No. 20-___

Supreme Court of the United States

ERIC C. DARDEN

Petitioner

v.

CITY OF FORT WORTH, TEXAS

Respondents

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. In *City of Canton, Ohio, v. Harris*, 489 U.S. 378 (1989), this Court held for the first time that a municipality's employees have a cause of action against the municipality itself if, in light of the duties assigned to the employee, it was "so obvious" that the lack of training would likely result in the violation of constitutional rights. The majority of circuits allow juries to determine liability on this issue. The Fifth Circuit, however, *requires* expert testimony—even on issues "so obvious" and undisputed, and rules on the admissibility of such testimony as a matter of law. Is the Fifth Circuit's precedent contrary to the purpose of *Harris* and circuit-court precedent throughout the country?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all of the parties.

CORPORATE DISCLOSURE STATEMENT

No corporations are involved in this proceeding.

STATEMENT OF RELATED PROCEEDINGS

Other proceedings in other courts that are directly related to this proceeding include:

— *Darden v. Snow*, No. 20-10296, United States Court of Appeals for the Fifth *Circuit*.

— *Darden v. Snow*, 4:15-cv-221-A, Unites States District Court for the Northern District of Texas, Fort Worth Division

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OPINIONS AND ORDERS BELOW

The Fifth Circuit's per curiam opinion affirming the district court's summary judgment is reported at 808 F. App'x 246 and is reprinted in the Petitioner's Appendix at App.3.

The district court's memorandum opinion granting Respondent's motion for summary judgment has not been reported. It is reprinted in the Petitioner's Appendix at App.11.

The district court's final judgment in favor of Respondent has not been reported. It is reprinted in the Petitioner's Appendix at App.28.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit had appellate jurisdiction over this dispute because the district court's orders granting the motions for summary judgment were final decisions under 28 U.S.C. § 1291. The Fifth Circuit affirmed the district court's judgment on April 24, 2020. Petitioners filed a petition for writ of certiorari in this Court on September 21, 2020. Accordingly, this conditional cross-petition is timely under Supreme Court Rule 12.5, and under this Court's March 19, 2020 order extending the deadline for filing a petition of certiorari to 150 days from the day of the lower court's judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Amendment IV. Searches and Seizures; Warrants

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code

42 U.S.C. § 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the

purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

William F. Snow and Javier Romero are employed as police officers by Respondent City of Fort Worth. On May 16, 2013, Snow and Romero were part of the City's "Zero Tolerance Unit," which was ordered to execute a "no-knock" search warrant on a private residence. ROA.679, 958. Although the City was supposed to provide the members of this unit with a "briefing sheet" in order to "make sure that all of the pertinent information is communicated to everybody that's involved," here it is undisputed that no such information was provided. ROA.1528. Accordingly, the officers were not provided with any information regarding physical descriptions of *any* of the expected occupants of the house (which included children) or whether weapons could be expected to be inside (there were none). ROA.1528; 1581.

When the "Zero Tolerance Unit" broke down the front door and stormed into the residence, they immediately encountered Jermaine Darden on the couch in the front room. ROA.1595. Clearly surprised by the officers' surprise entrance, Jermaine put both of his hands in the air, made no efforts to resist their orders, was clearly unarmed, and did not make any threatening gestures towards the officers. ROA.1511. Notwithstanding Jermaine's efforts to comply, however, Snow grabbed Jermaine and threw him to the ground, tearing his shirt in the process. ROA.1504. Despite the fact that Jermaine weighed approximately 350 pounds but was only 5' 8" tall, and was obviously morbidly obese, Snow was able to throw him to the ground in an instant. ROA.706, 1504, 1529.

Once on the ground, Snow placed his body on Jermaine, choked him and held him down, face first. ROA.1511. Romero choked Jermaine, punched him, and kicked him in the head. *Id.* Moreover, Jermaine and several of his family members repeatedly told the officers that he had asthma and could not breathe. ROA.1512. Despite these warnings and Jermaine's obvious physical condition, Snow also shot Jermaine with his taser two times in sixteen seconds. ROA.1497–98. After Jermaine went motionless, none of the officers checked his pulse to confirm if he was breathing, nor did any of the officers attempt to administer CPR. ROA.1538. Jermaine died at the scene before the ambulance arrived to take him to the hospital. ROA.1511.

Jermaine's brother, Respondent Eric C. Darden, filed the underlying lawsuit under the Ku Klux Klan of 1871, 42 U.S.C. § 1983, alleging (among other things) that Snow and Romero violated Jermaine's civil rights by using excessive force. ROA.593–95. He further alleged that the City was liable for failing to train Snow and Romero on the appropriate use of force under these circumstances. ROA.594–98. Following discovery, all both officers and the City filed motions for summary judgment. ROA.648–50 (Romero); ROA.757–60 (City); ROA.786–88 (Snow).

Snow and Romero's motion argued that they were entitled to qualified immunity as a matter of law. In support of this defense, Snow and Romero argued that the evidence conclusively established that their actions were "measured, minimal, and imminently reasonable." ROA.819. And although it was undisputed that the members of the "Zero Tolerance

Team" were not provided with briefing sheets, ROA.1520–23; 1559–61; 1580, and that both Snow and Romero admitted in their deposition testimony that the City provided training that taught them that it was acceptable to punch suspects in the face, ROA.1684–87, and to kick them in the mouth, ROA.1516–17, but failed to train them how to handle obese suspects (notwithstanding regulations requiring same), the City argued that it was entitled to summary judgment because its training is "adequate." ROA.775.

Respondent filed a combined response to all three motions, along with a joint appendix containing 187 pages of evidence, which—in addition to Snow and Romero's admissions discussed above—also included:

— Sworn testimony from multiple eyewitnesses who confirmed that Jermaine *was not* resisting arrest, never made any threatening gestures, and never attempted to push an officer off of him; ROA.1599–1601; 1612; 1619; 1638–44; 1667; 1674; 1678;

— Sworn testimony from several officers in the "Zero Tolerance Unit" who admitted that they were not trained on what amount of force is appropriate, were not properly advised about what to expect when they entered Jermaine's house, and were not trained about how to properly care for suspects who complain that they cannot breathe; ROA.1518; 1521–24; 1560–62; 1577;

— Expert testimony from the current Chief of Police for the Dallas Independent School District, who opined that *no* reasonable police officer would act as Snow and Romero did; ROA.1550–51; and

— Expert testimony from a forensic pathologist, who concluded that the officers' actions triggered a cardiac arrhythmia that sent Jermaine into sudden cardiac arrest, and that he could have been resuscitated had one of them properly performed CPR. ROA.1537.

This evidence, however, did not persuade the district court, which concluded that the video "clearly" showed that Jermaine did not comply with the officers' commands. ROA.1879. And because it found this evidence sufficient to establish that Snow and Romero were entitled to qualified immunity, it also dismissed Appellant's claim against the City without addressing the merits of its arguments. ROA.1880–81.

The Fifth Circuit, however, disagreed with the district court's analysis. Specifically, the court below concluded that "the videos do not show what happened during the twenty-five seconds that followed [Snow's initial takedown of Jermaine] and there is conflicting testimony about what transpired." ROA.1893. It further noted that the video actually reflected Jermaine *complying* with the officers' demands before they tased him. ROA.1893–94. Accordingly, because the videos "do not present the clarity necessary to resolve the factual dispute presented by the parties' conflicting accounts," the court of appeals' reversed the district court's summary judgment and remanded

the case for a jury trial. ROA.1900–01; 1906. And because it concluded that Snow and Romero were immune from suit, the district court dismissed Darden's claim against the City without addressing the merits of the arguments. ROA.1879–80.

Without requesting additional briefing or hearing oral argument, the district court granted the City's motion for summary judgment a second time. ROA.1939. After reciting several of Fort Worth Police Department's "general orders" for proper conduct, ROA.1947–50, and the fact that both Snow and Romero had received "hundreds of hours of training," ROA.1951, the district court concluded that the City's training program was constitutionally sufficient—notwithstanding the fact that the district court acknowledged that Darden offered Romero's *own testimony* that the Fort Worth Police Department trained them that it was "acceptable to punch and kick people in the face for no reason." ROA.1952. Ignoring the standard of review for summary-judgment motions, the district court called these assertions "absolutely absurd," and further concluded that even if the testimony true, Darden "has not shown how such training predictably caused [Jermaine's] death. ROA.1953. Finally, even though the parties' respective experts disagreed as to whether the need for more or different training is so obvious and the inadequacy so likely to result in the violation of constitutional rights, ROA.927–28; 1527–31; the district court concluded that *this* Court's precedent will not allow disagreements between experts does not establish a genuine issue of material fact for trial. ROA.1953.

The Fifth Circuit affirmed the district court's judgment. App.10. In its analysis, it did not discuss the district court's failure to credit Respondent's own testimony that the Fort Worth Police Department trained them that it was "acceptable to punch and kick people in the face for no reason." Instead, citing only its own precedent, it concluded that Darden's evidence in support of its inadequate-training claim was "insufficient" and "conclusory." App. 8–9.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's opinion conflicts with the holdings of at least four other circuits in its interpretation of this Court's holding in *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989), which its seminal decision on "failure-to-train" claims against a municipality that resulted in the deprivation of constitutional rights. The key language in *Harris* is as follows:

> It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen *that in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious and the inadequacy so likely to result in the violation of constitutional rights*, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

Id. at 390 (emphasis added). The question presented here is the amount of proof necessary to demonstrate what is "so obvious" and "inadequate," and whether such decisions should be made as a matter of law by the court, or whether they should be submitted to a jury that represents the community that is being served.

Here, the Fifth Circuit ultimately concluded that the testimony from Darden's expert was "conclusory," and could not show a genuine issue of material fact as to whether the City should have provided additional training to its police officers that executed "no-knock" warrants. But if the standard is whether a deficiency in the City's training was "so obvious," expert testimony should not have been necessary in the first place, and this Court has long held that expert testimony is not necessary to survive a summary judgment when a potential danger is "fairly obvious." *Salem v. U.S. Lines Co.*, 370 U.S. 31, 36 (1962). And even assuming—without conceding—that expert testimony *is* necessary, the majority of circuits addressing this issue have concluded that it is proper for a jury's consideration. Accordingly, Darden respectfully submits that this Court's guidance is necessary to resolve the split in authority that the Fifth Circuit's opinion created, and should therefore grant this petition for certiorari.

I. Several federal circuits have held that summary judgment is not appropriate on failure-to-train claims when the need for training is obvious and there is evidence that it was not provided.

A. Ninth Circuit: Kirkpatrick v. County of Washoe (2016)

In *Kirkpatrick v. County of Washoe*, a county social worker removed a two-day old child from the custody of her mother without a warrant. 843 F.3d 784, 786 (9th Cir. 2016). The child's biological father brought a claim against the county under section 1983, alleging

that it was liable for failing to appropriately train its social-services staff about the required legal procedures before seizing a child to investigate abuse or neglect. *Id.* at 793.

The summary-judgment record included evidence from the county that it trained its employees on the law and instructed them only to remove a child if there was an imminent risk of harm, such as when a child's life was in danger or when a child would suffer a serious injury. *Id.* at 801 (Kozinski, J., dissenting). And in support of its motion, the county also offered evidence that no other child had been unconstitutionally removed by a social worker. *Id.* at 802 (Kozinski, J., dissenting). But notwithstanding this evidence, the Ninth Circuit was persuaded by evidence that:

— The social worker testified that she was not provided with any training on how to obtain a warrant;

— The social worker confirmed that it was not in the county's "general practice" to obtain a warrant;

— The social worker could not remember the training that she received about when a child should be considered in "imminent danger;" and

— The county had "all kinds of policies and procedures for everything" but no policies related to warrants.

Id. at 795–96. Accordingly, in light of the work performed by social workers, the Ninth Circuit concluded that "the need for the county to train its employees on the constitutional limitations of separating parents and children is 'so obvious' that its failure to do so was properly characterized as deliberate indifference to the rights of Washoe County families." *Id.* at 796–97.

B. Sixth Circuit: Shadrick v. Hopkins County, Kentucky (2015)

In *Shadrick v. Hopkins County, Kentucky*, a twenty-five year old man went to a county jail to serve a short sentence. 805 F.3d 724, 729 (6th Cir. 2015). The evidence in the record reflected that the inmate was visibly sick from the moment he entered the jail, that he informed the jailers that he was currently suffering from a staph infection in his groin, and showed the jailers that he had open wounds. *Id.* at 729. Although the jail's medical staff placed him on "medical watch" and occasionally monitored his blood pressure, they did not follow written policy guidelines for treating staph infections. *Id.* at 730. Three days later, he was found dead in his cell. *Id.*

The inmate's mother sued the county on a several legal theories, including a section 1983 failure-to-train claim. *Id.* at 736. The Sixth Circuit concluded that the county was *not* entitled to summary judgment on this cause of action because the record included testimony from nurses that they did not receive ongoing training about their medical responsibilities in the jail setting, as well as expert testimony that the nurses received inadequate training. *Id.* at 740–41. The court also

reiterated its holding that, "Especially in the context of a failure-to-train claim, expert testimony may provide the sole avenue available to plaintiffs to call into question the adequacy of training procedures." *Id.* at 741 (citing *Russo v. City of Cincinnati*, 953 F.2d 1036, 1047–48 (6th Cir. 1992)). Moreover, despite the fact that the nurses at the jail received *some* training when they were first hired, the Sixth Circuit was persuaded by the fact that there was no proof of a specialized training program that was designed to provide necessary emergency care to inmates within the jail environment to avoid constitutional violations. *Id.* at 740. Accordingly, the court concluded:

> It is predictable that placing a nurse lacking the specific tools to handle the situations she will inevitably confront in the jail setting will lead to the violation of the constitutional rights of inmates. A reasonable jury, therefore, could determine that the hospital's failure to train and supervise its nurses in meeting their constitutional obligations demonstrates the hospital's own deliberate indifference to the highly predictable consequence that a nurse will commit a constitutional violation.

Id. Finally, because of the obviousness of the need for such training, the court held that there was a genuine issue of material fact as to whether the failure to train "actually caused or was closely related to" the inmate's death. *Id.* at 744.

C. First Circuit: Young v. City of Providence (2005)

In *Young v. City of Providence*, two white on-duty police officers shot and killed an off-duty African-American police officer who was responding to the same incident. 404 F.3d 4, 9 (1st Cir. 2005). The off-duty officer was acting in compliance with the city's "always armed/always on-duty policy," which required him to act despite being off-duty and out of uniform, but the white officers mistakenly believed the an African-American officer to be a threat. *Id.* at 9.

The off-duty-officer's mother filed suit against the city, claiming that it failed to properly train its police officers how to appropriately distinguish off-duty officers from suspects. *Id.* at 27. Although the city moved for summary judgment and offered evidence that it provided its officers with "some form of training," that evidence was rebutted by testimony from other officers that "no pertinent training took place." *Id.* at 16–17. The summary-judgment record also contained expert testimony that characterized the "always armed/always on-duty policy" as "inherently dangerous," and the expert further opined that "specific training and protocol are necessary to avoid friendly-fire shootings of off-duty officers." *Id.* at 18–19. Finally, the evidence reflected that in high-stress situations, even though the correct actions may seem like common sense, training is still required. *Id.* at 19.

Although the First Circuit noted that the city had *not* experienced a pattern of similar incidents, it denied the city's motion for summary judgment on the failure-to-train claim because:

— the jury could find that there was, at best, very minimal training on these issues, and no real program of training on them at all;

— a jury could conclude that the severity of consequences of a friendly-fire shooting forced the city to take notice of the high risk, despite the rarity of such an incident; and

— a jury could find that training would have made a difference here (unlike in other situations where it would have been unlikely to stop unconstitutional conduct).

Id. at 28–29. Finally, the court poignantly noted, "even though a jury could also rationally conclude in defendant's favor, that is not the test on summary judgment." *Id.* at 10.

D. Tenth Circuit: Allen v. Muskogee, Oklahoma (1997)

In *Allen v. Muskogee County, Oklahoma*, police officers attempted to arrest a man who was reported to be armed and had recently threatened family members, had an outstanding warrant for impersonating an officer, and was publicly stating that he intended to commit suicide. 119 F.3d 837, 839 (10th Cir. 1997). When the officers found the suspect, he was sitting in the driver's seat of his vehicle with one foot out the door and had a gun in his right hand. *Id.* at 839. The evidence in the record presented a conflicting account as to how one of the arresting officers approached the suspect: By one account, the officer ran up to the suspect screaming, shouted at the

suspect, attempted to enter the vehicle from the passenger side, and attempted to grab his weapon; by the other account, the officer approached the suspect cautiously and attempted to convince the suspect into giving up his gun. *Id.* at 839, 841. It is undisputed, however, that a firefight ensued that ultimately resulted in the suspect's death. *Id.* at 839.

The suspect's estate filed suit an excessive-force claim against the officer and a failure-to-train claim against his employer. *Id.* There—as here—the court of appeals correctly noted that there was a genuine issue of material fact as to "what actually happened" and, therefore, the officer was not entitled to summary judgment on his qualified-immunity defense. *Id.* at 841; *compare with Darden*, 880 F.3d 722, 731–33 (5th Cir. 2018. But in *Allen*, the court of appeals also addressed the merits of the section 1983 failure-to-train claim against the county and concluded that summary judgment was inappropriate on that cause of action as well because there was evidence in the record that:

— The use of force arose under circumstances that constituted a usual and recurring situation with which police officers must deal;

— The officers were trained to leave cover and approach armed, suicidal, emotionally disturbed persons and to try to disarm them;

— An expert concluded that the officer's actions were reckless, contrary to proper police practices, and was likely to provoke a violent response;

— An expert concluded that there were only two possibilities that could give rise to the incident: either the officers failed to follow their training, or they were improperly trained.

Id. at 841–45. Importantly, notwithstanding the municipality's evidence that its officers "completed many hours of training, including training on use of deadly force and dealing with upset or emotionally disturbed people," the court of appeals concluded that this evidence was insufficient—for summary-judgment purposes—to rebut the inference that the training was inadequate. *Id.* at 842. In sum, because the court recognized that *if* a jury were to believe the plaintiff's version of events and the testimony of her expert, it could rationally conclude that the suspect's death was a predictable consequence of a failure to train, and could give rise to a finding of deliberate indifference. *Id.* at 845.

II. The Fifth Circuit's interpretation of *City of Canton* is inconsistent with these decisions and effectively eviscerates "failure-to-train" liability under section 1983.

Darden respectfully submits that this Court should find the holdings from its sister circuits persuasive when resolving this appeal.

Here, as in all of the cases discussed above, there is affirmative testimony from the defendant officers and/or the defendant municipality affirmatively stating that *additional* training was not provided for the specific activities that were alleged to cause the injury at issue, even though it is undisputed that they

did receive *some* training on other topics. In each, the admissions from the defendants was held to be sufficient to place a genuine issue of material fact in dispute. The same result should follow here.

Moreover, this Court should recognize that the facts in the record about the "Zero-Tolerance Unit" demonstrate (at the very least) that there is a factual dispute as to whether its members were required to take part in law-enforcement activities that involve "high-stress situations" that require more than mere "common sense," (as in *Young*, 404 F.3d at 19) and whether such high-stress situations were "usual and recurring" for officers assigned to such units (as in *Allen*, 119 F.3d at 841). In *Young* and *Allen*, the courts concluded that such evidence would allow reasonable jurors to conclude that the natural relationship of the job description to violence rendered even rare occurrences foreseeable. And although the facts of *Kirkpatrick* and *Shadrick* did not arise out of police activities, those courts correctly held that when a county employee has a job description that regularly requires him or her to make decisions that may affect the constitutional rights of citizens, a jury could find that the consequences of failing to provide such training are "so obvious" that they could support a finding of deliberate indifference.

This Court should find the analysis of expert testimony in *Shadrick*, *Young*, and *Allen* to be consistent with its holding in *Harris*. There—unlike the Fifth Circuit's analysis here—the courts specifically held that the opinions of the plaintiff's expert should be taken into consideration when determining whether summary judgment is

appropriate; indeed the Sixth Circuit has acknowledged that it may be "the sole avenue available to plaintiffs to call into question the adequacy of training procedures. *Shadrick*, 805 F.3d at 741 (citing *Russo*, 953 F.2d at 1047–48). Here, the City's expert opined that "the planning and execution of the warrant was consistent with customary professional police practices and standards" and that the officers were "provided the necessary information and preparation." ROA.928. Darden's expert, by contrast, opined:

> — Tactical operations (such as the "Zero-Tolerance Unit") require appropriately trained and designed personnel to develop an operational plan in a consistent format for pre-planning purposes;
>
> — The planning processes should include target scouting: development of detailed written operations orders, detailed operations order briefings, operation rehearsals and pre-mission inspections;
>
> — It was evident from the officers' statements on video and in their depositions that proper intelligence had not been obtained before the raid began and that the City had not provided sufficient training to Officers Snow and Romero and other officers when and how to execute a no-knock warrant.

ROA.1513, 1521. The Fifth Circuit, however, concluded that these opinions (and the evidence on which Darden's expert relied, which is also in the

summary-judgment record) were "conclusory" because they do not identify "how such training would differ from existing training." App.7, 8. *But the City offered no evidence about the training that it provided on how to obtain proper intelligence on no-knock warrants.*

It should be no surprise that under its strained interpretation of *Harris*, the Fifth Circuit has upheld only a *single* jury verdict in the victim's favor on a failure-to-train claim in the last 25 years. *See Brown v. Bryan County, Okla.*, 219 F.3d 450 (5th Cir. 2000) (the original affirmance was in 1995). As a result of its holding in this case, a victim's success is even less likely, as municipalities can now seek summary judgment on failure-to-train claims without submitting *any* evidence of their formal training policies in their motion, thereby prohibiting the victim's experts from attacking the policy itself, and allowing the municipality to argue that any expert opinions derived from other evidence as to what the policy might be are "conclusory." Not only is such a holding inconsistent with Federal Rule of Civil Procedure 56(c)(1)(a) (requiring the movant to come forward with evidence to shift the burden to the non-movant), it defies this Court's statement in *Harris* that a municipality can be liable under section 1983 when the need for additional training is "so obvious." 489 U.S. at 390. Because *Harris's* role in this Court's jurisprudence is to *allow* causes of action against municipalities for failing to train its employees on how to preserve the constitutional rights of the people they serve, this Court certainly could not have imagined that access to this remedy could be so easily avoided through procedural manipulation.

CONCLUSION

This Court is doubtless aware of the numerous cases nationwide involving allegations of excessive force by police officers; particularly on members of minority communities. This case—although it arose out of events in 2014—is all too similar to the cases that have come to the forefront of our national discourse in 2020. Although numerous solutions have been proposed—in Congress and the courts—as to how to remedy this problem, one thing is certain: a decision from this Court that incentivizes municipalities to properly train their law-enforcement officers—or any of their employees—can only have positive side effects. And allowing the members of the community to serve on juries and adjudicate the "obviousness" of its government's failures is certain to provide that incentive.

For all of these reasons, Petitioner Eric C. Darden respectfully requests this Court to grant this petition for writ of certiorari.

Respectfully submitted,

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September 21, 2020

APPENDIX TABLE OF CONTENTS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11624

ERIC C. DARDEN, as Administrator of the Estate of Jermaine Darden and on behalf of the statutory beneficiaries of the Estate of Jermaine Darden (which are Donneika Goodacre-Darden, surviving mother of Jermaine Darden, Charles H. Darden, surviving father of Jermaine Darden),

Plaintiff-Appellant

v.

CITY OF FORT WORTH, TEXAS

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:15-CV-221

[Filed April 24, 2020]

BEFORE SOUTHWICK, GRAVES, and ENGELHARDT, Circuit Judges

PER CURIAM:

This case arises from the death of Jermaine Darden, who suffered a heart attack and died while being arrested by police officers employed by the City of Fort Worth. Mr. Darden's estate sued, alleging that the officers used excessive force and that the City was liable for failing to adequately train the officers. With respect to the failure-to-train claim, the district court granted summary judgment in the City's favor. We affirm.

I. BACKGROUND

On May 16, 2013, a large team of heavily armed police officers executed a no-knock warrant on a private residence in Fort Worth, Texas. *Darden v. City of Fort Worth, Tex.*, 880 F.3d 722, 725 (5th Cir. 2018). Officer W. F. Snow was assigned to the entry team, which was tasked with breaking down the front door, entering the residence, and securing the premises. *Id.* Officer Javier Romero drove the van that transported the team to the residence, but was also assigned to stand guard near the front door while other officers entered the residence and arrested the people inside. *Id.* Two other members of the team wore cameras on their helmets, which captured on video some, but not all, of the events that transpired as the warrant was executed. *Id.*

When the police first arrived at the house, the entry team broke down the front door with a battering ram, yelled that they were police, and ordered everyone to get down. *Id.* A man, later identified as Jermaine Darden ("Mr. Darden"), was

kneeling on the seat of a couch near the door when the officers entered, and he immediately raised his hands in the air. *Id.* Mr. Darden weighed approximately 340 pounds. *Id.* As Officer Snow entered the residence, he reached out and ripped the shirt off Mr. Darden's back, apparently in an attempt to get Mr. Darden from the couch to the ground. *Id.* The videos do not show what happened during the twenty-five seconds that followed, and there is conflicting testimony about what transpired. *Id.* at 725–26. Officer Snow twice used a Taser on Mr. Darden, who at one point appeared to push himself up on his hands. *Id.* at 726. Other people in the house repeatedly yelled, "He's got asthma," and, "He can't breathe." Eyewitnesses also testified that Mr. Darden told the officers he could not breathe and that he pushed himself up on his hands because he was trying to get into a position where he could breathe. *Id.*; *id.* at 726 n.3.

As Officer Romero finished placing handcuffs on Mr. Darden, Mr.Darden's body went limp. *Id.* at 726. The officers then pulled Mr. Darden's debilitated body up into a sitting position and left him there. *Id.* Mr. Darden appeared to be unconscious, and his head hung down on his chest. *Id.* It was subsequently determined that Mr. Darden had suffered a heart attack and died. *Id.*

The administrator of Mr. Darden's estate ("Plaintiff-Appellant") brought suit under Title 42 U.S.C. § 1983, claiming (1) that Officers Snow and Romero used excessive force in arresting Mr. Darden; (2) that the City of Fort Worth ("the City") was liable for failing to adequately train the officers; and (3) that various defendants were liable for state-law

torts. *Id.* at 727. All of the defendants filed motions for summary judgment, and the district court granted those motions and dismissed the case. *Darden*, 880 F.3d at 727. The district court determined that the officers had not violated clearly established law and were thus entitled to qualified immunity. *Id.* Because it held that the officers had not violated Mr. Darden's constitutional rights, the district court also granted summary judgment in favor of the City on the municipal liability claims. *Id.*

The administrator of Mr. Darden's estate appealed to this court, which reversed the district court's dismissal of the claims against Officers Snow and Romero. *Id.* at 734. The panel also vacated the dismissal of the claims against the City, remanding the case for further proceedings. *Id.* On remand, the district court again granted summary judgment in favor of the City on the estate's municipal liability claims.[1] This appeal followed.

II. STANDARD OF REVIEW

"We review a summary judgment de novo, 'using the same standard as that employed by the district court under Rule 56.'" *Newman v. Guedry*, 703 F.3d 757, 761 (5th Cir. 2012) (quoting *Kerstetter v. Pac.*

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[1] The district court also found that the City was entitled to summary judgment on Plaintiff-Appellant's state law claims. Plaintiff-Appellant did not address those claims in his appellate briefing. They are therefore forfeited. *See Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) ("An appellant abandons all issues not raised and argued in its initial brief on appeal."); *Davis v. Maggio*, 706 F.2d 568, 571 (5th Cir. 1983) (per curiam) ("Claims not pressed on appeal are deemed abandoned.")

Sci. Co., 210 F.3d 431, 435 (5th Cir. 2000)). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

III. DISCUSSION

Only one question is before this court: did the district court err in granting the City summary judgment on Plaintiff-Appellant's municipal liability claim? We conclude that it did not.

A municipality may be liable under Title 42 U.S.C. § 1983 ("Section 1983") if the municipality itself "'subjects' a person to a deprivation of rights or 'causes' a person 'to be subjected' to such deprivation." *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (quoting *Monnell v. New York City Dep't Soc. Servs.*, 436 U.S. 658, 692 (1978)). But local governments are only responsible for "their *own* illegal acts." *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986) (citing *Monell*, 436 U.S. at 665–83). "In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy" for purposes of Section 1983. *Connick*, 563 U.S. at 61. However, "[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." Id. (citing *Okla. City v. Tuttle*, 471 U.S. 808, 822–23 (1985)). When such a claim is made, "the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform." *Snyder v. Trepagnier*, 142 F.3d 791, 798 (5th Cir. 1998) (quoting *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390 (1989)).

Here, Plaintiff-Appellant alleges that the City provided inadequate training regarding the proper use of no-knock warrants, Tasers, and excessive and deadly force. In order to succeed at this stage, the City must show that there is no genuine dispute as to a material fact regarding (1) whether there was an inadequacy in the City's training policy; (2) whether the City was deliberately indifferent in its adoption of that policy; or (3) whether the inadequate training policy directly caused the constitutional violation allegedly suffered by Mr. Darden. See, e.g., *Sanders-Burns v. City of Plano*, 594 F.3d 366, 381 (5th Cir. 2010); *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 170 (5th Cir. 2010).

Plaintiff-Appellant does not argue a pattern of similar constitutional violations. Instead, it relies on the single-incident exception to that rule. As such, the City must show that there is no genuine dispute as to whether the constitutional violation allegedly suffered by Mr. Darden was the "highly predictable" consequence of the City's failure to train the officers in its Zero- Tolerance Unit. See *Valle v. City of Houston*, 613 F.3d 536, 549 (5th Cir. 2010). It has met that burden.

The City proffered, and the district court relied on, several "General Orders" governing police practices that were in place on the day of Mr. Darden's death. Those orders largely restate applicable law regarding the use of force. While the existence of such policies is not dispositive, "[w]e consider compliance with state requirements as a factor counseling against a 'failure to train' finding." *Zarnow*, 614 F.3d at 171.

Plaintiff-Appellant seeks to evade the import of the City's existing policies by emphasizing that its allegations are specific to the City's Zero- Tolerance Unit, which specializes in serving search warrants and conducting searches of residences, including "dynamic entries" and no-knock warrants. Plaintiff-Appellant offered evidence, in the form of an affidavit by Dallas Independent School District Police Chief Craig Miller,[2] that "[n]othing can potentially be more dangerous than making a Dynamic Entry into a location" about which officers have "very little information." The City, Plaintiff-Appellant emphasizes, offered no evidence that members of the Unit receive training on the use of excessive force and Tasers in the context of dynamic entries.

However, "a plaintiff must allege with specificity how a particular training program is defective." *Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005). Plaintiff-Appellant's general position is that the City failed to provide any training specific to the use of excessive force and Tasers in the context of no-knock entries. But it has not identified—in its briefing, at oral argument, or in post-argument supplemental briefing—how such training would differ from the existing training on using excessive

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[2] Prior to being employed by the Dallas Independent School District, Mr. Miller served as the Deputy Chief of the Crimes Against Persons Division of the Dallas Police Department. Mr. Miller also served as the Homicide Unit Commander.

force and Tasers.[3] Even Chief Miller, in his affidavit, neglected to address this issue. Indeed, he offered the conclusory statement that "a lack of adequate training [was] a significant part of the reason [the officers] utilized more force than the situation required" and opined that (1) "there were alternatives to conducting a dynamic entry search warrant," (2) the Zero Tolerance Unit "made entry into a location without proper intelligence and ultimately caused the death of Jermaine Darden," and (3) "nothing can potentially be more dangerous than making a dynamic entry into a location where, according to the briefing sheet, they had very little information."

Given this gap in Plaintiff-Appellant's allegations and summary judgment evidence, we conclude that the City is entitled to summary judgment. It has shown that—in this case, given the evidence now before the court—there is no genuine dispute as to a material fact regarding whether there was an inadequacy in the City's training policy.[4]

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[3] Plaintiff-Appellant emphasizes that the City "was supposed to provide the members of this unit with a 'briefing sheet' in order to 'make sure that all of the pertinent information is communicated to everybody that's involved,'" but that no such information was provided. This argument is unhelpful to Plaintiff-Appellant, as it suggests that the City did have an official policy of providing briefing sheets before no-knock entries.

[4] The parties dispute whether Plaintiff-Appellant's failure-to-train claim includes not just a failure-to-train on the use of excessive force and Tasers, but also a failure-to train-on

IV. CONCLUSION

The district court order granting summary judgment in favor of the City on Plaintiff-Appellant's municipal liability claims is AFFIRMED.

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rendering medical aid. That claim was largely ignored by the district court, and it is unclear whether or not it was adequately pled. (The operative complaint alleges only that the City "failed to implement and/or enforce policies, practices, and procedures for the Fort Worth Police Department that respected Jermaine Darden's constitutional rights to assistance, protection, and equal treatment under the law"; that the City is responsible for "assuring safety for all citizens of the City of Fort Worth"; that Mr. Darden told Officers Snow and Romero that he could not breathe but that his pleas were ignored; that Mr. Darden "was not provided with medical attention and sat unresponsive for at least 15 minutes before Medstar arrived"; and that the City "failed to implement and/or enforce the policies, procedures, and practices necessary to provide constitutionally adequate protection and assistance to [Mr.] Darden during his struggle to survive and implemented policies, procedures and practices which actually interfered with or prevented [Mr.] Darden from receiving the protection, assistance, and care he deserved.") But resolving that question is unnecessary. At no point did Plaintiff-Appellant offer any evidence regarding how the City's training on rendering medical aid is defective. That claim, like the others, therefore fails.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ERIC C. DARDEN, AS AMINISTRATOR OF THE ESTATE OF JERMAINE DARDEN,	§	
Plaintiff,	§	
	§	NO. 4:14-CV-221-A
v.	§	
THE CITY OF FORT WORTH TEXAS, et al.,	§	
Defendants	§	

[Filed December 10, 2018]

MEMORANDUM OPINION AND ORDER

By memorandum opinion and order signed August 10, 2016, the court granted the motions of defendants, City of Fort Worth ("City"), W. F. Snow ("Snow") , and J. Romero ("Romero"), for summary judgment. Doc.[1] 104. Because the court determined that Snow and Romero did not commit a constitutional violation, it held that City could not be liable for any constitutional violation. *Id.* at 15. And, the court determined that City was entitled to

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[1] The "Doc. "reference is to the number of the item on the docket in this action.

sovereign immunity as to plaintiff's state law claims. *Id.* at 15–16. Plaintiff appealed from the court's granting of the motions. Doc. 106. The United States Court of

Appeals for the Fifth Circuit reversed in part, vacated in part, and remanded the action for further proceedings. Doc. 114. Defendants filed a petition for writ of certiorari and the court granted a stay while the petition was pending. Doc. 119. The petition has now been denied. Doc. 120. Accordingly, by order signed November 15, 2018, the court lifted the stay. Doc. 122. City has requested that the court consider the merits of its summary judgment motion filed June 17, 2016. Doc. 121.

As the Fifth Circuit noted, this court did not reach the merits of plaintiff's municipal liability claims. Accordingly, the Fifth Circuit remanded for further consideration of municipal liability, expressing no opinion on the merits. Doc. 114 at 16- 17. The court now considers the motion of City for summary judgment. And, having considered the motion, the response, the reply, the summary judgment evidence, the record, and applicable authorities, the court finds that the motion should be granted.

I.

Plaintiff's Claims

The operative pleading is plaintiff's third amended complaint. Doc. 66. Plaintiff's claims arise out of the execution by Snow and Romero of a "no-knock" search warrant on May 16, 2013. Eric C. Darden ("Darden") died during the execution of the warrant after he was tased. Plaintiff alleges that Snow and Romero used excessive force and that City

is liable for failure to properly train its officers. He also alleges that City is liable under state law for Snow's negligent use of the taser.

II.

Grounds of the Motion

City maintains that plaintiff cannot establish that City had a policy, practice, or custom that caused a deprivation of Darden's constitutional rights.

> Specifically, the official policy of [City] has prohibited excessive force, and there is no custom or practice by department officials condoning excessive force. Plaintiff cannot demonstrate a deficiency in the Fort Worth Police Department's training or supervision of its officers that is capable of supporting Section 1983 liability because the City adequately trains all of its officers, and enforces its training and policies by supervising those officers, by investigating officers who are alleged to have engaged in misconduct, and disciplining them when warranted.

Doc. 74 at 6. City also alleges that it is entitled to sovereign immunity as to the state law claims.

III.

Applicable Legal Principles

A. Summary Judgment

Rule 56(a) of the Federal Rules of Civil Procedure provides that the court shall grant summary judgment on a claim or defense if there is no genuine dispute as to any material fact and the movant is

entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The movant bears the initial burden of pointing out to the court that there is no genuine dispute as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 325 (1986). The movant can discharge this burden by pointing out the absence of evidence supporting one or more essential elements of the nonmoving party's claim, "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323. Once the movant has carried its burden under Rule 56(a), the nonmoving party must identify evidence in the record that creates a genuine dispute as to each of the challenged elements of its case. *Id.* at 324; see also Fed. R. Civ. P. 56 (c) ("A party asserting that a fact...is genuinely disputed must support the assertion by...citing to particular parts of materials in the record...."). If the evidence identified could not lead a rational trier of fact to find in favor of the nonmoving party as to each essential element of the nonmoving party's case, there is no genuine dispute for trial and summary judgment is appropriate. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 597 (1986). In *Mississippi Prot. & Advocacy Sys., Inc. v. Cotten*, the Fifth Circuit explained:

> Where the record, including affidavits, interrogatories, admissions, and depositions could not, as a whole, lead a rational trier of fact to find for the nonmoving party, there is no issue for trial.

929 F. 2d 1054, 1058 (5th Cir. 1991).

The standard for granting a motion for summary judgment is the same as the standard for rendering judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 323. If the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita*, 475 U.S. at 597; see also *Mississippi Prot. & Advocacy Sys.*, 929 F.2d at 1058.

B. Municipal Liability

The law is clearly established that the doctrine of respondent superior does not apply to § 1983 actions. *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978); *Williams v. Luna*, 909 F.2d 121, 123 (5th Cir. 1990). Liability may be imposed against a municipality only if the governmental body itself subjects a person to a deprivation of rights or causes a person to be subjected to such deprivation. *Connick v. Thompson*, 563 U.S. 51, 60 (2011). Local governments are responsible only for their own illegal acts. *Id.* (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986)). Thus, plaintiffs who seek to impose liability on local governments under § 1983 must prove that action pursuant to official municipal policy caused their injury. *Monell*, 436 U.S. at 691. Specifically, there must be an affirmative link between the policy and the particular constitutional violation alleged. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985).

Proof of a single incident of unconstitutional activity is not sufficient to impose liability, unless proof of the incident includes proof that it was caused by an existing, unconstitutional policy, which policy can be attributed to a municipal policymaker. *Tuttle*, 471 U.S. at 823-24. (If the policy itself is not

unconstitutional, considerably more proof than a single incident will be necessary to establish both the requisite fault and the causal connection between the policy and the constitutional deprivation. *Id.* at 824.) Thus, to establish municipal liability requires proof of three elements: a policymaker, an official policy, and a violation of constitutional rights whose moving force is the policy or custom. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001).

The Fifth Circuit has been explicit in its definition of an "official policy" that can lead to liability on the part of a governmental entity, giving the following explanation in an opinion issued en bane in response to a motion for rehearing in *Bennett v. City of Slidell*:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority.
>
> Actions of officers or employees of a municipality do not render the municipality

> liable under § 1983 unless they execute official policy as above defined.

735 F.2d 861, 862 (5th Cir. 1984) (per curiam).

The general rule is that allegations of isolated incidents are insufficient to establish a custom or policy. *Fraire v. City of Arlington*, 957 F.2d 1268, 1278 (5th Cir. 1992); *McConney v. City of Houston*, 863 F.2d 1180, 1184 (5th Cir. 1989); *Languirand v. Hayden*, 717 F.2d 220, 227-28 (5th Cir. 1983).

C. Texas Tort Claims Act

Under the Texas doctrine of sovereign immunity, a governmental entity cannot be held liable for the actions of its employees unless a constitutional or statutory provision waives its sovereign immunity in clear and unambiguous language. *See Univ. of Tex. Med. Branch v. York*, 871 S.W.2d 175, 177 (Tex. 1994); *Duhart v. State*, 610 S.W.2d 740, 742 (Tex. 1980). The Texas Tort Claims Act provides such a waiver in certain circumstances. Tex. Civ. Prac. & Rem. Code § 101.025; *York*, 871 S.W.2d at 177. However, the Act does not waive immunity with respect to claims "arising out of assault, battery, false imprisonment, or any other intentional tort." Tex. Civ. Prac. & Rem. Code § 101.057(2); see *Goodman v. Harris County*, 571 F.3d 388, 394 (5th Cir. 2009). Use of excessive force is an intentional tort and an alternative negligence pleading cannot save the claim where the claim is based on the same conduct as the intentional tort claim. *Saenz v. City of El Paso*, 637 F. App'x 828, 830-31 (5th Cir. 2016); *Cox v. City of Fort Worth*, 762 F. Supp. 2d 926, 935 (N.D. Tex. 2010)

IV.

Facts Established by Summary Judgment Evidence

The summary judgment evidence[2] establishes:

The conduct of City police officers is primarily controlled by the police department's General Orders, copies of which are issued to each officer upon admission to the Fort Worth Police Academy. When General Orders are revised, each officer is issued and/or emailed a copy of the revised orders. Each officer is require to read, know, and follow the provisions of the General Orders. All officers are trained in the application of the General Orders and are required to comply with them. Failure to comply could result in discipline, including termination of employment. Doc. 77 at 53-54. In addition, all peace officers in the State of Texas must meet the training and continuing education standards of the Texas Commission on Law Enforcement and failure to adhere to those standards may result in suspension of an officer's license. *Id.* at 67.

On the date of Darden's death, City had the following General Orders in place:

1. 306.04, providing in pertinent part:

B. Under no circumstances will the force used by an officer be greater than necessary to make an arrest or a detention or to protect

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[2] Plaintiff has filed amended objections and a motion lo strike portions of the summary judgment evidence. Doe. 98. The court is not granting the motion, but, as is its custom, giving the summary judgment evidence whatever weight it may deserve.

oneself or another, nore will the force be used longer than necessary to subdue the suspect, and deadly force shall not be used except as specifically provided in this directive.

F. Force shall only be used to make an arrest or detention, and then, only the minimum amount of force necessary shall be used.

Id. at 54-55, 57.

2. 306.05, providing in pertinent part:

An officer's use of force shall be objectively reasonable and shall be the minimum amount of force necessary to make the arrest or detention.

Id. And,

c. Conducted Energy Device (CED) or Chemical Agent:

(1) Use of the CED or chemical agent force options shall be restricted to situations where the officer has probable cause to arrest and engaging the suspect would expose the officer to a reasonably defined risk or tactical disadvantage. The officer must be able to articulate a reasonable belief that there is a potential or immediate threat. Once the officer has gained compliance, the use of force options (technique) shall be followed by an alternate method of control or apprehension.

Id. at 54-55, 58.

3. 306.09, providing:

A. All use of force incidents which result in injury, involve the use of a chemical agent, or any use of force incident during which the level of force used is hard open-hand control and restraint or greater shall be reported and identified as "Use of Force by an Officer."

1. Officers shall report the full details of the use of force in related arrests or offense reports. If no arrest or offense report is to be completed, the details shall be reported in an incident report. A separate inter-office correspondence will be completed by the supervisor and forwarded through the officer's chain of command to be reviewed and filed by the bureau.

2. All reports in which the details of a use of force incident is reported shall be completed prior to the end of watch. These reports shall be flagged Use of Force and routed to the captain of the involved officer for management review.

3. Captains shall review each use of force report to determine if there is a need for changes in departmental procedures or additional training for the officer. Additional training for the officer may be based on whether the involved officer has had previous incidents indicating the officer is prone to violence or the need for referrals to the department

psychologist. The captain shall take appropriate action based on the basis of their determination.

4. All completed use of force reports and inter-office correspondence shall be forwarded to the Training Division for review.

5. Deputy chief shall conduct periodic audits to ensure the objectives of management review are being met.

6. Any use by an officer of a flashlight as a weapon or the use of a weapon or device taken from a citizen shall be reported as a Critical Police Incident and handled in accordance with General Order 356.00.

Id. at 54-55, 59.

4. 702.00, which provides in pertinent part:

B. Officers of the Fort Worth Police Department shall acquire a working knowledge of the General Orders, city ordinances, Texas Code of Criminal Procedure, Texas Penal Code, federal statutes, and current court cases.

C. All officers and employees shall comply with the General Orders, special orders, directives, procedures of the department, orders and instructions of supervising officers, federal law, state law, and city ordinances.

Id. at 54-55, 61.

5. 314.01, which provides in pertinent part:

A. Arrests may be made when a warrant of arrest has been issued by an authorized

magistrate or when arrest without a warrant is authorized under the laws of the United States, laws of the State of Texas, or the ordinances of Fort Worth.

Id. at 54-55, 62.

6. 504.0l(J), which provides in pertinent part:

3. Officers shall consider the age and physical condition of the subject when determining whether the CED is an appropriate option. Generally, unless exigent circumstances exist, the CED should not be discharged on a person

a. under the age of eleven (11),

b. above the age of seventy (70),

c. who is visibly frail, or

d. who is pregnant.

8. Upon activating the CED in either the drive stun mode or the cartridge mode, officers shall use the CED for one (1) standard five (5) second cycle and stop to evaluate the situation. If additional cycles are necessary, the number of cycles and duration of those cycles shall be the minimum necessary to place the subject into custody.

9. CEDs are prohibited from being used:

a. In a punitive or coercive manner

b. against persons displaying passive non-compliance; or

On any subject who does not demonstrate their over intention to use violence or force against themselves, the officer or another person.

> 11. Once handcuffed and under control, all persons will be placed in an upright position that does not impair respiration.
>
> 13. Once the CED has been activated, officers shall seek medical assistance for subjects who:
>
> a. May have pre-existing medical issues, including pregnancy,
>
> b. Appear to be under the influence of a narcotic or controlled substance,
>
> c. Receive three (3) or more electrical cycles from the CED or receive cycles for more than a cumulative 15 seconds, or
>
> d. Appear non-responsive, ill, or have difficulty breathing.

Id. at 54-55, 63-64.

Rachel DeHoyos was the supervisor of Snow and Romero. Because force was used by them, she reviewed their conduct with regard to Darden and determined that the use of force was justified. Other supervisors in her chain of command also reviewed the incident and made the same determination. Doc. 77 at 54–55. The "Major Case Division" of City's police department conducted an investigation and jury, which declined to indict turned its finding over to a grand Snow. *Id.* at 80–81.

Defendant Snow has been employed as a police officer with City since January 5, 2004. He attended and completed training at the Fort Worth Police Academy in 2004 and has never received any form of discipline. Doc. 77 at 12. Snow believed that he acted in a manner consistent with his training and standard police practices in his dealings with

Darden. *Id.* at 21. Defendant Romero has been employed as a police officer since 2007. At the time of the incident, Snow and Romero had received hundreds of hours of training.[3] *Id.* at 68-79.

IV.

Analysis

City maintains that plaintiff cannot establish anything more than a isolated incident of alleged misconduct. Plaintiff admits that his burden is to show City's training procedures were inadequate, City was deliberately indifferent in adopting its training policy, and the inadequate training policy directly caused the violations in question. Doc. 95 at 11-12. Plaintiff must show how the particular training program is defective; an isolated violation does not support a failure to train. *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 170 (5th Cir. 2010). Further, if training procedures comply with state law, that factors against failure to train. *Id.* at 171; *Morris v. Dallas County*, 960 F. Supp. 2d 665, 685 (N.D. Tex. 2013).

A municipality's liability is at its most tenuous when a claim turns on failure to train. *Connick*, 563 U.S. at 61. It is not enough to show that an officer could have been better trained. *City of Canton v. Harris*, 489 U.S. 378, 390-91 (1989). A training program is adequate if it allows officers to respond properly to the usual and recurring situations with

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[3] At the time the motion for summary judgment was filed, records reflected that Romero had accrued 3113 hours and Snow 3516 hours of education and training. Doc. 77 at 73, 79.

which they must deal. *Id.* at 391. The issue is whether the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. *Id.* at 388. In other words, one officer's unsatisfactory training will not establish municipal liability because that officer's shortcomings or mistakes may have been caused by factors other than deficient training. *Morris*, 960 F. Supp. 2d at 685.

In this case, plaintiff points to training that it is acceptable to punch suspects in the face to jump to the conclusion that City's officers were not adequately trained as to use of force. Doc. 95 at 13, 15. Even assuming plaintiff could show that City's officers received training that it is acceptable to punch and kick people in the face for no reason--which is absolutely absurd—plaintiff has not shown how such training predictably caused Darden's death. *See Estate of Davis ex rel. McCully v. City of N. Richland Hills*, 406 F.3d 375, 385-86 (5th Cir. 2005).

Plaintiff also refers to lack of training about how to care for suspects who complain they cannot breathe or who are obese. *Id.* 12-14, 16. He also complains about failure to perform CPR on Darden. *Id.* at 13. But, as City points out, plaintiff did not plead that City had a policy, practice or custom of violating its citizens' constitutional rights by failing to train regarding rendering medical care. But, in any event, plaintiff has not pointed to any other incident in which an obese suspect died due to City's failure in any respect to train its officers. Pursuant to policy, an ambulance was stationed near the scene; when the taser was deployed, the ambulance was

called; and, a second call was made when officers realized Darden was in distress. Doc. 77 at 20, 92.

Finally, plaintiff seems to take the position that because he has an expert and City has an expert, there must be a fact issue for a jury to determine. However, the conclusion of plaintiff's expert that officers "utilized more force than the situation required," doc. 95 at 15, does not establish a genuine fact issue for trial. See Connick, 563 U.S. at 68 (proving that an injury could have been avoided through better training will not suffice).

Plaintiff does not address City's arguments regarding his inability to succeed on his state law claims, apparently conceding that City is entitled to sovereign immunity and there is no waiver of immunity for intentional torts. See Tex. Civ. Prac. & Rem. Code § 101.057(2); *Goodman v. Harris Cnty.*, 571 F.3d 388, 394 (5th Cir. 2009); *Texas Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 580 (Tex. 2001); *Univ. of Tex. Med. Branch v. York*, 871 S.W.2d 175, 177 (Tex.1994); *Duhart v. State*, 610 S.W.2d 740, 742 (Tex. 1980).

V.

Order

The court ORDERS that City's motion for summary judgment be, and is hereby, granted, that plaintiff take nothing on his claims against City, and that such claims be, and are hereby, dismissed.

The court determines that there is no just reason for delay in, and hereby directs, entry of final judgment as to the disposition of plaintiff's claims against City.

SIGNED December 10, 2018.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ERIC C. DARDEN, AS AMINISTRATOR OF THE ESTATE OF JERMAINE DARDEN,	§	
Plaintiff,	§	
	§	NO. 4:14-CV-221-A
v.	§	
THE CITY OF FORT WORTH TEXAS, et al.,	§	
Defendants	§	

[Filed December 10, 2018]

FINAL JUDGMENT AS TO CERTAIN DEFENDANT

Consistent with this Court's memorandum order and opinion signed this date,

The Court ORDERS, ADJUDGES, and DECREES that plaintiff Eric C. Darden, as Administrator for. the Estate of Jermaine Darden, take nothing on his claims against defendant City of Fort Worth ("City"), and that such clams be, and are hereby, dismissed with prejudice.

The Court further ORDERS, ADJUDGES, and DECREES that City have and recover its court costs from Plaintiff.

SIGNED December 10, 2018.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

MATTHEW J. KITA
ATTORNEY AND COUNSELOR AT LAW
LICENSED IN TEXAS AND CALIFORNIA

CERTIFICATE OF SERVICE

No. 20-____

ERIC C. DARDEN
Petitioner

v.

CITY OF FORT WORTH, TEXAS
Respondent

I, Matthew J. Kita, hereby certify that I served a copy of the Petition for Writ of Certiorari in the this Case via e-mail to counsel for Respondent below, this 21st day of September, 2020:

Mrs. Laetitia Coleman Brown:
laetitia.coleman@fortworthtexas.gov

Mr. Gerald Pruitt, Deputy City Attorney:
Gerald.Pruitt@FortWorthTexas.gov

All parties required to be served have been served.

I further declare under penalty of perjury that the foregoing is true and correct. This certificate is executed on September 21, 2020.

Respectfully submitted,

Matthew J. Kita
Counsel of Record
3110 Webb Avenue, Suite 150
Dallas, Texas 75205
(214) 699-1863
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MATTHEW J. KITA
ATTORNEY AND COUNSELOR AT LAW
LICENSED IN TEXAS AND CALIFORNIA

CERTIFICATE OF COMPLIANCE

No. 20-____

ERIC C. DARDEN
Petitioner

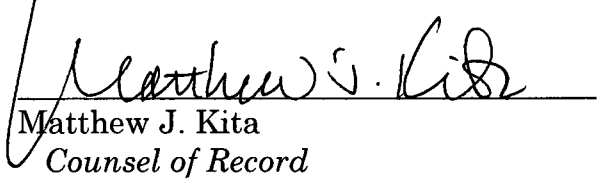
v.

CITY OF FORT WORTH, TEXAS
Respondent

As required by Supreme Court Rule 33.1(h), I certify that the Brief in Opposition to the Petition for Writ of Certiorari contains 4,688 words, excluding the parts of the Petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct. This certificate is executed on September 21, 2020.

Respectfully submitted,



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