the "use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness." Saucier, 533 U.S. at 202. The Fourth Amendment's reasonableness standard "is not capable of precise definition or mechanical application." Bell v. Wolfish, 441 U.S. 520, 559 (1979). As such, courts take a "totality of the circumstances" approach in analyzing the reasonableness of a law enforcement officer's use of force. See

Tennessee v. Garner, 471 U.S. 1, 8-9 (1985); see also Abraham v. Raso, 183 F.3d 279, 289 (3d Cir. 1999) ("[R]easonableness should be assessed in light of the 'totality of the circumstances . . . .'" (quoting Graham v. Connor, 490 U.S. 386, 396 (1989))).

Proper application of the reasonableness test requires special "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 [the suspect] is actively resisting arrest or attempting to evade arrest by flight." DelaCruz v. Borough of Hillsdale, 183 N.J. 149, 165 (2005) (quoting Graham, 490 U.S. at 396). The analysis also "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." Curley, 499 F.3d at 207 (quoting Graham, 490 U.S. at 396).

When balancing the government's interest against the nature of the intrusion, the reasonableness of an officer's "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." DelaCruz, 183 N.J. at 165 (quoting Graham, 490 U.S. at 396). That allows reviewing courts to take into account 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 167-68 (quoting Graham, 490 U.S. at 396-97). Hence, the Fourth Amendment does not require that an officer be correct -- it merely requires that the officer act reasonably. See Heien v. North Carolina, 574 U.S. 54, 60-61 (2014) ("To

be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials . . . ."); see also Bennett, 274 F.3d at 137 ("An officer may still contend that he reasonably, but mistakenly, believed that his use of force was justified by the circumstances as he perceived them . . . ."); DelaCruz, 183 N.J. at 167 ("[A]n officer is free to argue that his conduct was reasonable in conjunction with his version of the facts.").

The Court's emphasis on specificity in the context of a qualified immunity analysis in response to an alleged violation of the Fourth Amendment recognizes that "[i]t 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." Mullenix, 136 S. Ct. at 308 (alteration in original) (quoting Saucier, 533 U.S. at 205).

For example, in Brosseau v. Haugen, the Supreme Court of the United States reversed the Ninth Circuit's denial of qualified immunity to an officer who shot and killed a fleeing felon. 543 U.S. 194, 201 (2004). The Ninth Circuit had found that the officer violated the rule set forth in Garner -- that "deadly force is only permissible where 'the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.'" Haugen v. Brosseau, 339 F.3d 857, 873 (9th Cir. 2003) (quoting Garner, 471 U.S. at 11). The Supreme Court disagreed and held that the circuit court's reliance on the "general test[]" for excessive force set out in Garner "was mistaken." Brosseau, 543 U.S. at 199. The correct inquiry, the Court explained, was whether it was clearly

established that the Fourth Amendment prohibited the officer's conduct in the "'situation [she] confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area [were] at risk from that flight." Id. at 199-200 (quoting Saucier, 533 U.S. at 202).

Similarly, in Mullenix, the issue before the Supreme Court was whether the Fifth Circuit properly held that a police officer violated a clearly established right when he shot and killed a fleeing motorist during a high-speed chase. 136 S. Ct. at 307-08. The Court discussed excessive force cases that involved car chases, "reveal[ing] the hazy legal backdrop against which [the officer] acted." Id. at 309. According to the Court, even accepting that the factual circumstances before it "fall somewhere between" cases in which the force used was found excessive and those in which it was found to be reasonable, "qualified immunity protects actions in the 'hazy border between excessive and acceptable force.'" Id. at 312 (quoting Brosseau, 543 U.S. at 201).

Those cases reveal the context-dependent inquiry that must be performed here to determine whether Martinez is entitled to qualified immunity. Although Martinez used deadly force against Baskin, the use of deadly force is not per se unreasonable. Garner, 471 U.S. at 11. The Court must therefore consider Martinez's use of deadly force in the totality of the circumstances present in this case. Graham, 490 U.S. at 396.

IV.

I agree with the Appellate Division dissent that summary judgment is not precluded by the existence of a genuine issue of fact as to whether Baskin's hands were empty and raised at the time of his shooting. See, e.g., Conde, 293 F. Supp. 3d at 505-06 (holding that the officer's use of deadly force was not unreasonable where the suspect's hands were raised because the possibility existed for the suspect to reach into his waistband for the weapon he was believed to be carrying). Even if an officer is mistaken in believing a suspect is armed, qualified immunity will still apply if the officer's mistaken belief was objectively reasonable. See, e.g., Krueger v. Fuhr, 991 F.2d 435, 439 (8th Cir. 1993) (noting that, "even assuming" the suspect fatally shot by an officer was established to have been "unarmed at the time of the shooting, that fact would not preclude entry of [summary] judgment" in favor of the officer whose "belief that he was facing an armed and dangerous suspect was objectively reasonable"); Conde, 293 F. Supp. 3d at 505 ("[A]s long as [the officer's] belief that [the suspect] was armed is reasonable, qualified immunity applies even if [the officer] was mistaken."). Furthermore, Martinez's actions are considered "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." DelaCruz, 183 N.J. at 165 (quoting Graham, 490 U.S. at 396). Even if Baskin's account of the events is accepted as true for purposes of summary judgment, Martinez reasonably believed that he confronted an armed and dangerous suspect who posed an immediate threat to his life when he shot Baskin.

Here, before he was restrained, Baskin threatened the lives of police officers and the general public by speeding away from one police vehicle and crashing into another. Baskin, armed with a gun, then fled the scene of the crash on foot and led the police on a pursuit through a residential neighborhood in the middle of the afternoon. Baskin thus "openly . . . exhibited a total willingness to commit dangerous acts against police officers" and displayed an "apparent disregard for innocent bystanders." Ridgeway v. City of Woolwich Twp. Police Dep't, 924 F. Supp. 653, 658 (D.N.J. 1996).

Additionally, Baskin posed "an immediate" threat because he was in possession of a handgun while actively resisting arrest. DelaCruz, 183 N.J. at 165 (quoting Graham, 490 U.S. at 396). Those facts reasonably led Martinez to conclude that Baskin, who had committed serious crimes "involving the infliction or threatened infliction of serious physical harm" -- crashing into a police vehicle in an attempt to escape -- was dangerous and willing to use deadly force against the officer and others. Garner, 471 U.S. at 11-12.

Martinez unholstered his service weapon only after he entered the alley and observed Baskin pick up the gun from the ground and run out of Martinez's view into a backyard. It was then that Baskin threw his gun away. As Martinez rounded the corner and for an instant saw Baskin turn towards him, Martinez's belief that Baskin was armed -- even if mistaken -- was reasonable given the "tense, uncertain, and rapidly evolving" circumstances before him. DelaCruz, 183 N.J. at 167 (quoting Graham, 490 U.S. at 397).

The totality of the circumstances establishes that a reasonable officer at the scene would have no reason to know, in the split second that Martinez fired his weapon, that Baskin no longer possessed a gun. Thus, considering the alleged facts in a light most favorable to Baskin -- that his hands were empty and raised -- Martinez's belief in the need to use deadly force to prevent Baskin's escape and protect against the threat of danger Baskin posed to Martinez and others was reasonable given the totality of the circumstances from the perspective of an officer on the scene. Particularizing the law to the facts of the case, White, 137 S. Ct. at 552, Martinez's use of deadly force falls within Garner's parameters because "a reasonable officer could have believed that [Martinez's] conduct was justified." Sheehan, 135 S. Ct. at 1777 (quoting Billington v. Smith, 292 F.3d 1177, 1189 (9th Cir. 2002)). The record establishes that Martinez acted reasonably under extraordinarily dangerous circumstances, and that defendants are therefore entitled to qualified immunity as a matter of law. Accordingly, I dissent.

APPENDIX B

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5553-15T2

BRYHEIM JAMAR BASKIN

Plaintiff-Appellant,

v.

RAFAEL MARTINEZ, CITY OF

CAMDEN, AND SCOTT THOMPSON,

Defendants-Respondents.

Argued November 27, 2017 - Decided September 14, 2018

Before Judges Accurso, O'Connor and Vernoia
(Judge Accurso dissenting).

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-0901-14.

Paul R. Melletz argued the cause for appellant (Gerstein, Grayson, Cohen & Melletz, LLP, attorneys; Paul R. Melletz, on the brief).

Timothy J. Galanaugh, Assistant City Attorney, argued the cause for respondents (Marc A. Riondino, City Attorney, attorney; Timothy J. Galanaugh, on the brief).

Opinion

PER CURIAM

In this action, plaintiff Bryheim Jamar Baskin alleges defendant Rafael Martinez, a police officer of defendant City of Camden (Camden), violated his federal constitutional rights under 42 U.S.C. § 1983. Specifically, plaintiff claims Martinez used excessive force when he shot and wounded plaintiff in the abdomen. Plaintiff also alleges Camden and defendant Scott Thompson, the chief of police of the Camden Police Department at the time of the shooting[1], are liable for tolerating the use of excessive force within the Department. In addition, plaintiff asserts state-law claims against all defendants for assault and battery and negligence.

Following discovery, Martinez filed a motion for summary judgment claiming the doctrine of qualified immunity protected him from plaintiff's allegations he employed excessive use of force. On July 22, 2016, the Law Division entered an order granting him summary judgment. In its oral opinion, the court determined Martinez was entitled to summary judgment on the ground qualified immunity protected him from liability for his actions. Plaintiff appeals from this order.

Having reviewed the record, the arguments presented, and the prevailing legal standards, we reverse and remand for further proceedings.

[1] The Camden Police Department disbanded in 2013. The Camden County Police Department has been providing police services to Camden since.

I

For the balance of the opinion, the term "defendant" shall refer to Martinez only. We start by recounting plaintiff's version of what transpired. Although we must view the facts in the light most favorable to plaintiff to determine whether the grant of summary judgment to defendant, the moving party, was appropriate, see Rule 4:46-2(c), because it bears upon our disposition, we provide defendant's version as well.

With some exceptions specifically identified below, we glean plaintiff's account from his deposition testimony. Plaintiff testified that in the early afternoon of September 11, 2012, he was exiting a parking lot in Camden when an unmarked police car drove in front of him and tried to cut him off. Instead of stopping, plaintiff put his car in reverse, backed up, and collided into an unmarked police car that was behind him.

Plaintiff asserted he did not know the two unmarked cars were in fact police cars or that the cars were occupied by police officers. He also claimed he did not know why the occupants in either car wanted to stop him, explaining:

> All I know is that when I – that first car came and cut me off ... I turned and ... looked in my rearview, which is when I saw another car. That's when I know somebody want me. I didn't know if it's somebody shooting is the police; I don't know. I just know somebody want me.... That area is shootings. It is – it a lot of shootings and drug activity.... [P]eople get killed and shot for unmistaken car.

Plaintiff admitted he had a loaded, semiautomatic handgun in his possession and that drugs were located in his car.

Approximately two months before his deposition, plaintiff pled guilty to various offenses arising out of his encounter with the police. Those offenses were second-degree eluding, second-degree unlawful possession of a weapon, third-degree resisting arrest, and possession with intent to distribute less than a half-an-ounce of cocaine.[2]

During the plea colloquy, plaintiff admitted the police attempted to stop him. Even though he was aware the police wanted to stop and take him into custody, he resisted their efforts by "speeding off" at a high rate of speed and colliding into one of the police cars. He acknowledged that by doing so he put the officers and the community at large at risk of harm. Elsewhere in the colloquy he equivocated and indicated he did not collide into the police car but, rather, he and the driver of the police vehicle "hit each other."

Returning to his deposition testimony, plaintiff testified that after the collision with the police vehicle, he fled from the accident scene on foot. The police chased him, also on foot. Plaintiff's gun was in his right front pocket, although in his responding statement of material facts to defendant's summary judgment motion, see Rule 4:46-2(b), he stated the gun was actually tucked in his waistband.

At one point plaintiff dropped his gun, but he stopped to retrieve it and resumed running. He eventually ran into and became cornered in the yard of a residence. Aware he was being pursued by the police, he threw the gun away from himself. He admitted the police were not present when he discarded the gun and,

[2] The specific statutory citations to these offenses and the degree of the drug offense were not included in the record.

thus, were unaware he had disarmed himself.

Plaintiff then put his hands, which were empty, up in the air to signal he was surrendering. However, a police officer then entered the yard and shot him in the abdomen. Plaintiff did not say anything to the officer before the officer shot him, believing that raising his hands in the air was sufficient to show he was capitulating.

It is not clear from his testimony how high in the air his hands were, but plaintiff testified they were "probably" higher than his ears. Plaintiff mentioned he had two cell phones in his possession when he was shot, but claimed the cell phones were in his pocket and not in his hands when he was shot.

Not surprisingly, defendant's account is different. In his deposition testimony, defendant noted that an unmarked police car attempted to pull plaintiff over after plaintiff exited a parking lot without signaling. At the time, defendant was in another police car but, to provide assistance to the other officers, approached the area where the police were endeavoring to pull plaintiff over. Plaintiff's car then backed up at a "fast pace" and struck the car defendant was occupying. Defendant noted his car was also an unmarked car, and acknowledged plaintiff likely would not have known his car was a police vehicle. Plaintiff then fled from his car on foot. Defendant followed plaintiff on foot while another officer followed by car.

While chasing plaintiff, defendant identified himself as a police officer and shouted "numerous verbal warnings" to stop, but to no avail. Defendant heard an officer yell that plaintiff had a gun, and defendant also observed plaintiff drop and pick up a black handgun during the course of the chase. Plaintiff then ran into the

rear of a residence with the gun in his hand, at which point defendant unholstered his own gun and slowly moved around the house to the rear yard.

As defendant approached the rear corner of the house, he began to "slice the pie." Defendant explained "slicing the pie" is a tactic he learned at the police academy, and

> is basically used when you know there is a threat around the corner and you have to pursue but you want to safely do it, you want to do it as safely as possible. Instead of me running straight behind him, I – I get up there, and I start to slowly look a little, piece by piece, go over until – and I said slowly just to make sure there is no gun popping or I'm getting shot at immediately. If there is a threat and I need to disappear behind the house, I can go back ....
>
> I just gradually took it step by step as I got a little more view of the backyard, until I could see the entire back of the residence.

When defendant finally gained full view of the back yard, plaintiff had his back to defendant, but plaintiff immediately started to turn around "medium to fast," and plaintiff's hands were pointing straight out in front of him. When plaintiff was half-way through his turn, defendant saw a black object in plaintiff's right hand. Having seen plaintiff with a gun moments before, defendant assumed the object was a gun and, "in fear of my life," fired one shot into plaintiff's abdomen. Disabled from the shot, plaintiff fell over and was subsequently transported to the hospital for treatment. Defendant admits he did not say anything to plaintiff before he shot him. Defendant did not check to see what had been in plaintiff's hand just before he fired.

A resident on the street (eyewitness) saw the shooting. During her deposition, the eyewitness testified she saw plaintiff run into the backyard of a residence across the street from where she was standing at the time. She stated the officer was "right behind" plaintiff when plaintiff ran into the yard; there was no gap in time between the moment plaintiff and the officer arrived in the back yard.

According to the eyewitness, after they both arrived in the yard, plaintiff put his hands up, turned around, and was shot by the officer. At first she stated plaintiff was completely turned around, but then indicated she was not sure if plaintiff was still turning around toward the officer when shot. However, she noted, "I know his hands were in the air, and you could see him turning around." She further testified she did not see anything in plaintiff's hands when he had his hands up and turned around. She also did not see any objects in plaintiff's hands when he ran into, or observe him toss a gun after, he arrived in the back yard.

At the conclusion of discovery, defendant filed a motion for and was granted summary judgment. The court determined defendant was protected by qualified immunity. The court's findings were as follows.

> [W]hat I have is the plaintiff involved in a high speed chase, crashed his car into the officers, fleeing on foot, known to have a weapon. The only information Martinez has is that [plaintiff] still has the weapon because Martinez is not privy to the information, and there's no dispute as to this, Martinez is not privy to the information that the plaintiff dropped his gun. [Martinez] chases him into an alleyway, and in Martinez' perception, which is not refuted by any of the other witnesses, he turns toward him and Martinez fires. Even if I take out Martinez' belief that he

> had a black object in his left hand, the fact that this person, when confronted in that alley by the officer, turned towards the officer, I find that gives the officer qualified immunity for his actions in using his weapon.
>
> I'm not requiring this officer to make a distinction as to whether [plaintiff] had something in his hands or he didn't at this point in time. [Martinez] knows [plaintiff is] armed. I'm not giving the officer the obligation to have to determine whether it's a cell phone or a weapon in the hand. I don't even have to go there.
>
> Once this Mr. Baskin brings this officer on a chase that leads him into this alley and Baskin turns towards the officer, at that point the officer has qualified immunity based on the actions he took to protect himself against someone who was known to be armed in his estimation based on the facts that he had in his knowledge. What Baskin didn't do was get on the ground, be passive, or anything of that nature.

The court discounted the eyewitness' account, stating, "she really doesn't say his hands were empty. She says she didn't see anything. She doesn't even say she was able to see his hands and that his hands were empty."

II

On appeal, plaintiff primarily contends there were material facts in dispute that precluded the entry of summary judgment, see Rule 4:46-2(c).

In considering plaintiff's appeal, we must adhere to well-settled principles applicable to summary judgment motions. A court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the

alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540, 666 A.2d 146 (1995); see also R. 4:46-2(c). If there are materially disputed facts, the motion for summary judgment should be denied. See Parks v. Rogers, 176 N.J. 491, 502-03, 825 A.2d 1128 (2003); Brill, 142 N.J. at 540, 666 A.2d 146.

"The doctrine of qualified immunity operates to shield 'government officials performing discretionary functions generally ... from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " Morillo v. Torres, 222 N.J. 104, 116, 117 A.3d 1206 (2013) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Qualified immunity is an affirmative defense; thus, the burden of proving its applicability rests with the defendant. See Beers-Capitol v. Whetzel, 256 F.3d 120, 142, n.15 (3d Cir. 2001).

To determine if qualified immunity applies to a government official, the court must examine whether: (1) "taken in the light most favorable to the party asserting the injury, ... the facts alleged show the officer's conduct violated a constitutional right," and (2) "the right was clearly established" at the time of the objectionable conduct.[3] Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that

[3] Courts may exercise discretion in deciding which of the two prongs of the qualified immunity analysis is to be addressed first. Pearson v. Callahan, 555 U.S.223, 236 (2009).

right." Id. at 202, 121 S.Ct. 2151 (quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). "[T]he salient question ... is whether the state of the law" at the time of an incident provided "fair warning" to the defendants "that their alleged [conduct] was unconstitutional." Hope v. Pelzer, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002).

Here, the specific constitutional right at issue is the Fourth Amendment right to be free from excessive force.[4] Under this Amendment, a person is protected from unreasonable seizures, see Graham v. Connor, 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), and the use of excessive force violates a suspect's Fourth Amendment rights, ibid. The Fourth Amendment permits a police officer to exercise only an "objectively reasonable" degree of force in effectuating an arrest or other seizure. Kopec v. Tate, 361 F.3d 772, 776-78 (3d Cir. 2004). "[T]here is no doubt that Graham ... clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness." Saucier, 533 U.S. at 201-202, 121 S.Ct. 2151.

To determine whether an officer's conduct was objectively reasonable in an excessive use of force case, a court looks to the "totality of the circumstances." See Graham, 490 U.S. at 396, 109 S.Ct. 1865 (citing Tennessee v. Garner, 471 U.S. 1, 8-9, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)). Factors that must be considered when evaluating reasonableness include: "the severity of the crime at issue, whether the

[4] Although in his complaint plaintiff asserts defendant violated the Fifth, Eighth, and Fourteenth Amendments, it is the Fourth Amendment that governs the disposition of claims of excessive force of use. See Abraham v. Raso, 183 F.3d 279, 288 (3d Cir. 1999).

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." Ibid. However, deadly force will only be considered reasonable if "necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." Garner, 471 U.S. at 3, 105 S.Ct. 1694 (emphasis supplied). In addition:

> 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 .... 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.
>
> [Ibid. (citations omitted).]

As our Supreme Court recently noted, "[o]rdinarily, application of the defense of qualified immunity is a legal question for the court rather than the jury ...." Brown v. State, 230 N.J. 84, 98-99 (2017). However, "[a]n exception to that rule arises when the case involves disputed issues of fact. In such a circumstance, the case may be submitted to the jury to determine 'the who-what-when-where-why type of historical fact issues,' after which the trial judge may incorporate those findings in determining whether qualified immunity applies." Id. at 99 (citing Schneider v. Simonini, 163 N.J. 336, 359 (2000)). Therefore, although a court is to determine if qualified immunity applies in a matter and such question is to be evaluated in the light most favorable to the party asserting the alleged injury, before undertaking such evaluation, the jury

must resolve any disputed issues of fact.

Here, plaintiff and defendant's versions of what occurred in the moments just before plaintiff was shot differ in material respects. Plaintiff concedes defendant did not know he was no longer armed, but asserts his hands were up and empty when defendant entered the yard and shot him, a claim corroborated by the eyewitness.

Defendant claims when he arrived at the rear corner of the house, plaintiff turned toward him with his hands stretched out in front of him -- not up -- with a black object in his right hand. Defendant stated it was when he saw the black object that he fired, suggesting that, if plaintiff's hands were empty, he would not have shot plaintiff. Accordingly, whether plaintiff held an object in his hand when defendant entered the rear yard and saw plaintiff is pivotal. This disputed issue of material fact alone should have precluded the entry of summary judgment.

When the trial court evaluated the facts, it did consider whether defendant was entitled to qualified immunity if plaintiff had not been holding a black object in his hand when defendant shot him; however, the court still found defendant entitled to immunity even if such fact were true. The difficulty with that determination is defendant is asserting he was induced to and justified in shooting plaintiff <u>because</u> he was holding a black object in his hand. If plaintiff were not holding an object in his hand then, according to defendant -- at least implicitly -- there would not have been a reason to shoot him. The court assumed defendant's reaction would have been the same <u>and</u> would have been reasonable even if plaintiff had not been holding an object in his hand; however, the evidence provided does not support that conclusion. Clearly,

whether plaintiff was holding a black object in his hand is significantly material.

It is also not known if the court assumed other facts as asserted by plaintiff were true when it made its decision. It is unclear whether the court determined plaintiff had his hands up or out in front of him, as well as other contentions about the moments leading up to the shooting. The court also improperly weighed the eyewitness' observations.

For example, the court was dismissive of the eyewitness' account because, for example, she testified she did not see anything in plaintiff's hands when he was shot, rather than state plaintiff's hands were empty. However, the court was required to credit the evidence and all inferences in the light most favorable to plaintiff. See R. 4:46-2(c). Further, it was not for the court to assume or interpret what the eyewitness intended or meant by her testimony. See Conrad v. Michelle & John, Inc., 394 N.J. Super. 1, 13, 925 A.2d 54 (App. Div. 2007) (stating, in the context of a summary judgment motion, a judge "does not weigh the evidence, or resolve credibility disputes," as such functions are "uniquely and exclusively performed by a jury").

We also note the eyewitness' testimony challenged defendant's claim he "sliced the pie" before entering the back yard. Defendant's testimony suggested he was not impulsive but carefully assessed the situation before acting. According to the eyewitness, defendant ran into the back yard right behind plaintiff and immediately shot him. That testimony potentially affects defendant's credibility. Of course, the weight to be accorded such testimony and its impact upon a party's credibility is for the jury to decide. Ibid.

Accordingly, we reverse the July 22, 2016 order and remand so that the question of what exactly occurred before the shooting can be assessed and resolved by a jury. There exist disputed facts that must be resolved before the court can determine whether defendant's actions were objectively reasonable and if he is entitled to qualified immunity. We do not mean to suggest the question whether plaintiff was holding an object in his hand when shot is the only material fact in dispute. Any "who-what-when-where-why type of historical fact issues," Brown, 230 N.J. at 99, shall be decided by the jury.

Finally, in his brief, defendant contends plaintiff's convictions preclude him from obtaining damages in an action asserted under 42 U.S.C. § 1983. Defendant cites Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), in support of his argument. Defendant raised this issue before the trial court but it did not rule on it.

We also decline to address this issue because, first, defendant did not file a notice of cross-appeal and, second, the trial court did not decide this issue; thus, we decline to do so in the first instance. Duddy v. Gov't Emps. Ins. Co., 421 N.J. Super. 214, 221, 23 A.3d 436 (App. Div. 2011).

We also conclude that, on remand, this matter should be heard by a judge different from the one who presided over defendant's summary judgment motion. See N.J. Div. of Youth & Family Servs. v. A.W., 103 N.J. 591, 617, 512 A.2d 438 (1986) (Court ordered the case assigned to a different judge because the trial court "may have a commitment to its findings"). Reversed and remanded for further proceedings

consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.
s/ Joseph H. Orlando
CLERK OF THE APPELLATE DIVISION

ACCURSO, J.A.D., dissenting.

As our Supreme Court has recently reiterated, "a reasonable mistake of fact on the part of a police officer will not render a search or arrest predicated on that mistake unconstitutional." State v. Sutherland, 231 N.J. 429, 431 (2018). That principle applies to qualified immunity as well. An officer does not lose the protection of qualified immunity because he made a reasonable mistake of fact in a split second encounter with a fleeing felon armed with a gun.

The majority reverses summary judgment to Detective Martinez because it finds the Law Division judge erred by resolving disputed issues of material fact in defendants' favor. But whether facts are material is a question of the substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Brill, 142 N.J. at 529-30, 666 A.2d 146. Because I believe defendants can concede Detective Martinez was mistaken in believing Bryheim Baskin had a gun in his hand at the moment the detective shot him and still be entitled to qualified immunity, I respectfully dissent.

Although the majority focuses on the factual disputes in this record, the principals' accounts of what occurred that September afternoon are remarkably congruent. They agree Baskin fled from police trying to effect a car stop.[5] They agree

[5] The majority sees a more disputed record, for example noting Baskin's deposition testimony that he was unaware it was the police who tried to pull him over and then chased him when he fled. Ante at 4. Baskin, however, pled guilty to, among other things, eluding, resisting arrest and unlawful possession of a firearm. He acknowledged on the record at his plea hearing that he knew it was the police who were attempting to stop him and he instead sped off "at a high rate of speed" and collided with a police car. A defendant cannot enter a plea of guilty in this state while maintaining his innocence. State v. Taccetta, 200 N.J. 183, 195-96 (2009). Both Baskin's plea, see N.J.R.E 803(c)(22); N.J. Mfrs. Ins. Co. v. Brower, 161 N.J. Super. 293, 297-98 (App. Div. 1978), and the statements he made on the record when he entered his plea, see N.J.R.E. 803(b)(1); Kohrherr v. Ferreira, 215 N.J.Super. 123, 130-31

(App. Div. 1987), are admissions, fully admissible in this civil action. See also Biunno, Weissbard & Zegas, Current N.J. Rules of Evidencec cmt. 1 on N.J.R.E. 803(b), cmt. on N.J.R.E. 803(c)(22)(2018).

Here are the facts plaintiff admitted on the motion:

1. Detective Ralph Martinez, along with other poOlice officers, was on patrol in the area of 32nd Street and Westfield Avenue in Camden.
2. The area around 32nd and Westfield is an area with significant drug activity.
3. All of the officers involved in this matter were dressed in Class "A" Uniforms, which clearly identified them as police.
4. Detectives attempted to stop Bryheim Baskin, who was driving a red Toyota Camry.
5. Mr. Baskin initially stopped and then backed his car up and collided with a police vehicle.
6. The police vehicle was occupied by Detective Ralph Martinez and Detective Argenis Bernard.
7. After colliding with the police vehicle, Mr. Baskin fled from the scene on foot.
8. Detective Martinez immediately pursued Mr. Baskin.
9. Mr. Baskin was carrying a gun he had...tucked in his waistband.
10. Detectives Saladin Webb and Michael Perez joined in the foot pursuit.
11. Baskin ran from the rear yards of North 32nd Street to the {} Block of Beideman Avenue.
12. Detective Martinez saw the gun in Mr. Baskin's waistband during the chase.
13. An independent witness,..., confirms Mr. Baskin had a gun when he initially fled the accident scene.
14. Mr. Baskin eventually ran to the rear yard of [a house on] Beideman Avenue.
15. Detective Martinez observed Mr. Baskin drop the gun and then reach down to retrieve it.
16. Mr. Baskin ran behind the house out of Martinez's sight. Martinez drew his weapon.
17. Detective Martinez turned the corner and saw Mr. Baskin on the patio attached to the rear of the house.

...

19. Detective Martinez fired one shot hitting Mr. Baskin in the torso.

...

21. Mr. Baskin had thrown his gun toward the rear fence of the yard once he had gotten behind the house.
22. Detective Martinez did not see Mr. Baskin throw the gun.
23. Mr. Baskin was removed to Cooper Medical Center and treated for a gunshot wound.
24. The Camden County Prosecutor's Office conducted an investigation into the non-fatal shooting of Bryheim Baskin.
25. The Camden County Prosecutor's Office concluded Detective Martinez "reasonably believed Bryheim Baskin's actions placed him in imminent danger of death or bodily injury."
26. The Prosecutor's investigation led to the conclusion that Detective Martinez's actions were justified.
27. The report outlining the Camden County Prosecutor's investigation and conclusions was reviewed by the New Jersey Attorney General's Division of Criminal Justice.
28. The Director of the Division of Criminal Justice agreed with the determination of the County Prosecutor's Office.

...

30. Plaintiff was charged with various crimes arising from this incident.
31. Plaintiff has pleaded guilty to numerous crimes which he committed on the day this cause of action arose.
32. Plaintiff has pleaded guilty to possession of cocaine with intent to deliver, eluding to avoid arrest and possession of a firearm, a handgun....
33. Plaintiff has been sentenced in these guilty pleas.
34. Plaintiff is currently serving his prison sentence.
35. Plaintiff has not challenged or in a anyway appealed his conviction and sentence.

Here are the facts plaintiff denied.

18. Mr. Baskin turned toward Detective Martinez with a black object in his hand.

...

20. The black object Mr. Baskin had in his hand was a cell phone.

in the course of doing so, Baskin rammed his car into the unmarked car Detective Martinez was driving. They agree Baskin fled on foot. They agree Detective Martinez ran after him. They agree the detective was in uniform and that Baskin knew he was being chased by police. They agree Baskin was armed with a gun, and that the detective saw it in Baskin's waistband.

Baskin and the detective agree Baskin ran through a residential neighborhood in Camden, leading the detective through yards and over two fences in an effort to escape. They agree the detective saw Baskin drop his gun in the side yard of a house on Beideman Avenue, stop, pick it up and run around the back of the house out of sight. They agree the detective only unholstered his own weapon when he saw Baskin pick up the gun from the ground. They agree that when Baskin ran into the backyard, he found his path blocked by a brick wall and tossed the gun away. They agree the detective had not yet come around the corner of the house to see Baskin toss away the gun.

The two men agree that when Detective Martinez came around the corner of the house seconds later, Baskin was standing on the patio close to the house with his back to the detective. They agree as Baskin swung around to face Detective Martinez that Martinez immediately fired one round from his semi-automatic duty weapon hitting Baskin in the right abdomen.

What the two disagree on is where Baskin's hands were and what, if anything,

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...

29. The Detective when acting reasonably is immune from the claims asserted by Mr. Baskin.

he was holding. Detective Martinez testified at deposition that "[a]s [he] hit that corner," he saw Baskin's back but not his hands because they were "inside ... at a 90-degree angle." According to the detective, Baskin "immediately turned towards [him]" with his hands at the same 90-degree angle "pointing straight in front of him." The detective explained that Baskin's "hand never pointed all the way to [the detective's] direction," because as Baskin got "a little bit more than ... half" way around, the detective saw "the black object" in Baskin's right hand and "fear[ing] for his life ... pulled the trigger and ... hit him in the abdomen area."

Baskin testified he knew the officer chasing him saw him stop to pick up the gun after he dropped it and "probably just [saw him] like, going behind the house" where Baskin discovered "the brick wall." Not "want[ing] to get caught with a gun on [him]," Baskin claimed he "tried to throw the gun on the roof, but the gun came back down." He then "threw it ... far over the — over the brick, so it landed on the —" and "[o]pen[ed] [his] hands up." Baskin testified Detective Martinez was not yet in the back yard when Baskin threw the gun away, explaining "[h]e was coming, but he wasn't there." Baskin claimed he had two phones "[i]n [his] pocket" at the time he was shot, but his hands were empty and open and up around his ears, "[p]robably higher." Police found Baskin's gun in the grass near the brick wall and two cell phones, one in the grass just off the edge of the patio and the other on the patio close to where Baskin was standing when he was shot.

The only witness to apparently see both Baskin and Martinez run down the side yard, around the house, and the shooting, testified Baskin

> went between the houses. And once he got to the backyard, it's like — I don't know if it's a pool or some kind of wall or barricade. Like, he couldn't go any further. And, like, officer's right behind him. And he — he, like, put his hands up and he turned around. And when he turned around, it was just, like, he just got shot that fast.

Although the witness claimed she never "los[t] sight" of Baskin, she did not see him stop to pick up the gun he dropped in the side yard and did not see him toss the gun away before he was shot. The witness claimed Baskin never had anything in his hands. Another witness saw Martinez shoot Baskin but could not see Baskin until he was lying on the ground. The homeowner heard the commotion and the gunshot but did not witness the shooting on her patio.

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." Ashcroft v. al-Kidd, 563 U.S. 731, 735, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011) (quoting Harlow, 457 U.S. at 818, 102 S.Ct. 2727). The Supreme Court has made clear a court is free "to decide which of the two prongs of qualified-immunity analysis to tackle first." Ibid. Because I think the constitutional claim here a straightforward one, I start there.

"A claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's 'reasonableness' standard,"[6] Plumhoff v. Rickard, 572 U.S. 765, 134 S.Ct. 2012, 2020, 188 L.Ed.2d 1056 (2014), a test admittedly "not capable of precise definition or mechanical application." Bell v. Wolfish, 441 U.S. 520, 559, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). Accordingly, "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." Graham, 490 U.S. at 396, 109 S.Ct. 1865. The Court has explained it chose "a test that cautioned against the '20/20 vision of hindsight' in favor of deference to the judgment of reasonable officers on the scene" "[b]ecause '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.' " Saucier, 533 U.S. at 205, 121 S.Ct. 2151 (quoting Graham, 490 U.S. at 396-97, 109 S.Ct. 1865).

"The operative question in excessive force cases is 'whether the totality of the circumstances justifie[s] a particular sort of search or seizure.' " County of Los Angeles v. Mendez, 581 U.S. ——, 137 S.Ct. 1539, 1546, 198 L.Ed.2d 52 (2017) (quoting Garner, 471 U.S. at 8-9, 105 S.Ct. 1694). It is an "objective" inquiry "judged from the perspective of a reasonable officer on the scene." Graham, 490 U.S. at 396, 109 S.Ct. 1865. "That inquiry is dispositive: When an officer carries out a seizure that

[6] Although Baskin's complaint might be read to assert state law claims, he has pursued only a Fourth Amendment excessive force claim under 42 U.S.C. § 1983.

is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim." Mendez, 137 S.Ct. at 1546.

Applying those standards to the facts considered in the light most favorable to Baskin, I cannot conclude Detective Martinez violated Baskin's Fourth Amendment rights. While there is no question but that "it is unreasonable for an officer to 'seize an unarmed, nondangerous suspect by shooting him dead,' " Brosseau v. Haugen, 543 U.S. 194, 197, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (quoting Garner, 471 U.S. at 11, 105 S.Ct. 1694), the calculus is vastly different "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." Id. at 197-98, 125 S.Ct. 596. In that case, "it is not constitutionally unreasonable" for an officer "to prevent escape," or save himself, "by using deadly force." Id. at 198, 125 S.Ct. 596.

Judging by what Detective Martinez knew when he entered the backyard, Baskin was not "an unarmed, nondangerous suspect." Id. at 197, 125 S.Ct. 596. To the contrary, Baskin had already threatened the lives of the officers and others when he sped away from one police car and crashed into another. He then fled on foot through a residential neighborhood in the middle of the afternoon armed with a gun. Although aware Baskin was armed, the detective never drew his own weapon until he saw the gun in Baskin's hand just before he ran around the back of the house.

When the detective entered the backyard seconds later, he had no way to know Baskin was no longer holding the gun. There is no dispute the detective did not see Baskin throw it towards the wall that blocked his escape, even though he was only

seconds behind him. As Martinez entered the backyard and Baskin swung around, as he claimed with his hands empty and open and up around his ears, "[p]robably higher," the detective thought he saw the gun in Baskin's hand and shot him. The witness claimed "when [Baskin] turned around, it was just, like, he just got shot that fast." Both Baskin and Martinez agree Martinez shot Baskin as he turned to face Martinez immediately upon Martinez entering the backyard. There is no dispute that in that split second, Martinez erred, Baskin was not holding a gun. Indeed, his hands, for purposes of the motion, were empty.

Based on the totality of the circumstances, I cannot find the detective's mistake an unreasonable one. Baskin was actively resisting arrest and had already threatened the lives of the officers; he posed a dangerous threat to Detective Martinez, the other officers and the women close enough to have witnessed the confrontation. See Graham, 490 U.S. at 396, 109 S.Ct. 1865. Accepting that Baskin's hands were empty and open as he turned toward Martinez, declaring the detective's decision to fire on Baskin unreasonable would accord only "little more than lip service" to "the great pressure and intensity inherent in a police officer's hot pursuit of a suspect known to be armed and highly dangerous." Curley v. Klem, 499 F.3d 199, 216 (3d Cir. 2007) (quotation omitted). In my view, the Fourth Amendment did not require Martinez to wait for a suspect he knew to be armed and extremely dangerous to swing all the way around and face him so the detective could get a better look at the suspect's hands in the split second before he fired.

The majority contends the detective's claim he shot Baskin because he saw a black object in his hand, "suggest[s] that, if plaintiff's hands were empty, [the detective] would not have shot" him. Ante at 14, 105 S.Ct. 1694. It thus concludes "whether plaintiff held an object in his hand when defendant entered the rear yard and saw plaintiff is pivotal." Id. at 14-15, 105 S.Ct. 1694. I disagree for two related reasons. First, viewing as "pivotal" whether Baskin was holding an object in his hand when Martinez entered the backyard, impermissibly isolates that fact instead of considering it "as a factor in the totality of the circumstances." District of Columbia v. Wesby, 583 U.S. —— (2018) (slip op. at 11) (quoting Maryland v. Pringle, 540 U.S. 366, 372 n.2, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003)) (acknowledging the Court's "precedents recognize that the whole is often greater than the sum of its parts — especially when the parts are viewed in isolation").

Second, and more important, the Fourth Amendment does not require that the detective be right, it only requires that he be reasonable. See Heien v. North Carolina, 547 U.S. ——, 135 S.Ct. 530, 536, 190 L.Ed.2d 475 (2014) (noting "[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials"). The question thus is not whether Martinez was right about seeing a black object in Baskin's hand, but assuming he was wrong and Baskin's hand was empty, whether the mistake was an objectively reasonable one under the circumstances.

Because I find Detective Martinez's mistake an objectively reasonable one under the "tense, uncertain, and rapidly evolving" circumstances he faced for the

reasons I have set out, I find no Fourth Amendment violation, and thus that plaintiff failed to establish an excessive force claim. See Graham, 490 U.S. at 397, 109 S.Ct. 1865. Baskin's proofs, viewed most favorably to him, are simply too slim to put in issue the reasonableness of the detective's use of deadly force at the moment the shot was fired, when viewed, as required, from the perspective of a reasonable police officer on the scene and not with the benefit of 20/20 hindsight "in the peace of a judge's chambers." Id. at 396-97, 109 S.Ct. 1865 (quotation omitted); see also Saucier, 533 U.S. at 209-12, 121 S.Ct. 2151 (Ginsberg, J., concurring).

If that analysis is incorrect, and Martinez violated Baskin's Fourth Amendment rights, I am not convinced the majority has correctly concluded the "contours of the right" were "sufficiently clear" that a reasonable officer in Detective Martinez's position would understand that shooting Baskin was unlawful. Creighton, 483 U.S. at 640, 107 S.Ct. 3034. The majority has "failed to identify a case where an officer acting under similar circumstances as [Detective Martinez] was held to have violated the Fourth Amendment." White v. Pauly, 580 U.S. ——, 137 S.Ct. 548, 552, 196 L.Ed.2d 463 (2017). Instead, it identifies "the specific constitutional right at issue [as] the Fourth Amendment right to be free from excessive force." Ante at 12, 105 S.Ct. 1694.

The United States Supreme Court, however, has repeatedly admonished that " 'clearly established law' should not be defined 'at a high level of generality' " but "must instead be 'particularized' to the facts of the case." White, 137 S.Ct. at 552 (quoting al-Kidd, 563 U.S. at 742, 131 S.Ct. 2074 and Creighton, 483 U.S. at 640); see

also City & County of San Francisco v. Sheehan, 575 U.S. ——, 135 S.Ct. 1765, 1776, 191 L.Ed.2d 856 (2015) ("Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures."). "The dispositive question is 'whether the violative nature of particular conduct is clearly established.' " Mullenix v. Luna, 577 U.S. ——, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015) (quoting al-Kidd, 563 U.S. at 742). "The 'clearly established' standard ... requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' " Wesby, slip op. at 14 (quoting Saucier, 533 U.S. at 202, 121 S.Ct. 2151). Our own Supreme Court has recently echoed those concerns in a case granting qualified immunity to State Troopers seizing a home for the purposes of securing it pending a search warrant. See Brown, 230 N.J. at 106-09.

I am unaware of any clearly established law that suggests that an officer whose police car has been rammed by a driver fleeing a car stop who escapes on foot, and who the officer sees with a gun in his hand just before he runs around a blind corner, must himself, as he rounds that same corner in pursuit, refrain from firing his service weapon as the driver turns toward him until he can clearly see the driver has discarded the gun he held moments before. Accordingly, I cannot find Baskin's right to be free from deadly force under the circumstances of this case was clearly established, even if Detective Martinez's use of force violated the Fourth Amendment.

"Because qualified immunity is 'an immunity from suit rather than a mere

defense to liability ... it is effectively lost if a case is erroneously permitted to go to trial.' " Pearson, 555 U.S. at 231, 129 S.Ct. 808 (quoting Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). It is designed to "provide[ ] ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). As it is clear to me on the undisputed facts in the record, viewed most favorably to Baskin, that Detective Martinez does not fall into either category, I would affirm the summary judgment in his favor. I would likewise affirm the summary judgment to the City of Camden and its former Chief of Police under Monell v. Department of Social Services, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), based on Baskin's failure to prove a deprivation of his rights.

This was not a case representing one of those "incidents in which unarmed men allegedly reach for empty waistbands when facing armed officers." Salazar-Limon v. City of Houston, 581 U.S. ——, 137 S.Ct. 1277, 1282 n.2, 197 L.Ed.2d 751 (2017) (Sotomayor, J., dissenting). Because I believe the majority errs in treating it as one, I respectfully dissent.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.
s/ Joseph H. Orlando
CLERK OF THE APPELLATE DIVISION

APPENDIX C

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
CAMDEN COUNTY
DOCKET NO. CAM-L-901-14
A.D. # A-005553-15-T2

BRYHEIM JAMAR BASKIN,

Plaintiff,

vs.

RAFAEL MARTINEZ, CITY OF CAMDEN, SCOTT THOMPSON, JOHN DOES I-X, FICTITIOUS INDIVIDUALS,

Defendants.

TRANSCRIPT
OF
MOTION

Place: Camden County Hall of Justice
101 South Fifth Street
Camden, New Jersey 08102

Date: July 22, 2016

BEFORE:

HONORABLE ANTHONY M. PUGLIESE, J.S.C.

TRANSCRIPT ORDERED BY:

PAUL R. MELLETZ, ESQ.
(Begelman, Orlow & Melletz)

APPEARANCES:

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(Begelman, Orlow & Melletz)
Attorney for the Plaintiff

* TIMOTHY J. GALANAUGH, ESQ. (Asst. Camden City Attorney)
Attorney for the Defendant

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THE COURT: We are to number five, which was an eleven o'clock ready hold on Baskin versus Martinez. Counsel.

MR. MELLETZ: Paul R. Melletz appearing on behalf of the plaintiff Baskin.

MR. GALANAUGH: Timothy Galanaugh appearing on behalf of the defendants.

THE COURT: All right. It's number 901-14. And you can have a seat. And it goes back to a September 11, 2012 matter where the plaintiff, Mr. Baskin, was involved in a high speed police chase at which point his vehicle collided with a police vehicle and then the plaintiff is alleged to have fled on foot.

I think at this point it's somewhat more than an allegation because he did plead guilty in a criminal context to an eluding charge, and I read part of that. He did indicate that he did know that they were officers, know that they were trying to stop him, and he avoided them. So he fled on foot with a .40-caliber Smith and Wesson weapon. And again, he admitted that at the context of this point in time that he did in his recitation for his plea agreement indicate that he possessed that .40-caliber Smith and Wesson weapon at that time and place. The police gave chase on foot.

And then the allegations go that the

plaintiff got out of sight of the following officer, the defendant Martinez, and when he was out of sight of that officer, that he discarded his weapon.

Defendant Martinez apparently caught up with him in a back alley and observed the plaintiff turn towards him with, as the defendant Martinez says, with a black object in his left hand, and the defendant Martinez shot the plaintiff Baskin in the torso.

The plaintiff was seriously wounded, was hospitalized, has recovered, and pled guilty to two criminal charges, eluding and a weapons charge and then filed this action.

In opposition -- well what the plaintiff is saying is, my officer has qualified immunity based on the information that he undertook at this point in time, the information he had was that he was giving chase to an armed suspect who was fleeing, who had been involved in a high speed police chase. He had no information -- even though others saw Baskin drop the weapon, Martinez, there's no dispute in terms of the fact that Martinez did not see that and was not aware that he had dropped the weapon. And Martinez says, I get upon him, we're in an alley, he turns, I observe he's got something in his left hand, it's a black object, I fire.

He says I have qualified immunities for those actions based on the fact that what I did was reasonable under the circumstances, and further that the prosecutor's office of Camden County as well as the State Attorney General have both reviewed the matter and have not brought charges against me, but even more so, have indicated that I did not do anything to not follow protocol in the circumstance. Correct, counsel?

MR. GALANAUGH: Yes, Your Honor. Your Honor, I would add one thing. My understanding is that Mr. Baskin also pleaded guilty to possession with intent to sell.

THE COURT: Yeah, but that doesn't impact -- whatever else he was doing --

MR. GALANAUGH: Well it does because later on he says he didn't do it. That's why I -- I just wanted to make --

THE COURT: But here's the point. I'm not assessing his credibility.

MR. GALANAUGH: No, I understand that, Judge.

THE COURT: I can't.

MR. GALANAUGH: We don't have to worry about that.

THE COURT: So to the extent that he pled guilty to something else and that I should then

discount whatever he says because of a credibility issue because he's changing his story after he entered his plea, I don't make those determinations at summary judgment. Really I'm not relying on very much -- in terms of summary judgment, the fact that he entered the plea has some bearing. But it's not really dispositive on the case because a lot of the facts I already talked about are in dispute. He entered the pleas, he was in a high speed chase, he went up the alley, he had a weapon that he dropped. Martinez didn't see the weapon that was dropped.

So, plaintiff refers to the testimony of a, is it a Cheron (phonetic) Johnson?

MR. MELLETZ: Yes, Your Honor.

THE COURT: All right. Cheron Johnson. And that's Exhibit B of plaintiff's submissions, page 8, lines 9 through 21. The questioning goes "did he have anything in his hands? No, I didn't see him with anything." That's on page 8. Defendant then talks to me and says "but Judge, look at page 15, she says she didn't see the plaintiff until after he was shot."

I can't make an assessment as to her credibility. I have to say both -- I can't say I accept one, I don't accept the other. What I do have is her saying in response to the question, "did he have

anything in his hands? No, I didn't see him with anything."

At his guilty plea, on page 55 and 56, Baskin admits he knew that they were police officers, they wanted him to stop, and he drove away at a high speed and then he crashed his car into theirs. He admitted to having -- at page 58 -- admitted to having the weapon without the permit, the .40-caliber Smith and Wesson. He acknowledged that there was a civil matter pending and that it had no bearing on his guilty plea.

No one's disputing that he, at one point in time, had the weapon. Further, no one disputes that he dropped it. And no one disputes that Martinez did not know that he dropped it. There's no evidence in the case, other than that, on those points.

Counsel, defense says they have qualified immunity based on what Martinez knew and did. Why doesn't he?

MR. MELLETZ: Because Your Honor, the factual allegations supported by my client's testimony and the deposition testimony of Ms. Cheron Johnson indicate that at the time that the police officer had his gun out and pointed to him he had -- my client had his hands raised and that there was nothing in his hands.

THE COURT: Cheron Johnson doesn't say that

he had his hands raised. She said, in questioning, he didn't have anything in his hands? Did she say that?

MR. GALANAUGH: There's two witnesses, Judge, and I think the court may have confused the two.

MR. MELLETZ: Yeah, there's another one.

THE COURT: Oh, okay. The other one says she only saw him after.

MR. GALANAUGH: The other one says at the end of her statement, I didn't see anything in his hand, or I didn't see him until after the shooting. Ms. Johnson does say she saw him, hands up, nothing in his hand.

THE COURT: He didn't have anything in his hands.

MR. GALANAUGH: Yes, sir.

THE COURT: Okay, all right.

MR. MELLETZ: And what I'm intending on is that, if you believe our facts, allegations, based on those depositions, which I submit under the Summary Judgment Motion that you should, that therefore there's a factual dispute because if we're correct, then Officer Martinez sees that there was nothing in his hand. He doesn't order him to drop anything. He admits to that. He just shoots him one time.

Now, our contention is that our facts show that there was nothing in his hand and he had no basis

to shoot him at that time. There was a cell phone, two cell phones actually, found near the body. It makes no sense to say that my guy --

THE COURT: It's not near the body. It's near Mr. Baskin.

MR. MELLETZ: Correct. Mr. Baskin.

THE COURT: It's the body if Mr. Baskin's spirit leaves it, I presume. Okay. It's Mr. Baskin. It was next to Mr. Baskin.

MR. MELLETZ: Next to Mr. -- near Mr. Baskin. There was no evidence, no testimony in any of the depositions that as he's running he's carrying a cell phone with him. It makes no sense that he throws the gun away and then he's going to reach into his pocket and pull out --

THE COURT: Yeah but I'm not here to determine what makes sense and what doesn't make sense. That's assessing -- well you're asking me to make an inference in your favor that he didn't reach for his cell phone?

MR. MELLETZ: No, Your Honor.

THE COURT: I presume you can do that.

MR. MELLETZ: What I'm saying, Your Honor, is that this is a matter that should go to trial as a factual dispute, a credibility dispute, both as to

qualified immunity and as to the rest of the summary judgment.

THE COURT: Okay. Counsel, I'll hear you.

MR. GALANAUGH: Judge, I believe that the court must look at the totality of the circumstances to determine whether or not, with everything that the court has before it, it can make a determination that what this officer did under all the facts and circumstances known to him was what a reasonable police officer would do. That's the standard. I suggest that it's easy to make that determination because we have a situation where an independent agency, the county prosecutor, has examined this and then sent it to the Attorney General's Office to have them examine it. And both have said that nothing is going to happen to this officer because he had a reasonable belief that he was in imminent, he was facing imminent harm. And under all the facts and circumstances -- and I understand --

THE COURT: I understand their investigation but their judgment doesn't go into the place of the court's judgment. I have to make that determination.

MR. GALANAUGH: I'm not suggesting that, Judge.

THE COURT: I know you're saying they looked at it as well. I know no charges were brought. But I

can't say why. I mean I have to make the decision on my own.

MR. GALANAUGH: I understand that, Judge, but what I'm suggesting to you is this is one factor to look at. You have the testimony of the police officer, the investigations that were conducted, and then the investigation into whether or not what he did was reasonable. And you look at all of those facts and I suggest the court can come to the conclusion that what he did was reasonable, was consistent with the actions of a reasonable police officer, which is the standard for whether or not an officer is qualifiedly immune. And in this case I suggest he is.

THE COURT: Anything else?

MR. MELLETZ: Judge, one very brief point just to cover one thing about the investigation of the Camden County Prosecutor's Office.

THE COURT: You don't need to. You can make it for the record. I'm not relying on what the prosecutor's office found or didn't find. I have to make my own determination. All I know is they didn't charge him. They investigated and they didn't charge him. I don't know the qualify of their investigation. I have to look at the facts of the case. I can't be persuaded or say I'm going to substitute my judgment

for what they decided to do in their own case.
MR. MELLETZ: I understand that, Your Honor. All I was going to say is they did not know about Chevon Johnson.
THE COURT: Johnson, okay, understood. All right.
MR. GALANAUGH: Judge, there was another aspect of the motion. I don't know if --
THE COURT: Go ahead.
MR. GALANAUGH: Heck vs. Humphrey.
THE COURT: About the fact that he pled.
MR. GALANAUGH: Yes, yes.
THE COURT: All right. I'll hear you on that.
MR. GALANAUGH: All right, Judge. I just wanted -- the court hadn't mentioned it. I didn't know whether or not --
THE COURT: I know it's in your Brief. Go ahead.
MR. GALANAUGH: All right. Judge, Heck vs. Humphrey says that if the actions of an individual in bringing a civil lawsuit will undermine the conviction, that he is, in this instance he had pleaded guilty to it, then he is barred from proceeding. I suggest that this is exactly the kind of case that Heck was looking

at because when he goes in court in the criminal action he says, yes I did it, yes I did it, yes I did it. Now he's saying, no I didn't, no I didn't, no I didn't. If the jury is to accept what he says at eventual trial, we would have a judicial determination that would undermine the conviction that has happened previously in this courtroom. That's the type of thing that Heck says an individual is --
THE COURT: You don't have -- yeah. What about that, counsel?
MR. MELLETZ: It doesn't affect it at all, Your Honor. The issue is whether he pled guilty to having the gun at the time that he was confronted by the officer.
THE COURT: Well let me ask you this. You want me to rely on his testimony that he -- well let's see. He fled. He says that he fled; he admits to that. Is he going to retract that he fled?
MR. MELLETZ: No.
THE COURT: He does in his statements here.
MR. MELLETZ: Your Honor, the issue for the trial and for this court is whether he had a gun at the time, in his hand, and there's no question --
THE COURT: No, he doesn't need a gun in his hand to get --

MR. MELLETZ: He didn't have it.
THE COURT: He doesn't need a gun in his hand for the officer to get qualified immunity.
MR. MELLETZ: No, but the officer has to have, when the statements of a witness that there was nothing in his hand, the officer has to say, hey yeah I saw it but there was nothing in his hand to see. So it is a factual issue.
THE COURT: Well I'm not going to make my decision based on Heck. There could be -- I don't know what he would say at trial, but there could be a circumstance where he says things that are not inconsistent with his guilty plea and he could prevail at trial. I don't need to rely on Heck. I'm relying on Molineux. He's entitled to qualified immunity. That's why he's entitled to it.
The fact that this Ms. Johnson says, no I didn't see him with anything, I got to give every inference to the plaintiff in that regard, that that statement means his hands were empty. But she really doesn't say his hands were empty. She says she didn't see anything. She doesn't even say she was able to see his hands and that his hands were empty.
But being that as it may, even if I give the plaintiff that inference, what I have is the plaintiff

involved in a high speed chase, crashed his car into the officers, fleeing on foot, known to have a weapon. The only information Martinez has is that he still has the weapon because Martinez is not privy to the information, and there's no dispute as to this, Martinez is not privy to the information that the plaintiff dropped his gun. He chases him into an alleyway, and in Martinez' perception, which is not refuted by any of the other witnesses, he turns toward him and Martinez fires. Even if I take out Martinez' belief that he had a black object in his left hand, the fact that this person, when confronted in that alley by the officer, turned towards the officer, I find that gives the officer qualified immunity for his actions in using his weapon.
I'm not requiring this officer to make a distinction as to whether he had something in his hands or he didn't at this point in time. He knows he's armed. I'm not giving the officer the obligation to have to determine whether it's a cell phone or a weapon in the hand. I don't even have to go there.
Once this Mr. Baskin brings this officer on a chase that leads him into this alley and Baskin turns towards the officer, at that point the officer has qualified immunity based on the actions he took to

protect himself against someone who was known to be armed in his estimation based on the facts that he had in his knowledge. What Baskin didn't do was get on the ground, be passive, or anything of that nature. So I'm granting summary judgment based on the fact that defendant Martinez had qualified immunity for the actions that he undertook based on the facts, including what Ms. Johnson says. Thank you.

MR. GALANAUGH: Thank you, Your Honor.

(OFF THE RECORD)

THE COURT: On that last case, one preliminary matter. That was basically, I should have done it on the papers before they argued the Motion For Summary Judgement but I didn't. I had previously dismissed plaintiff's case for failure to respond to the Summary Judgment Motion. But I was satisfied and there was no opposition to the fact that it was something that took place in error, that the matter wasn't properly served on plaintiff's counsel. Defense had no opposition to it so they permitted me to vacate my prior dismissal of the case.

So as of today, July 22nd, technically the first thing I do is unopposed vacate that prior Order which had dismissed the case. But now, as I just did moments ago, I dismissed the matter based on Summary

Judgment based on qualified immunity. So there will be two Orders. This first one reinstates the case. The next one, minutes later, dismisses it again.

(OFF THE RECORD)

* * *

CERTIFICATION

I, ANNE M. YOWELL, the assigned transcriber, do hereby certify the foregoing transcript of proceedings dated 7/22/16, index numbers from 11:31:05 to 11:53:10 is prepared to the best of my ability and in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded.

/s/ Anne M. Yowell
Anne M. Yowell

/s/ Patricia A. Hallman
Patricia A. Hallman

AD/T 312
AOC Number

Pat's Transcription Service
Agency Name

9/12/16
Date

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Attorney for Defendant, City of Camden

BRYHEIM JAMAR BASKIN, Plaintiff, vs. RAFAEL MARTINEZ, CITY OF CAMDEN, SCOTT THOMSON, JOHN DOES I-X, fictitious individuals Defendant(s).	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION **CIVIL ACTION** **DOCKET NO.: L-901-14** **ORDER**

The above matter having been brought before the Court upon the Motion of the defendant, City of Camden, Marc A. Riondino, City Attorney, by Timothy J. Galanaugh, Assistant City Attorney, appearing pursuant to R. 1:6-2, for an Order granting Summary Judgment in favor of the defendants, City of Camden, Rafael Martinez and Scott Thomson as to the Complaint and any and all cross-claims; and the Court having read and considered the Brief filed in support of Motion and in opposition thereto, if any; and the Court having heard and considered the arguments of counsel; and the Court having determined that there exists no genuine issue of material fact in dispute and that the defendants, City of Camden, Rafael Martinez and Scott Thomson, is entitled to Summary Judgment as a matter of law; and for good cause shown;

IT IS on this 10th day of June, 2016 ORDERED that the Motion of the defendant, City of Camden, for Summary Judgment, be and hereby is GRANTED as to the Complaint and any and all cross-claims of the co-defendants.

TRUE COPY
Anthony M. Pugliese, J.S.C.

Anthony M. Pugliese, J.S.C.

____ OPPOSED

__✓__ UNOPPOSED

"Reasons Set Forth on Record"

APPENDIX E

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SUMMONS

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Office Address 411 Route 70 East, Suite 245
Town, State, Zip Code Cherry Hill, NJ 08034

Telephone Number (856) 428-6020
Attorney(s) for Plaintiff
Bryheim Jamar Baskin

Plaintiff(s)

Vs.

Rafael Martinez; City of Camden; Scott Thomson;
John Does I-X, fictitious individuals
Defendant(s)

Superior Court of New Jersey

CAMDEN COUNTY
LAW DIVISION
Docket No: L-901-14

CIVIL ACTION SUMMONS

From The State of New Jersey To The Defendant(s) Named Above:

The plaintiff, named above, has filed a lawsuit against you in the Superior Court of New Jersey. The complaint attached to this summons states the basis for this lawsuit. If you dispute this complaint, you or your attorney must file a written answer or motion and proof of service with the deputy clerk of the Superior Court in the county listed above within 35 days from the date you received this summons, not counting the date you received it. (A directory of the addresses of each deputy clerk of the Superior Court is available in the Civil Division Management Office in the county listed above and online at http://www.judiciary.state.nj.us/pro se/10153_deptyclerklawref.pdf.) If the complaint is one in foreclosure, then you must file your written answer or motion and proof of service with the Clerk of the Superior Court, Hughes Justice Complex, P.O. Box 971, Trenton, NJ 08625-0971. A filing fee payable to the Treasurer, State of New Jersey and a completed Case Information Statement (available from the deputy clerk of the Superior Court) must accompany your answer or motion when it is filed. You must also send a copy of your answer or motion to plaintiff's attorney whose name and address appear above, or to plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve a written answer or motion (with fee of $135.00 and completed Case Information Statement) if you want the court to hear your defense.

If you do not file and serve a written answer or motion within 35 days, the court may enter a judgment against you for the relief plaintiff demands, plus interest and costs of suit. If judgment is entered against you, the Sheriff may seize your money, wages or property to pay all or part of the judgment.

If you cannot afford an attorney, you may call the Legal Services office in the county where you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJ-LAW (1-888-576-5529). If you do not have an attorney and are not eligible for free legal assistance, you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A directory with contact information for local Legal Services Offices and Lawyer Referral Services is available in the Civil Division Management Office in the county listed above and online at http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf.

/s/ Michelle M. Smith
Clerk of the Superior Court

DATED: 03/17/2014

Name of Defendant to Be Served: CITY OF CAMDEN

Address of Defendant to Be Served: 520 Market St., City Hall, Camden, NJ 08103

CAMDEN COUNTY
SUPERIOR COURT
HALL OF JUSTICE
CAMDEN NJ 08103

TRACK ASSIGNMENT NOTICE

COURT TELEPHONE NO. (856) 379-2200
COURT HOURS

DATE: MARCH 11, 2014
RE: BASKIN VS MARTINEZ
DOCKET: CAM L -000901 14

THE ABOVE CASE HAS BEEN ASSIGNED TO: TRACK 3.

DISCOVERY IS 450 DAYS AND RUNS FROM THE FIRST ANSWER OR 90 DAYS FROM SERVICE ON THE FIRST DEFENDANT, WHICHEVER COMES FIRST.

THE PRETRIAL JUDGE ASSIGNED IS: HON ANTHONY M. PUGLIESE

IF YOU HAVE ANY QUESTIONS, CONTACT TEAM 301
AT: (856) 379-2200 EXT 3080.

IF YOU BELIEVE THAT THE TRACK IS INAPPROPRIATE YOU MUST FILE A CERTIFICATION OF GOOD CAUSE WITHIN 30 DAYS OF THE FILING OF YOUR PLEADING.
PLAINTIFF MUST SERVE COPIES OF THIS FORM ON ALL OTHER PARTIES IN ACCORDANCE WITH R.4:5A-2.

ATTENTION:

ATT: PAUL R. MELLETZ
BEGELMAN ORLOW & MELLETZ
411 ROUTE 70 EAST STE 245
CHERRY HILL PROFESSIONAL BLDG
CHERRY HILL NJ 08034-2414

JUAJL1

Appendix XII-B1

CIVIL CASE INFORMATION STATEMENT (CIS)

Use for initial Law Division
Civil Part pleadings (not motions) under *Rule* 4:5-1
Pleading will be rejected for filing, under *Rule* 1:5-6(c), if information above the black bar is not completed or attorney's signature is not affixed

FOR USE BY CLERK'S OFFICE ONLY
PAYMENT TYPE: ☐ CK ☐ CG ☐ CA
CHG/CK NO.
AMOUNT:
OVERPAYMENT:
BATCH NUMBER:

ATTORNEY / PRO SE NAME	TELEPHONE NUMBER	COUNTY OF VENUE
PAUL R. MELLETZ, ESQ.	(856) 428-6020	Camden

FIRM NAME (if applicable)	DOCKET NUMBER (when available)
BEGELMAN, ORLOW & MELLETZ	L 901-14

OFFICE ADDRESS	DOCUMENT TYPE
411 ROUTE 70 EAST, SUITE 245 CHERRY HILL, NJ 0034	COMPLAINT
	JURY DEMAND ☒ YES ☐ NO

NAME OF PARTY (e.g., John Doe, Plaintiff)	CAPTION
BRYHEIM JAMAR BASKIN, PLAINTIFF	BRYHEIM JAMAR BASKIN v. RAFAEL MARTINEZ, CITY OF CAMDEN, SCOTT THOMSON, JOHN DOES I-X, fictitious individuals

CASE TYPE NUMBER (See reverse side for listing)	HURRICANE SANDY RELATED?	IS THIS A PROFESSIONAL MALPRACTICE CASE?
005	☐ YES ☒ NO	☐ YES ☒ NO IF YOU HAVE CHECKED "YES," SEE *N.J.S.A.* 2A:53 A -27 AND APPLICABLE CASE LAW REGARDING YOUR OBLIGATION TO FILE AN AFFIDAVIT OF MERIT.

RELATED CASES PENDING?	IF YES, LIST DOCKET NUMBERS
☐ YES ☒ NO	

DO YOU ANTICIPATE ADDING ANY PARTIES (arising out of same transaction or occurrence)?	NAME OF DEFENDANT'S PRIMARY INSURANCE COMPANY (if known)
☐ YES ☒ NO	☐ NONE ☒ UNKNOWN

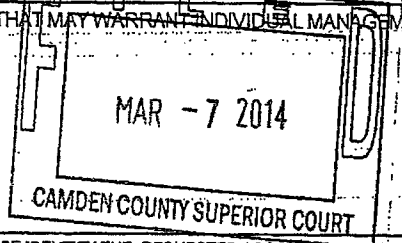
THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE.

CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION

DO PARTIES HAVE A CURRENT, PAST OR RECURRENT RELATIONSHIP?	IF YES, IS THAT RELATIONSHIP:
☐ YES ☒ NO	☐ EMPLOYER/EMPLOYEE ☐ FRIEND/NEIGHBOR ☐ OTHER (explain) ☐ FAMILIAL ☐ BUSINESS

DOES THE STATUTE GOVERNING THIS CASE PROVIDE FOR PAYMENT OF FEES BY THE LOSING PARTY? ☐ YES ☒ NO

USE THIS SPACE TO ALERT THE COURT TO ANY SPECIAL CASE CHARACTERISTICS THAT MAY WARRANT INDIVIDUAL MANAGEMENT OR ACCELERATED DISPOSITION



DO YOU OR YOUR CLIENT NEED ANY DISABILITY ACCOMMODATIONS?	IF YES, PLEASE IDENTIFY THE REQUESTED ACCOMMODATION
☐ YES ☒ NO	
WILL AN INTERPRETER BE NEEDED?	IF YES, FOR WHAT LANGUAGE?
☐ YES ☒ NO	

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with *Rule* 1:38-7(b).

ATTORNEY SIGNATURE: Paul R Melletz

Side 2

CIVIL CASE INFORMATION STATEMENT
(CIS)

Use for initial pleadings (not motions) under *Rule* 4:5-1

CASE TYPES (Choose one and enter number of case type in appropriate space on the reverse side.)

Track I - 150 days' discovery

151 NAME CHANGE
175 FORFEITURE
302 TENANCY
399 REAL PROPERTY (other than Tenancy, Contract, Condemnation, Complex Commercial or Construction)
502 BOOK ACCOUNT (debt collection matters only)
505 OTHER INSURANCE CLAIM (including declaratory judgment actions)
506 PIP COVERAGE
510 UM or UIM CLAIM (coverage issues only)
511 ACTION ON NEGOTIABLE INSTRUMENT
512 LEMON LAW
801 SUMMARY ACTION
802 OPEN PUBLIC RECORDS ACT (summary action)
999 OTHER (briefly describe nature of action)

Track II - 300 days' discovery

305 CONSTRUCTION
509 EMPLOYMENT (other than CEPA or LAD)
599 CONTRACT/COMMERCIAL TRANSACTION
603N AUTO NEGLIGENCE – PERSONAL INJURY (non-verbal threshold)
603Y AUTO NEGLIGENCE – PERSONAL INJURY (verbal threshold)
605 PERSONAL INJURY
610 AUTO NEGLIGENCE – PROPERTY DAMAGE
621 UM or UIM CLAIM (includes bodily injury)
699 TORT – OTHER

Track III - 450 days' discovery

005 CIVIL RIGHTS
301 CONDEMNATION
602 ASSAULT AND BATTERY
604 MEDICAL MALPRACTICE
606 PRODUCT LIABILITY
607 PROFESSIONAL MALPRACTICE
608 TOXIC TORT
609 DEFAMATION
616 WHISTLEBLOWER / CONSCIENTIOUS EMPLOYEE PROTECTION ACT (CEPA) CASES
617 INVERSE CONDEMNATION
618 LAW AGAINST DISCRIMINATION (LAD) CASES

Track IV - Active Case Management by Individual Judge / 450 days' discovery

156 ENVIRONMENTAL/ENVIRONMENTAL COVERAGE LITIGATION
303 MT. LAUREL
508 COMPLEX COMMERCIAL
513 COMPLEX CONSTRUCTION
514 INSURANCE FRAUD
620 FALSE CLAIMS ACT
701 ACTIONS IN LIEU OF PREROGATIVE WRITS

Multicounty Litigation (Track IV)

266 HORMONE REPLACEMENT THERAPY (HRT)
271 ACCUTANE/ISOTRETINOIN
274 RISPERDAL/SEROQUEL/ZYPREXA
278 ZOMETA/AREDIA
279 GADOLINIUM
281 BRISTOL-MYERS SQUIBB ENVIRONMENTAL
282 FOSAMAX
284 NUVARING
285 STRYKER TRIDENT HIP IMPLANTS
286 LEVAQUIN
287 YAZ/YASMIN/OCELLA
288 PRUDENTIAL TORT LITIGATION
289 REGLAN
290 POMPTON LAKES ENVIRONMENTAL LITIGATION
291 PELVIC MESH/GYNECARE
292 PELVIC MESH/BARD
293 DEPUY ASR HIP IMPLANT LITIGATION
295 ALLODERM REGENERATIVE TISSUE MATRIX
296 STRYKER REJUVENATE/ABG II MODULAR HIP STEM COMPONENTS
297 MIRENA CONTRACEPTIVE DEVICE
601 ASBESTOS
623 PROPECIA

If you believe this case requires a track other than that provided above, please indicate the reason on Side 1, in the space under "Case Characteristics.

Please check off each applicable category ☐ Putative Class Action ☒ Title 59

BEGELMAN, ORLOW & MELLETZ
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Attorneys for Plaintiff

Plaintiff BRYHEIM JAMAR BASKIN	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - CAMDEN COUNTY
v.	:	DOCKET NO. L 901-14
Defendant RAFAEL MARTINEZ; CITY OF CAMDEN; SCOTT THOMSON; JOHN DOES I-X, fictitious individuals	:	Civil Action **COMPLAINT AND DEMAND FOR JURY TRIAL**

Plaintiff, Bryheim Jamar Baskin, residing at 37 N. Dudley Street, Camden, New Jersey, by way of Complaint says:

Introductory Allegations

1. At all times mentioned, Plaintiff is a citizen of the United States and residing at 37 N. Dudley Street, Camden, New Jersey.

2. Plaintiff believes that the Defendant Rafael Martinez, at all times mentioned, was a police officer with the City of Camden Police Department and at all times mentioned, was acting in such capacity as the agent, servant and employee of the Defendant City of Camden Police Department. He is sued individually and in his official capacity.

3. Defendant Scott Thomson, at all times mentioned, was the Chief of Police of the City of Camden Police Department. As such, he was commanding officer of Defendant Rafael Martinez and was responsible for the training, supervision, hiring and conduct of

Defendant Rafael Martinez as more fully set forth below. He was responsible by law for enforcing the regulations of the City of Camden Police Department and for ensuring that Defendant Rafael Martinez obey the laws of the State of New Jersey and the United States. He is sued in his official capacity.

4. The Defendant City of Camden is a municipal corporation with the State of New Jersey and at all times relevant hereto, employed the Defendant Rafael Martinez and Defendant Scott Thomson.

5. The Defendants John Does I-X are fictitious individuals whose real names are presently unknown. At all times relevant hereto said Defendants were police officers in the City of Camden Police Department and at all times mentioned were acting in such capacity as the agent, servant and employee of the Defendant City of Camden Police Department and are sued individually and in their official capacity.

6. At all times relevant hereto and in all their actions described herein, Defendant Rafael Martinez, Police Chief Scott Thomson and Defendant John Does I-X were acting under color of law and pursuant to their authority as police officers and police officials.

Count One (Deprivation of Civil Rights)

7. Prior to and on or about September 11, 2012 at approximately 1:29 p.m., Defendant Rafael Martinez had in his possession a gun.

8. On or about September 11, 2012 at approximately 1:29 p.m. at the approximate location of 202 Beideman Avenue, Camden, New Jersey, Plaintiff Bryheim Jamar Baskin was standing with his hands up in the air facing the Defendant Rafael Martinez. Plaintiff

Bryheim Jamar Baskin had no weapon and was surrendering to the Defendant Rafael Martinez, who had his gun drawn. Without warning and without provocation, Defendant Rafael Martinez shot Plaintiff Bryheim Jamar Baskin in the stomach.

9. The above actions of Defendant Rafael Martinez were done in a wanton, reckless manner and without justification. Defendant Rafael Martinez willfully, maliciously and intentionally fired his revolver at Plaintiff, thus committing a battery on the Plaintiff and inflicting serious injuries.

10. Plaintiff Bryheim Jamar Baskin was unarmed and helpless and in no way posed a threat to Defendant Rafael Martinez or to the safety of any other person.

11. Defendant Rafael Martinez shot Plaintiff without just and legal cause, thereby violating his rights under the laws and Constitution of the United States, in particular the Fifth and Fourteenth Amendments, and his rights under the Constitution of the State of New Jersey.

12. In shooting Plaintiff Bryheim Jamar Baskin, Defendant Rafael Martinez violated the rules and regulations of the City of Camden Police Department regarding the use of extreme force.

13. As a direct and proximate result of the above-described unlawful and malicious acts of Defendant Rafael Martinez, committed under color of his authority as a City of Camden police officer, and while acting in that capacity, Plaintiff Bryheim Jamar Baskin suffered grievous bodily harm and extreme pain, all of which is in violation of his rights under the laws and Constitution of the United States, in particular the Fifth, Eighth and Fourteenth Amendments and 42 U.S.C. §1983.

14. Plaintiff Bryheim Jamar Baskin was the victim of punishment administered in a grossly disproportionate manner to whatever Plaintiff Bryheim Jamar Baskin's acts may have been and constituted cruel and unusual punishment and deprived him of the right to due process of law under the laws and Constitution of the United States, in particular the Fifth, Eighth and Fourteenth Amendment. The shooting of Plaintiff Bryheim Jamar Baskin was unwarranted, cruel, unjustifiable and excessive.

15. As a further result of the above-described acts, Plaintiff Bryheim Jamar Baskin was deprived of rights and immunities provided to him, under the Constitution and Laws of the United States and of the State of New Jersey including, but not limited to, his rights under the Fourteenth Amendment to be secure in his person, to be free from punishment without due process, and to the equal protection of the laws.

16. The failure of the Defendant City of Camden and the Defendant Scott Thomson, Chief of Police of the City of Camden, to provide training and supervision regarding the lawful use of an officer's service revolver amounts to gross negligence and a deliberate indifference to the safety and lives of the citizens of the City of Camden. This gross negligence was a proximate cause of the injuries of Plaintiff.

17. Defendants City of Camden and Police Chief Scott Thomson are directly liable and responsible for the acts of Defendant Rafael Martinez because they knowingly failed to enforce the laws of the State of New Jersey and the regulations of the City of Camden Police Department pertaining to the use of force and possible deadly force by the City of Camden police officers, thereby creating with the City of Camden Police Department an atmosphere of lawlessness in which police officers employ excessive and illegal force and

violence, including deadly force, in the belief that such acts will be condoned and justified by their superiors. Defendants City of Camden and Scott Thomson were, or should have been aware of these unlawful acts and practices prior to and at the time of Plaintiff Bryheim Jamar Baskin's shooting.

WHEREFORE, Plaintiff prays for judgment against Defendants and each of them, as follows:

a. Compensatory damages to Plaintiff;

b. General damages to Plaintiff;

c. Punitive damages against Defendant Rafael Martinez;

d. Awarding Plaintiff the reasonable costs and expenses of this action;

e. Attorney fees; and

f. Such other and further relief as may be just.

Second Count (Assault and Battery)

18. Plaintiff incorporates by reference the allegations of paragraphs 1 through 17 as if fully set forth herein.

19. On or about September 11, 2012 at approximately 1:29 p.m. at or near 202 Beideman Avenue, Camden, New Jersey, Defendant Rafael Martinez wrongfully, unlawfully, intentionally and violently threatened to shoot Plaintiff and in fact, did shoot Plaintiff, resulting in the injuries and damages described below.

20. The force inflicted on Plaintiff included, but was not limited to, his being shot once in the stomach.

21. Plaintiff did not consent to being touched in the manner described above. Plaintiff did not do anything to justify the use of physical force against him. Plaintiff did not pose any reasonable threat of harm or bodily injury to Defendant Rafael Martinez or any other person. Consequently, the use of physical force by Defendant Rafael Martinez under these circumstances was excessive, unlawful, malicious, offensive, and with a deliberate indifference to Plaintiff's rights.

22. As a legal result of the above-described conduct, Plaintiff has sustained severe physical and emotional pain and injury, all in an amount to be determined according to proof at trial. Moreover, Plaintiff has incurred medical expenses from hiring doctors, psychiatrists and psychologists to examine, care for and treat Plaintiff as well as other incidental medical expenses also in an amount to be determined according to proof at trial.

23. The conduct of Defendant Rafael Martinez was wanton, malicious and oppressive and justifies the awarding of punitive damages against him. At the time he was shot, Plaintiff was unarmed and had not displayed any unreasonable acts of aggression or other conduct to justify the use of physical force against him. The Defendant Rafael Martinez intentionally shot Plaintiff as Plaintiff proceeded to surrender with his hands up, thus maliciously attempting to inflict pain and injury on Plaintiff. This wanton, malicious and oppressive conduct justifies the awarding of punitive damages against Defendant Rafael Martinez.

WHEREFORE, Plaintiff prays for judgment against Defendants and each of them as follows:

a. Compensatory damages to Plaintiff;

b. General damages to Plaintiff;

c. Punitive damages against Defendant Rafael Martinez;

d. Award Plaintiff the reasonable costs and expenses of this action; and

e. Such other and further relief as may be just.

Third Count (Negligence)

24. Plaintiff incorporates by reference the allegations in paragraphs 1 through 23 as if fully set forth herein.

25. On or about September 11, 2012 at the time and place described above, Defendant Rafael Martinez negligently, carelessly and without reasonable cause mistakenly concluded that Plaintiff posed a threat to Defendant Rafael Martinez' safety, and said Defendant responded which included the use of excessive force against Plaintiff and resulted in Plaintiff being seriously injured.

26. In addition, Plaintiff believes that Defendant City of Camden negligently hired, trained, supervised and/or managed Defendant Rafael Martinez in that the Defendant City knew, or through the exercise of reasonable diligence should have known that Defendant Rafael Martinez had a history of being dangerous and violent, prone to assault, batter and/or use unnecessary and unreasonable and/or unlawful physical force.

27. As a legal result of the above-described conduct, Plaintiff has sustained physical and emotional pain and injury, all in an amount to be determined according to proof at trial. Moreover, Plaintiff has incurred medical expenses from hiring doctors, psychiatrists and

psychologists to examine, care for and treat Plaintiff as well as other incidental medical expenses.

WHEREFORE, Plaintiff prays for judgment against Defendants and each of them as follows:

a. Compensatory damages to Plaintiff;

b. General damages to Plaintiff;

c. Reasonable costs and expenses of this action;

d. Such other and further relief as may be just.

Fourth Count – John Does I-X

28. Plaintiff incorporates by reference the allegations in paragraphs 1 through 27 as if fully set forth herein.

29. The Defendants John Does I-X are fictitious individuals who were aiding and abetting the named Defendants or who used excessive force against Plaintiff and resulted in Plaintiff being seriously injured and violated Plaintiff's civil rights and committed an assault and battery upon Plaintiff either intentionally or negligently.

30. Said actions causing Plaintiff to sustain physical and emotional pain and injury and medical expenses.

WHEREFORE, Plaintiff prays for Judgment against Defendants John Does I-X as follows:

A. Compensatory damages;

B. General damages;

C. Punitive damages;

D. Attorney fees and costs;

E. Such other relief as may be just.

BEGELMAN, ORLOW & MELLETZ

Dated: March 6, 2014

PAUL R. MELLETZ, ESQUIRE