United States Court of Appeals
for the Fifth Circuit

No. 20-40334

JUAN CARLOS SALAZAR,

Plaintiff—Appellee,

versus

JUAN RENE MOLINA, *Deputy, Zapata County Sheriff's Office*,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:16-cv-292

(Filed Jun. 16, 2022)

Before SMITH, ELROD, and OLDHAM, *Circuit Judges*.

ANDREW S. OLDHAM, *Circuit Judge*:

Juan Salazar led police on a high-speed chase through a residential neighborhood. After Salazar stopped his vehicle, a sheriff's deputy tased and handcuffed him. Salazar sued the deputy, arguing that the tasing violated his Fourth Amendment rights. At summary judgment, the district court denied qualified immunity to the deputy. We reverse and render.

I.

A.

This case involves a high-speed car chase, which officers captured on a dashcam video. We therefore "view[] the facts in the light depicted by the videotape." *Scott v. Harris*, 550 U.S. 372, 381 (2007); *see also Betts v. Brennan*, 22 F.4th 577, 582 (5th Cir. 2022) ("[W]e assign greater weight, even at the summary judgment stage, to the video recording taken at the scene." (quotation omitted)); *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011) ("A court of appeals need not rely on the plaintiff's description of the facts where the record discredits that description but should instead consider the facts in the light depicted by the videotape." (quotation omitted)).

Around 2:00 a.m. on March 1, 2014, a Zapata County sheriff's deputy tried to pull over Juan Carlos Salazar for speeding. Instead of stopping, Salazar accelerated and led police on a high-speed chase for approximately five minutes. At one point, Salazar traveled in excess of 70 miles per hour on a narrow residential street.

Eventually, two vehicles pulled in front of Salazar's path, blocking his way forward. Salazar abruptly stopped his vehicle. He quickly got out, dropped to his knees next to the car, and raised his hands. He then lay on the ground with arms above his head and legs crossed. Five seconds after stopping his car, Salazar was lying prone on the ground.

Just as Salazar finished lowering himself to the ground, Deputy Juan Molina brought his patrol car to a stop behind Salazar's vehicle. Molina exited his vehicle and ran toward Salazar. Salazar remained on the ground but uncrossed his legs two seconds before Molina got to him. Upon reaching Salazar—eight seconds after Salazar had stopped his car—Molina fired his taser at Salazar's back.

The video shows that Salazar tensed up and his upper body shook for approximately six seconds. Molina says he deployed his taser just once, shocking Salazar for one five-second cycle. Salazar contends that Molina kept his finger on the taser and triggered a second cycle, tasing Salazar for a total of ten seconds.

After the tasing, Molina removed the taser prongs from Salazar's back and handcuffed Salazar. Then he helped Salazar up and walked him to a patrol car. Salazar was back on his feet less than a minute after lying down next to his car.

B.

Salazar sued Molina, along with various other officers and governmental entities. As relevant to this appeal, Salazar alleged that Molina's use of the taser constituted excessive force and therefore violated his Fourth Amendment right against unreasonable seizures. *See* U.S. Const. amend. IV; *see also Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (incorporating the Fourth Amendment against the States). Salazar sought damages under 42 U.S.C. § 1983.

Molina moved for summary judgment on Salazar's excessive-force claim, arguing that he was entitled to qualified immunity. The district court denied Molina's motion. The court held there were material factual disputes as to whether a reasonable officer would have viewed Salazar as an immediate threat; whether Salazar's apparent surrender was a ploy to evade arrest; and whether Salazar was tased once or twice. The court also concluded that the "law on the excessive use of force as it applies to tasers was clearly established" at the time of the tasing.

Molina timely appealed the denial of his summary-judgment motion. Our review is *de novo*. *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019).

II.

Salazar seeks money damages from a law enforcement officer. To win them, he must overcome qualified immunity. That means he must show (A) that Molina violated his constitutional rights and (B) that the right at issue was "clearly established" at the time of the alleged misconduct. *Morrow*, 917 F.3d at 874. Salazar can't make either showing.

A.

The Fourth Amendment prohibits "unreasonable . . . seizures." Salazar concedes that Molina had the right to seize—*i.e.*, arrest—him after his high-speed flight from police. But Salazar contends that Molina's

seizure was unreasonable because Molina used excessive force.

In *Graham v. Connor*, 490 U.S. 386 (1989), the Court emphasized that our excessive-force inquiry must be fact-intensive. *See id.* at 396–97. It "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. We must also account for "the degree of force" the officer used, because "the permissible degree of force depends on the *Graham* factors." *Cooper v. Brown*, 844 F.3d 517, 524–25 (5th Cir. 2016) (quotation omitted). Moreover:

> 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.

Graham, 490 U.S. at 396–97.

The first *Graham* factor is "the severity of the crime at issue." *Id.* at 396. Salazar led police on a dangerous car chase through a residential area and was charged with the felony of evading arrest with a vehicle. The district court accordingly found that the

first *Graham* factor weighed against a finding of excessive force. It further noted that "leading law enforcement in a high-speed chase through a heavily populated area is a serious crime that puts at risk not only the lives of Plaintiff and the officers but also those of the general public." This finding comports with our cases, which have found far less dangerous offenses to be "serious" for purposes of the first *Graham* factor. *E.g.*, *Cooper*, 844 F.3d at 522 (DUI); *Brothers v. Zoss*, 837 F.3d 513, 519 (5th Cir. 2016) (DUI and interfering with the duties of a public servant). Salazar does not dispute the severity of his offense.

The second *Graham* factor is "whether the suspect poses an immediate threat to the safety of the officers or others." 490 U.S. at 396. Salazar argues that a jury could easily find that he posed no threat to anyone's safety when Molina tased him. That's so, on Salazar's view, because (1) Salazar was not suspected of a violent offense; (2) Salazar adopted a non-threatening position of surrender after exiting his vehicle; and (3) Molina could see Salazar's hands and tell that he was not wielding a weapon. The district court agreed and held that "there are genuine factual disputes as to whether [Salazar] posed an immediate threat to the safety of anyone at the scene."

We disagree because Salazar's position comports with neither common sense nor our precedent. First, as a matter of common sense, what preceded the surrender matters. A reasonable officer will have little cause to doubt the apparent surrender of a compliant suspect who has not engaged in dangerous or evasive

behavior. But when a suspect has put officers and bystanders in harm's way to try to evade capture, it is reasonable for officers to question whether the now-cornered suspect's purported surrender is a ploy. That's especially true when a suspect is unrestrained, in close proximity to the officers, and potentially in possession of a weapon.

Second, precedent forecloses Salazar's argument that Molina could no longer reasonably fear for his safety and justifiably use any force once Salazar purported to surrender. To the contrary, we've repeatedly refused to hold that "*any* application of force to a compliant arrestee is *per se* unreasonable." *Escobar v. Montee*, 895 F.3d 387, 394–95 (5th Cir. 2018) (quotation omitted); *Cooper*, 844 F.3d at 524. *Escobar* is instructive. There, an officer allowed his police dog to bite a suspect for a full minute—even after the suspect, "in an attempt to convey his surrender," "dropped his knife and la[id] flat on the ground 'like a parachute man.'" 895 F.3d at 390–91. We still granted the officer qualified immunity. That's because, despite the apparent surrender, other circumstances indicated the suspect might still be a threat. These included: (1) the suspect had committed a felony; (2) he had sought to evade police for 20 minutes; (3) it was nighttime; (4) the suspect had a knife within reach, even though he had dropped it; and (5) the officer had been warned that the suspect was dangerous. *See id.* at 394–95; *see also Crenshaw v. Lister*, 556 F.3d 1283, 1293 (11th Cir. 2009) (per curiam) (determining in similar circumstances that "[e]ven assuming, as we

must, that Crenshaw was legitimately attempting to surrender, it was objectively reasonable for Lister to question the sincerity of Crenshaw's attempt to do so" because Crenshaw "up to that point, had shown anything but an intention of surrendering").

As *Escobar* illustrates, a suspect cannot refuse to surrender and instead lead police on a dangerous hot pursuit—and then turn around, appear to surrender, and receive the same Fourth Amendment protection from intermediate force[1] he would have received had he promptly surrendered in the first place. Like *Escobar*, this case involves a fleeing felony suspect who eventually decided to surrender and was then temporarily subjected to intermediate force.

Salazar makes several attempts to distinguish *Escobar*, but none is persuasive. First, Salazar argues that unlike in *Escobar*, he didn't pose a threat to officers because he "unambiguously surrender[ed]" before being tased. But again, the rule is not that an "unambiguous surrender" negates any threat posed by a previously hostile suspect. If that were the case, *Escobar* would have come out the other way, because Escobar laid down with his hands visible and complied with the officer's commands before being bitten. *See* 895 F.3d at 394–95. Rather, the relevant inquiry is whether—despite the *appearance* of unambiguous surrender—"an officer [would] have reason to doubt the suspect's compliance and still perceive a threat." *Id.* at 395.

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[1] This broad category of non-deadly force includes weapons such as police dogs and tasers.

Second, Salazar relies on *Lytle v. Bexar County*, 560 F.3d 404 (5th Cir. 2009), where we stated that "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." *Id.* at 413; *see also Amador v. Vasquez*, 961 F.3d 721, 730 (5th Cir. 2020) (citing *Lytle* for this same principle). In *Lytle*, we denied qualified immunity to an officer who shot and killed a passenger in a vehicle driving away from the officer some three or four houses down a residential block. 560 F.3d at 412–13. Seconds earlier, the vehicle had been much closer and backing up toward the officer. But, we held, that didn't justify shooting at the vehicle after the vehicle was moving away from the officer and was several hundred feet away. *See id.* at 413–14.

Notably, *Lytle* reaffirmed that the relevant "justification for the use of force" is the officer's reasonable perception of a threat of harm. *Ibid.* And this does *not* always require that a suspect be actively resisting, fleeing, or attacking an officer at the precise moment force is used. *See id.* at 414 (noting that it's reasonable to use defensive force where insufficient time has elapsed "for the officer to perceive new information indicating the threat was past" (quotation omitted)). Instead, the relevant inquiry is whether the officer used a justifiable level of force in light of the continuing threat of harm that a reasonable officer could perceive. In *Lytle*, we said deadly force was unjustified because the vehicle was hundreds of feet away and driving away from the officer. *See ibid.*; *see also Amador*, 961 F.3d at 730 (similar analysis where

officers shot and killed a suspect standing motionless 30 feet away with his hands in the air). But that says little about the reasonableness of using a taser on a previously noncompliant suspect in close physical proximity to officers.

Finally, Salazar tries to distinguish *Escobar* on the facts. He correctly points out several factual differences between this case and *Escobar*—most significantly, Molina couldn't see a weapon nearby, and Molina had not been warned that Salazar was dangerous before the incident. But on the other hand, cartel activity near the scene and the presence of bystanders made the situation Molina confronted more dangerous than the one in *Escobar*. And the force deployed here was substantially less than that used in *Escobar*—a 10-second tasing before handcuffing rather than 60 seconds of dog biting that continued until the suspect was fully handcuffed. *See also Cooper*, 844 F.3d at 521 (denying qualified immunity where an officer subjected a DUI suspect who had previously fled on foot to more than a full minute of dog biting). Accordingly, Salazar's efforts to distinguish *Escobar* are unpersuasive, and that precedent reinforces our conclusion that the second *Graham* factor favors Deputy Molina.

The third *Graham* factor is "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." 490 U.S. at 396. The parties agree that the second and third *Graham* factors implicate the same facts, including whether Molina could have reasonably been concerned that Salazar's surrender was not genuine. *See Escobar*, 895 F.3d at 396 ("[T]he

third *Graham* factor . . . largely folds into the second. If [the suspect] may have posed a threat, then he also might have attempted to flee."). To the extent that there are considerations uniquely relevant to the third factor, they support the reasonableness of the tasing. Salazar had just spent five minutes "attempting to evade arrest by flight" in a highly dangerous manner. *Graham*, 490 U.S. at 396. And after stopping his car, Salazar quickly exited it without a command and looked toward an open area—rather than staying in his vehicle and awaiting a command. If anything, these facts made it just as reasonable for Molina to fear that Salazar still sought to escape as it was for Molina to fear that Salazar was a threat to his or others' safety. The third *Graham* factor thus also supports the reasonableness of Molina's use of his taser.

When Molina made the split-second decision to deploy his taser, Salazar had just committed a dangerous felony and was unrestrained at night in the open. Because of the preceding high-speed chase, Molina could reasonably be concerned about the sincerity of Salazar's purported surrender. And the totality of the force deployed—a 10-second tasing—was comparatively modest and not grossly disproportionate to the threat Molina could have reasonably perceived. We hold that Molina's conduct did not amount to an unreasonable seizure under the Fourth Amendment.

B.

On the undisputed facts before us, Salazar cannot show that Molina violated his Fourth Amendment

rights. But even if he could, Molina would nonetheless be entitled to qualified immunity because Salazar can't show a violation of clearly established law.[2] We (1) explain what it takes to show clearly established law, and then we (2) hold that Salazar hasn't made that showing.

1.

Qualified immunity allows law enforcement officers to avoid personal liability and the burdens of defending suit unless their conduct violates a clearly established constitutional right. It "protects all but the plainly incompetent or those who knowingly violate the law." *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021) (per curiam) (quotation omitted). To overcome a qualified immunity defense, the "plaintiff has the burden to point out clearly established law" and also "bears the burden of raising a fact issue as to its violation." *Tucker v. City of Shreveport*, 998 F.3d 165, 173 (5th Cir. 2021) (quotation omitted).

"[T]he Supreme Court has repeatedly instructed that clearly established law is *not* to be defined at a high level of generality. This is particularly true in recent years." *Ibid.* A panel of our court wrote those words in May 2021. Five months later, the Supreme Court reinforced that instruction in two strongly worded summary reversals holding that defendants

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[2] "This circuit follows the rule that alternative holdings are binding precedent and not obiter dictum." *Jarkesy v. SEC*, 34 F.4th 446, 459 n.9 (5th Cir. 2022) (quotation omitted).

in excessive-force § 1983 suits were entitled to qualified immunity because their conduct did not violate clearly established law. The first, *City of Tahlequah*, reiterated:

> We have repeatedly told courts not to define clearly established law at too high a level of generality. It is not enough that a rule be suggested by then-existing precedent; 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.

142 S. Ct. at 11 (quotation omitted). The second case, *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021) (per curiam), explained:

> A right is clearly established when it is sufficiently clear that every reasonable official would have understood that what he is doing violates that right. Although this Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition.

Id. at 7–8 (quotation omitted).

"Specificity is especially important in the Fourth Amendment context, where it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Id.* at 8 (quotation omitted). "Use

of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam) (quotation omitted). So "to show a violation of clearly established law, [Salazar] must identify a case that put [Molina] on notice that his specific conduct was unlawful." *Rivas-Villegas*, 142 S. Ct. at 8. As we put it in another excessive-force case involving a high-speed chase, "the law must be *so* clearly established that—in the blink of an eye, in the middle of a high-speed chase—every reasonable officer would know it immediately." *Morrow*, 917 F.3d at 876.

Salazar frames the applicable inquiry somewhat differently. He points to *Hope v. Pelzer*, 536 U.S. 730 (2002), an Eighth Amendment case, as well as Fifth Circuit decisions that relied on *Hope* and predated *City of Tahlequah* and *Rivas-Villegas*. For example, Salazar relies on *Ramirez v. Martinez*, 716 F.3d 369 (5th Cir. 2013), which emphasized *Hope*'s statement that law can be clearly established "despite notable factual distinctions between the precedents relied on and the cases then before the Court." *Id.* at 379 (quotation omitted). Salazar similarly relies on *Amador*, which quoted *Hope* for the propositions that "[t]he salient question is . . . fair warning" and "[g]eneral statements of the law are not inherently incapable of giving fair and clear warning" to officers. *Amador*, 961 F.3d at 729–30 (quoting *Hope*, 536 U.S. at 741) (alteration omitted).

Salazar is correct to some extent. It's true *Hope* established that a plaintiff need not identify an on-point case to overcome qualified immunity when a violation is "obvious." 536 U.S. at 741; *see also Kisela*, 138 S. Ct. at 1153. But Salazar does not argue that this case is obvious. Accordingly, Molina is "entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela*, 138 S. Ct. at 1153. Moreover, Salazar must identify precedent placing the constitutional question "beyond debate" such that the answer would immediately be apparent to every reasonable officer. *Rivas-Villegas*, 142 S. Ct. at 8; *see also Morrow*, 917 F.3d at 876–77.

2.

We proceed to consider whether Salazar has made the required showing to overcome qualified immunity. By citing no factually similar Supreme Court cases, Salazar effectively concedes that Supreme Court precedent offers him no help. He turns instead to Fifth Circuit excessive-force cases. Even on the assumption that Fifth Circuit precedent can create clearly established law, *see Rivas-Villegas*, 142 S. Ct. at 7 (assuming the proposition), none of Salazar's cases is a close enough fit.

Three of Salazar's cases are unpublished and non-precedential. *See Clark v. Massengill*, 641 F. App'x 418 (5th Cir. 2016); *Byrd v. City of Bossier*, 624 F. App'x 899 (5th Cir. 2015) (per curiam); *Anderson v. McCaleb*, 480 F. App'x 768 (5th Cir. 2012) (per curiam). For a right to

be clearly established, however, "existing *precedent* must have placed the statutory or constitutional question beyond debate." *Rivas-Villegas*, 142 S. Ct. at 8 (emphasis added) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017)). "Because nonprecedential opinions do not establish any binding law for the circuit, they cannot be the source of clearly established law for qualified immunity analysis." *Marks v. Hudson*, 933 F.3d 481, 486 (5th Cir. 2019) (quotation omitted); *see also Bell v. City of Southfield*, ___ F.4th ___, ___ (6th Cir. 2022) (Thapar, J.) (holding that "a plaintiff cannot point to unpublished decisions" to show clearly established law).

Salazar's fourth case, *Poole v. City of Shreveport*, 691 F.3d 624 (5th Cir. 2012), cannot clearly establish the law because the court found no Fourth Amendment violation. *Id.* at 629; *see Nerio v. Evans*, 974 F.3d 571, 575 (5th Cir. 2020) ("[T]o clearly establish the violative nature of an officer's conduct, a prior decision must at least hold there was some violation of the Fourth Amendment."). His fifth case, *Amador*, was decided in 2020 and addressed a 2015 incident. 961 F.3d at 724. So *Amador* cannot show clearly established law at "the time of the violation" Salazar alleges here—March 1, 2014. *Id.* at 727; *see also Kisela*, 138 S. Ct. at 1154 ("[A] reasonable officer is not required to foresee judicial decisions that do not yet exist in instances where the requirements of the Fourth Amendment are far from obvious."). And Salazar's sixth case, *Peña v. City of Rio Grande City*, 879 F.3d 613 (5th Cir. 2018), is irrelevant

because the court did not address the issue of qualified immunity. *Id.* at 621.[3]

Two more of Salazar's cases do not involve tasing or fleeing; Salazar instead relies on them for general statements of the law governing excessive-force claims. *See Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008) (applying the *Graham* factors to deny qualified immunity to an officer who "forcefully slam[med arrestee's] face into a vehicle while she was restrained and subdued"); *Deville v. Marcantel*, 567 F.3d 156, 168 (5th Cir. 2009) (applying the *Graham* factors to deny qualified immunity on an excessive-force claim where an officer, after "very little, if any, negotiation" with an arrestee, "resorted to breaking her driver's side window and dragging her out of [her] vehicle"). From these cases, Salazar infers a rule that an officer violates clearly established law if he uses intermediate force before negotiating when a suspect is restrained, subdued, and not fleeing. This rule, even if correct, wouldn't apply here because Salazar wasn't restrained when he was tased. Just as importantly, positing this kind of general rule is insufficient to show

[3] Even if the threshold barriers to considering these six cases could be overcome, it's doubtful that any involves sufficiently similar facts to this case to clearly establish that Molina's conduct was unlawful. Two of them—*Massengill* and *Anderson*—involved the use of a taser against a previously fleeing suspect. But both cases involved far more extreme uses of force than here. *See Massengill*, 641 F. App'x at 421 (suspect had already been bitten repeatedly by a police dog and submitted before the tasing); *Anderson*, 480 F. App'x at 769 (suspect tased five or six times, hit with a closed fist, and slammed on the ground—all after attempting to surrender).

clearly established law. *See Kisela*, 138 S. Ct. at 1153 ("[O]fficers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." (quotation omitted)).

That leaves Salazar with four cases: *Ramirez*; *Carroll v. Ellington*, 800 F.3d 154 (5th Cir. 2015); *Newman v. Guedry*, 703 F.3d 757 (5th Cir. 2012); and *Darden v. City of Fort Worth*, 880 F.3d 722 (5th Cir. 2018). The key question is whether those decisions would have made it clear to every reasonable officer that he could not tase Salazar in the specific circumstances Molina confronted. *See Morrow*, 917 F.3d at 876.

According to Salazar, *Ramirez* establishes that tasing a suspect who is not actively resisting is unlawful. *Ramirez* involved the execution of an arrest warrant for Reynaldo Ramirez's sister-in-law at Ramirez's business. 716 F.3d at 372. Ramirez arrived at his business while the warrant was being executed and began arguing with a deputy. *Ibid.* The deputy told Ramirez to turn around and put his hands behind his back; when Ramirez refused, the deputy tased him and (with the help of other deputies) forced him to the ground. *Id.* at 372–73. The deputy restrained him and then "tased Ramirez a second time while lying face-down on the ground in handcuffs." *Id.* at 373. The court found that the deputy was not entitled to qualified immunity, relying primarily on the fact that "a reasonable officer could not have concluded Ramirez posed an immediate threat to the safety of the officers by questioning their presence at his place of business

or l[y]ing on the ground in handcuffs." *Id.* at 378. Although *Ramirez* also involved the tasing of a suspect resisting arrest, the facts in that case are not similar enough to those here. Unlike here, Ramirez found deputies at his business and questioned them—he did not lead officers on a dangerous high-speed car chase. And unlike here, the officers tased Ramirez even after he was restrained with handcuffs. Both distinctions are material to the *Graham* analysis, which considers the severity of the crime at issue and the threat posed by the suspect. *Ramirez* thus does not show that any reasonable officer would have known tasing Salazar under these circumstances was unlawful.

Salazar's reliance on *Carroll* is similarly misplaced. In *Carroll*, an officer followed Herman Barnes into his home because he suspected Barnes of vandalizing mailboxes. 800 F.3d at 162–63. When Barnes refused to get onto the ground, that officer and subsequently arriving officers engaged in a long struggle to subdue Barnes, including 35 taser cycles and numerous strikes. *Id.* at 165–66. Barnes died after the altercation. *Id.* at 166. The court granted the officers qualified immunity for the force used before "Barnes was tackled to the ground, handcuffed, and held down and surrounded by several deputies." *Id.* at 176; *see also id.* at 174–76. But because there was a fact issue as to whether the use of force persisted after that point, the court found that "the deputies are not entitled to qualified immunity as a matter of law for injuries Barnes sustained after he was handcuffed and restrained and after he stopped resisting arrest." *Id.* at 177. As with *Ramirez, Carroll*

does not support Salazar's position because Salazar was not subjected to the use of additional force after he was handcuffed and subdued.

Salazar's next case is *Newman*. Derrick Newman was a passenger in a vehicle that was pulled over for failing to yield. 703 F.3d at 759. An officer discovered that a different passenger in the car had an outstanding warrant for unpaid traffic tickets and began to arrest him. *Ibid.* Newman exited the car and consented to a protective pat-down search. *Id.* at 759–60. On Newman's telling, he complied with all commands, but after he merely made an off-color joke, the officers beat him 13 times with a baton and tased him three times. *Id.* at 760. This court held that the officers were not entitled to qualified immunity, noting that "[n]one of the *Graham* factors justifie[d] . . . tasering Newman." *Id.* at 764. Specifically, "on Newman's account, he committed no crime, posed no threat to anyone's safety, and did not resist the officers or fail to comply with a command." *Ibid.* Because *Newman* involved a plaintiff who committed no crime and obeyed all commands, that case cannot clearly establish that using a taser was unlawful in the circumstances Molina confronted here.

Salazar's last case is *Darden*. In that case, while making an arrest at a private residence, "officers allegedly threw [the arrestee] to the ground, tased him twice, choked him, punched and kicked him in the face, pushed him into a face-down position, pressed his face into the ground, and pulled his hands behind his back to handcuff him." *Darden*, 880 F.3d at 725. As a result,

the arrestee had a heart attack and died during the arrest. *Ibid.* The force used in *Darden*—causing the death of the arrestee—is obviously much more extreme than the 10-second tasing at issue here. Moreover, the arrestee in *Darden* "was not suspected of committing a violent offense." *Id.* at 729 (quoting *Cooper*, 844 F.3d at 522). Given that Molina encountered a more threatening situation—outside at night, with a suspect who had just committed a dangerous felony—and used far less force, *Darden* cannot clearly establish that Molina's conduct in these specific circumstances was unlawful.

To generalize a bit, all four of Salazar's tasing-related cases share two characteristics that make them materially different from this case. First, they all involved far less-threatening circumstances than here—in none of them was the plaintiff suspected of a dangerous felony, and in two of them the plaintiff was suspected of no crime at all. Nor had the plaintiff just attempted to flee from officers. Second, all four involved far more force than was deployed here—so much force, in fact, that it killed two of the arrestees. Salazar points to no case where officers used a similar level of force in similarly threatening circumstances. And because this is an excessive-force case that required a split-second judgment, Salazar can only win if "the law [was] *so* clearly established that—in the blink of an eye, in the middle of a high-speed chase—every reasonable officer would know it immediately." *Morrow*, 917 F.3d at 876. Salazar cannot meet that burden, so Molina is entitled to qualified immunity.

* * *

The judgment of the district court is REVERSED, and judgment is RENDERED for Deputy Molina.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

JUAN CARLOS SALAZAR,	§	
Plaintiff,	§	**CIVIL ACTION**
VS.	§	**NO. 5:16-CV-292**
ZAPATA COUNTY TEXAS, *et al*,	§	(Filed Apr. 23, 2020)
Defendants.	§	

MEMORANDUM & ORDER

This civil rights suit was brought by Plaintiff Juan Carlos Salazar for injuries he allegedly suffered in a March 1, 2014 tasing (hereinafter "tasing incident") by a Zapata County Sheriff's Deputy. (Dkt. 1.) On December 11, 2015, Plaintiff filed his *pro se* complaint pursuant to 42 U.S.C. § 1983, naming as Defendants Zapata County, Texas; Sheriff of Zapata County; "unknown deputy" who tased Plaintiff; and "other unknown Deputies of Zapata County[,] Texas on scene at the time [he] was tased." (*Id.*) Upon Court order[1] (Dkt. 5), Plaintiff filed a more definite statement of his complaint on February 5, 2016 (Dkt. 9). There, he

[1] Plaintiff initially filed suit in the Houston Division of the Southern District of Texas. (Dkt. 1 at 1.) The case was transferred to this Court in September of 2016 because "all of the events or omissions alleged by Plaintiff took place in Zapata County, . . . within the Laredo Division of the Southern District of Texas." (Dkt. 11 at 2.)

identified the "unknown deputy" who tased him as Deputy Juan Rene Molina. (*Id.* at 4.)

On March 13, 2018—four years after the tasing incident—Plaintiff filed his first amended complaint (Dkt. 71) naming as Defendants Zapata County, Texas; Zapata County Sheriff Alonso Lopez; Chief Deputy Raymundo Del Bosque, Jr.; Deputy Juan Rene Molina, Jr.; Game Warden Steven Ramos; Deputy Adrian Lopez; Jesus Hinojosa; Erasmo Maldonado; Julian Delgado, Jr.; and Erica Saenz. Since then, Defendants Adrian Lopez and Steven Ramos have been terminated from the case. (Dkts. 101, 148.) Now pending is the remaining Defendants' sealed "Motion for Judgment on the Pleadings and Motion for Summary Judgment" (Dkt. 166).[2] Defendants move for judgment on Plaintiff's first amended complaint (Dkt. 71), arguing that there are insufficient facts to establish that Plaintiff's claims relate back to Plaintiff's original complaint (Dkt. 1) and are thus barred by the statute of limitations. (Dkt. 166 at 3.) Specifically, Defendants argue that Defendants Del Bosque, Hinojosa, Maldonado, Delgado, and Saenz should be struck because they were named after the statute of limitations expired. (*Id.* at 6.) Further, Defendants argue that Plaintiff's denial of medical treatment, municipal liability, and negligence claims should be struck because the

[2] The Magistrate Judge granted Defendants' request to file their motion under seal (Dkt. 161) because attached exhibits included Plaintiff's confidential medical records, the disclosure of which would violate Texas law and the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

two-year statute of limitations expired for these causes of action for all Defendants, including Molina. (*Id.*) Finally, Defendants move for summary judgment on all claims based on the defenses of qualified immunity, official immunity, and sovereign immunity. (*Id.*)

For reasons discussed in detail below, the Court finds that (1) Plaintiff's newly added claims against Defendants Zapata County, Sheriff Lopez, and Molina relate back to the original complaint; (2) Plaintiff's claims against newly added Defendant Del Bosque do not relate back to the original complaint; (3) Plaintiff's newly added denial of medical care claim against Defendants Hinojosa, Maldonado, Delgado, and Saenz is time-barred; (4) there is a genuine dispute of material fact as to Plaintiff's excessive force claim against Molina; (5) Plaintiff fails to establish a denial of medical care claim against Molina; (6) Plaintiff fails to establish a municipal liability claim against Zapata County and Sheriff Lopez; and (7) Plaintiff fails to establish a negligence claim against Zapata County. Therefore, "Defendants' Motion for Judgment on the Pleadings and Motion for Summary Judgment" (Dkt. 166) should be granted in part and denied in part.

Background

A. The March 1, 2014 Tasing Incident

In the early hours of March 1, 2014,[3] Plaintiff was driving a vehicle borrowed from a friend when Chief

[3] According to Plaintiff's arrest record, Plaintiff was eventually arrested that day at approximately 2:23 a.m. (Dkt.

Deputy Raymundo Del Bosque attempted to stop him. (Dkt. 166 at 11; Dkt. 169 at 5.) The reason why this traffic stop was initiated is disputed. Defendants' contend that Del Bosque observed Plaintiff "traveling at a speed higher than the speed limit." (Dkt. 166 at 11; Dkt. 166, Ex. B at 14–15.) However, Plaintiff claims that he noticed Del Bosque's police vehicle in a hotel parking lot alongside the highway. (Dkt. 170, Ex. 5 at 23)[4] At that time, Plaintiff avers that (1) he was neither speeding nor committing any other traffic infraction; (2) the vehicle's license plates were not expired; (3) the vehicle's lights were fully functional; (4) his vehicle did not contain contraband or weapons of any kind; and (5) he was not intoxicated.[5] (Dkt. 71 at 5.) Upon noticing the marked police vehicle, Plaintiff alleges he checked that he was driving below the speed limit. (Ex. 5 at 22, 35.) When Del Bosque's police vehicle "got behind" Plaintiff's vehicle—with its emergency lights and sirens activated—Plaintiff claims that he "panicked"

166, Ex. B at 14–15.) There is a typographical error on the report stating that the arrest took place on "Saturday, March 4, 2014," instead of "Saturday, March 1, 2014." (*Id.* at 13.)

[4] Plaintiff's summary judgment evidence was filed as Exhibits 1 through 25 to Docket No. 170. Accordingly, the Court will refer to these filings by exhibit number only. Further, the Court did not consider Plaintiff's Exhibits 16, 17, 18, 19, 20, and 21, which were previously struck from the record. (*See* Dkt. 188 at 7.)

[5] Plaintiff testified that, earlier, he went to meet a woman at Aqua Restaurant & Bar in Zapata, Texas. (Ex. 5 at 140.) He stated he had "a couple of beers" but was not intoxicated. (*Id.* at 14041.) Officers who were at the scene testified that, later upon Plaintiff's arrest, they could smell alcohol on his person. (*See* Ex. 8 at 37; Ex. 22 at 14.)

and "took off." (*Id.* at 36; *see* Dkt. 71 at 4–5.) Del Bosque requested assistance, and Deputy Juan Rene Molina responded. (Dkt. 166 at 11; *see* Ex. 6 (hereinafter "Vid.") at 2:46.)[6]

Parties agree that Plaintiff subsequently evaded the police, resulting in a high-speed chase.[7] (Dkt. 166 at 11; Dkt. 169 at 5; *see* Vid. at 4:54–6:06.) Plaintiff himself concedes he "tried to escape." (Dkt. 169 at 5; *see* Ex. 5 at 36.) Eventually, two vehicles pulled in front of Plaintiff's vehicle, blocking his path.[8] (Dkt. 2 at 5; Vid. at 6:06.) Plaintiff stopped his vehicle on the side of the road, exited, dropped to his knees, and raised his hands. (Dkt. 166 at 11; Dkt. 169 at 5; Vid. at 6:06–08.) Plaintiff claims that he was shouting, "I'm not resisting. Please don't tase me! I have asthma!" (Dkt. 2 at 6–7; Dkt. 169 at 6; *see* Ex. 5 at 40, 44.) He then placed his hands on the ground and lowered his body to the ground. (Vid. at 6:10.) He immediately spread

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[6] "Vid." refers to a 19-minute-and-27-second video from the dashboard camera of Molina's vehicle, depicting the chase and subsequent tasing incident. (Ex. 6.) The timestamps are in minute:second format. The video does not include any audio. (*See* Ex. 1 at 23 (confirming that no audio can be heard); Ex. 5 at 44 (same); Ex. 8 at 43 (same).) Additionally, the video quality makes it difficult at times to discern what is happening.

[7] The police report completed by Molina and Del Bosque indicate that Plaintiff was driving at "speeds in excess of 70 miles per hour." (Dkt. 166, Ex. B at 14.)

[8] One vehicle, a red pickup truck, belonged to David Moya, a civilian. (Ex. 8 at 31, 41.) The other belonged to Game Warden Steven Ramos. (*Id.* at 40.) Molina testified that when the chase came to an abrupt halt, he did not know who was in the red pickup truck that had stopped at the scene. (*Id.* at 31, 41.)

his arms and placed them on the ground above his head. (*Id.*)

Then, for a brief moment (less than a second), Plaintiff crossed and uncrossed his legs.[9] (*Id.* at 6:10–11.) Defendants claim that this movement prompted Molina's "split-second decision to deploy . . . the taser."[10] (Dkt. 166 at 11.) Plaintiff alleges that Molina "ran up to [Plaintiff], shouted "'*Por pendejo!*'[11] . . . and shot [Plaintiff] with a Taser." (Dkt. 169 at 7.) The prongs of the taser struck Plaintiff in the back, causing Plaintiff to "jerk and writhe" on the ground. (Dkt. 71 at 8–9; *see* Vid. at 6:13–20.) After approximately ten seconds, Plaintiff became motionless on the ground.[12] (*See* Vid. at 6:23.)

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[9] Defendants allege that "Plaintiff uncrossed his feet as the law enforcement officers were approaching *and raised up.*" (Dkt. 166 at 11 (emphasis added).) It is unclear as to what was allegedly being "raised up." (*See* Vid. at 6:10–12; *compare* Dkt. 166, Ex. 6 (Report of Defendants' Expert Margo Frasier) *with* Ex. 9 at 2–3 (Rebuttal Report of Plaintiff's Expert Anthony Winterroth).) In his deposition, Molina testified that "It looks like he's reaching up. . . . With his body. . . . It looked like he's pushing up." (Ex. 8 at 44–45; *see* Vid. at 6:14.)

[10] Molina testified that he does not remember the tasing itself: "I just remember just holstering my taser and putting the handcuffs on [Plaintiff] and then I just walked him to the unit." (Ex. 8 at 31–32, 45.)

[11] Plaintiff translates "*Por pendejo!*" as "For being stupid!" (Dkt. 169 at 7.) Plaintiff also states that Molina shouted in Spanish, "You're not that slick, motherfucker!" (Dkt. 9 at 4; Dkt. 71 at 8.)

[12] It is unclear how long the tasing lasted. (*See* Ex. 5 at 41 (stating that the tasing "seemed [like] forever"); Ex. 8 at 31–32.) Molina expressly denied holding the trigger down but when asked

Molina proceeded to handcuff Plaintiff, lift him off the ground, and walk him to the police vehicle.[13] (*See id.* at 6:22–7:15.) Plaintiff alleges that Molina leaned him against the vehicle and told him, "Hold on, Salazar, this is going to hurt" before proceeding to "yank[] the Taser probes from his back, causing pain."[14] (Dkt. 169 at 7; *see* Ex. 5 at 41.) Molina then placed Plaintiff in the vehicle of Deputy Omar Saldaña to be transported to Zapata County Regional Jail.[15] (Dkt. 166 at 11; Dkt. 169 at 7–8; *see* Vid. at 11:36–48.)

Approximately two to three minutes after Molina removed the taser probes, Del Bosque arrived on the scene in a separate vehicle. (Dkt. 71 at 12; *see* Vid. at

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if he pulled the trigger a second time after releasing it, he replied, "Not that I remember." (Ex. 8 at 47.) Witness David Moya estimated, based on his experience and review of the video, that the tasing lasted ten seconds. (Ex. 7 at 21.)

[13] According to Molina, Plaintiff appeared "calm, very drunk, very intoxicated," but Plaintiff was neither given a field sobriety test nor charged with driving while intoxicated. (Ex. 8 at 36–37.) Molina testified that Plaintiff was only charged with evading arrest because Del Bosque "talked to [Plaintiff] and cut him a break." (*Id.*) Del Bosque, on the other hand, testified that Plaintiff "didn't seem intoxicated" when he arrived at the scene of the arrest. (Ex. 4 at 40 (noting Plaintiff "always looks like he's in a daze" and "that's the way he's been since school").)

[14] Molina, on the other hand, testified that they did not say anything to each other during this time and that he did not tug hard when removing the taser probes. (Ex. 8 at 47–48.)

[15] In "Plaintiff's First Amended Complaint," Plaintiff incorrectly identifies the officer who drove him to the jail as former Defendant Adrian Lopez. (Dkt. 71 at 12.) The officer has since been identified as Deputy Omar Saldafia, who is not a party to this case. (Ex. 8 at 51; Ex. 22 at 14.)

8:44.) Officers searched Plaintiff's vehicle, including the trunk. (Vid. at 9:40–10:30; *see* Ex. 8 at 49.) No contraband was found in the vehicle or on Plaintiff's person, other than two open beer containers in the vehicle. (Ex. 5 at 38, 47; Ex. 8 at 52, 53–54; Ex. 22 at 10; *see* Vid. at 13:50–14:00.)

According to Plaintiff, during this time "within eyesight and earshot of Defendants Molina, Ramos, Adrian Lopez, and Del Bosque, [Plaintiff] struggled to breath[e]." (Dkt. 71 at 12.) Plaintiff claims that "despite witnessing his obvious distress and knowing about his asthma," Defendants did not take any action to ensure he received adequate medical treatment. (*Id.*) It is undisputed that Plaintiff was not provided medical treatment at the time of his arrest. However, Defendants claim that Plaintiff was neither coughing nor wheezing, and that he did not request any medical treatment. (*See* Ex. 4 at 40.)

B. Booking and Detention at Zapata County Regional Jail

At the jail, Plaintiff was booked on the charge of evading arrest. (Ex. 11 at 1; *see* Dkt. 166 at 11; Ex. 5 at 38.) Plaintiff alleges that the booking officer, Defendant Hinojosa, saw Plaintiff's wounds and exclaimed, "That's messed up what they did to you." (Dkt. 71 at 13.) Hinojosa took photographs of the taser wounds on Plaintiff's back. (*Id.*; Ex. 12 at 23; *see* Ex. 11 at 4 (photo of taser wounds).) Plaintiff claims that

he complained about the wounds but Hinojosa did not treat them. (Dkt. 71 at 13; *see* Ex. 5 at 20–21.)

During booking, Defendants Maldonado and Delgado searched Plaintiff, who complained about his pain and difficulties with breathing. (Dkt. 71 at 13.) They did not provide medical assistance.[16] (*Id.*) Plaintiff was then placed in a holding cell with several other individuals. (*Id.*)

At some point, a nurse—Defendant Saenz—entered the cell and wiped the blood from Plaintiff's back. (*Id.*) While she was doing this, Plaintiff said, "Please help me. I have a bad back and bad asthma." (*Id.*) Plaintiff claims Saenz took photographs of his wounds and provided him a mattress but did not otherwise treat his wounds or asthma. (*Id.*)

Plaintiff claims that he remained on his mattress in the cell for approximately five days, during which "he could barely move or speak and could not eat the meals the facility officers provided." (*Id.* at 14) Plaintiff

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[16] Plaintiff alleges that despite his "persistent complaints about his pain and asthma . . . [Deputy] Saldaña[ ] signed a 'Medical Clearance Certification' stating that [Plaintiff] 'indicated that he [was] not in need of medical treatment." (Dkt. 71 at 13; *see* Dkt. 166, Ex. B at 19 ("Medical Clearance Certification") While there is evidence that at least some medical care was provided, Plaintiff alleges it was inadequate. In his deposition, Plaintiff testified, "When I first got [to the jail] I remember . . . they sat me there and they put me in the cell, and they came and wiped off my wounds and gave me a Benadryl." (Ex. 5 at 21.) Plaintiff stated that the jailers should have called the paramedics for his back and asthma. Plaintiff did not tell jailers to call the paramedics; he "was just asking for help." (*Id.*)

alleges that medical treatment was not provided at any point. (*Id.*)

C. The Tasing Video

Approximately two months after the tasing incident, in April or May of 2014, Deputy Aaron Sanchez and former Sheriff Sigifredo Gonzalez approached Plaintiff at his home.[17] (Dkt. 71 at 14–15; Ex. 5 at 23.) Sanchez told Plaintiff that the Zapata County Sheriff's Office violated his rights and that he had witnessed other officers at the police station laughing at a video of the tasing incident. (*Id.*; *see* . 2 at 4–5.) Gonzalez informed Plaintiff that the deputies of the Zapata County Sheriff's Office have committed similar acts of excessive force, referring to at least four similar incidents that occurred since Defendant Alonso Lopez was elected as Sheriff in 2013. (Dkt. 71 at 15.) Based on statements from Sanchez, Plaintiff further alleges that there was more than one video of the tasting incident, and that these other videos have been erased either at the direction of or by Sheriff Lopez himself.[18] (*See* Dkt. 1 at 4; Dkt. 9 at 3; Ex. 5 at 23.)

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[17] In Plaintiff's more definite statement, Plaintiff identifies the individual who notified him about the tasing video as "Aaron Solis." (Dkt. 9 at 3–4.) This appears to have been a misnomer. (*See* Ex. 5 at 23 (identifying the person who approached Plaintiff as "Aaron Sanchez").)

[18] According to Plaintiff, Aaron Sanchez told Plaintiff that the videos of his tasing had been erased. (*See* Ex. 5 at 23.)

Legal Standards

A. Judgment on the Pleadings

The standard for dismissal of a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is the same as that for dismissal for failure to state a claim under Rule 12(b)(6). *Bosarge v. Mississippi Bureau of Narcotics*, 796 F.3d 435, 439 (5th Cir. 2015) (citing *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004)). "The central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief." *Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010) (citing *Doe v. MySpace Inc.*, 528 F.3d 413, 418 (5th Cir. 2008)). Although a court must accept the factual allegations in the pleadings as true, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *MySpace*, 528 F.3d at 418 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007)).

B. Summary Judgment

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit." *Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir. 2000) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A dispute as to a material fact is "genuine" if

"the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." *Id.*

The movant may satisfy its initial burden by merely pointing out the absence of evidence supporting the nonmovant's case. *Duffle v. United States*, 600 F.3d 362, 371 (5th Cir. 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). The burden then shifts to the nonmovant to establish a genuine fact issue. *Lincoln Gen. Ins. Co. v. Reyna*, 401 F.3d 347, 349 (5th Cir. 2005). The nonmovant must go beyond the pleadings and identify specific evidence in the record supporting its position. *Id.* at 349–50. Conclusory allegations, unsubstantiated assertions, and improbable inferences are insufficient to defeat a motion for summary judgment. *See Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996) (per curiam); *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994). However, a "court must consider the evidence in the light most favorable to the non-movant, and any reasonable inferences are to be drawn in favor of that party." *Distribuidora Mari Jose, S.A. de C.V. v. Transmaritime, Inc.*, 738 F.3d 703, 706 (5th Cir. 2013). Further, "[e]vidence on summary may be considered to the extent not based on hearsay or other information excludable at trial." *Fowler v. Smith*, 68 F.3d 124, 126 (5th Cir. 1995); *see* Fed. R. Civ. P. 56(c); *see also Smith v. Palafox*, 728 F. App'x 270, 274 (5th Cir. 2018) ("As a general matter, the competent evidence of the summary judgment nonmovant is to be accepted and credited." (modifications omitted)).

Discussion

I. Procedural Claims and Motion for Judgment on the Pleadings

A. Statute of Limitations

As a preliminary matter, the Court considers Plaintiff's "Answer for a More Definite Statement" (Dkt. 9) to be an amendment to his original complaint (Dkt. 1) and thus, part of the pleadings for the purposes of the analysis below. (*See* Dkt. 136 at 6.) *See also Haines v. Kerner*, 404 U.S. 519, 520 (1972) (noting that a *pro se* complaint is held to "less stringent standards than formal pleadings drafted by lawyers"); *Gilbert v. French*, 364 F. App'x 76, 80 (5th Cir. 2010) ("[P]leadings filed by a *pro se* litigant are entitled to a liberal construction that affords all reasonable inferences which can be drawn from them.").

In "Plaintiff's First Amended Complaint" (Dkt. 71), filed on March 13, 2018, Plaintiff added the following claims:

- denial of medical care claim against Defendants Molina, Ramos, Adrian Lopez, Del Bosque, Hinojosa, Maldonado, Delgado, and Saenz;
- municipal liability claim against Defendants Zapata County, Sheriff Lopez, and Del Bosque; and
- negligence claim under Texas tort law against Defendant Zapata County.

(Dkt. 71 at 23–30.) Parties stipulated to the dismissal of Adrian Lopez on July 24, 2018 (*see* Dkts. 100–01), and the Court terminated Ramos as a defendant on February 21, 2019 after granting his motion to dismiss (*see* Dkts. 81, 148).

Defendants move for judgment on the pleadings as to the claims against Defendants Del Bosque, Hinojosa, Maldonado, Delgado, and Saenz, who were added to the suit after the two-year statute of limitations expired. (Dkt. 166 at 6.) *See* Fed. R. Civ. P. 12(c); Tex. Civ. Prac. Rem. Code § 16.003(a). Defendants also move to strike the additional causes of action for denial of medical care, municipal liability, and negligence because these were added after the two-year statute of limitations expired for all Defendants, including Molina.[19] (Dkt. 166 at 6.) While Plaintiff does not dispute that the denial of medical care claim against Defendants Hinojosa, Maldonado, Delgado, and Saenz (collectively "Jailer Defendants")

[19] The Court notes that Defendants' motion for summary judgment is unclear as to which specific claims Defendants are challenging in their relation back analysis. (*See generally* Dkt. 166 at 5–10.) At times, Defendants refer to a single "claim" set forth in Plaintiff's first amended complaint—presumably the denial of medical care claim (*see id.* at 6–7), while at other times, Defendants state that the "allegations" and "claims" in the first amended complaint do not relate back (*see id.* at 10). Given Defendants' requested relief (i.e., "The Court should also strike the *additional causes of action* . . . ." (emphasis added)), the Court assumes that Defendants challenge all newly added claims. (*See id.* at 6.)

"do not relate back," he argues that the statute of limitations should be equitably tolled. (Dkt. 169 at 3.)

The Court will address, in turn, whether (1) Plaintiff's newly added claims against Defendants Zapata County, Sheriff Lopez, and Molina relate back to the original complaint; (2) Plaintiff's claim against newly named Defendant Del Bosque relate back to the original complaint; and (3) equitable tolling applies to the newly added claim against Jailer Defendants.

1. Relation Back

For a § 1983 claim, the statute of limitations period is "determined by the general statute of limitations governing personal injuries in the forum state . . . . Texas has a two year statute of limitations for personal injury claims." *Balle v. Nueces Cty., Tex.*, 690 F. App'x 847, 849 (5th Cir. 2017) (citations omitted); *see also* Tex. Civ. Prac. & Rem. Code § 16.003(a). Here, the claims against Defendants accrued on the date of the tasing incident on March 1, 2014 and the applicable statute of limitations is two years. Accordingly, the statute of limitations expired on Plaintiff's claims on March 1, 2016.

A cause of action brought after the statute of limitations has expired would be time-barred. However, under the doctrine of relation-back, a plaintiff may amend his complaint "to add a new party, claim or defense that arises out of the conduct, occurrence or transaction alleged in [the] original pleading and that would otherwise be time-barred."

Ultraflo Corp. v. Pelican Tank Parts, Inc., 926 F. Supp. 2d 935, 945–46 (S.D. Tex. 2013). If an amended pleading relates back, it is "treated, for purposes of the statute of limitations, as having been filed on the date of the original complaint." *Id.* at 946; *see Jacobsen v. Osborne*, 133 F.3d 315, 318–19 (5th Cir. 1998). The federal relation-back doctrine is governed by Federal Rule of Civil Procedure 15, which provides, in relevant part:

> **(c) Relation Back of Amendments.**
>
> **(1) When an Amendment Relates Back.** An amendment to a pleading relates back to the date of the original pleading when:
>
> **(A)** the law that provides the applicable statute of limitations allows relation back;
>
> **(B)** the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or
>
> **(C)** the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> **(i)** received such notice of the action that it will not be prejudiced in defending on the merits; and

> **(ii)** knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Fed. R. Civ. P. 15(c). Thus, there are three situations in which an amendment to a pleading will relate back to the date of the original pleading.

First, an amendment relates back when "the law that provides the applicable statute of limitations allows relation back." Fed. R. Civ. P. 15(c)(1)(A). The Fifth Circuit has held that the law governing the statute of limitations in a § 1983 claim arising in Texas does not relate back within the meaning of Rule 15(c)(1)(A). *See Balle*, 690 F. App'x at 850.

Second, an amendment relates back when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P 15(c)(1)(B). However, when relation back is invoked to change the party or the naming of a party, rather than merely adding a claim arising from the occurrence at issue in the original complaint, subsection 15(c)(1)(B) is insufficient to permit relation back.

Third, relation back is available when the "amendment changes the party or the naming of the party against whom a claim is asserted," if (1) Rule 15(c)(1)(B) is satisfied; (2) the prospective defendant received notice of the action within 90 days of the complaint's filing; and (3) in the same 90-day period,

the prospective defendant "knew or should have known that the action would have been brought against but for a mistake concerning the proper party's identity." Fed. R. Civ. P. 15(c)(1)(C).

a. Newly Added Claims Against Defendants Zapata County, Sheriff Lopez, and Molina

Because Defendants Zapata County, Sheriff Lopez, and Molina were already named in Plaintiff's timely filed more definite statement (Dkt. 9), Plaintiff's newly added claims against them relate back to the original complaint if they "arose out of the same conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). Defendants do not dispute that Plaintiff's newly added claims against Defendants Zapata County, Sheriff Lopez, and Molina,[20] arise out of

[20] Defendants state that they "do not dispute that the *claim* set forth in Plaintiff's amendment arises out of the March 1, 2014 tasing described in the original complaint" (Dkt. 166 at 6 (emphasis added)), but they do not specify which claim. Even assuming *arguendo* that Defendants concede that *only* the denial of medical care claim arose from the tasing incident in Plaintiff's original complaint, the Court finds that Plaintiff's municipal liability and negligence claims also arose from the same facts. *See Mayle v. Felix*, 545 U.S. 644, 659 (2005) (stating that "relation back depends on the existence of a common 'core of operative facts' uniting the original and newly asserted claims"). Specifically, the Court agrees with Plaintiff that the injuries caused by Defendants' alleged policy and negligence arose from the same tasing incident described in Plaintiff's original complaint (Dkt. 1 at 4) and more definite statement (Dkt. 9 at 3–4). (*See* Dkt. 169 at 22.) The "theory that animates" Rule 15(c) "is that once litigation

the March 1, 2014 tasing described in the original complaint. (*See* Dkt. 166 at 6–7.) Therefore, Plaintiff's newly added municipal liability, denial of medical care, and negligence claims against Defendants Zapata County, Sheriff Lopez, and Molina relate back to the date when the original complaint was filed on December 11, 2015.

b. Claims Against Newly Added Defendant Del Bosque

Defendants argue that Del Bosque should be dismissed because he, like the Jailer Defendants, was added after the two-year statute of limitations had expired on Plaintiff's municipal liability, denial of medical care, and negligence claims. (*See* Dkt. 166 at 6–10; Dkt. 175 at 17–18.) While Plaintiff has failed to address the Rule 15(c) requirements with respect to the claims against Del Bosque (*see* Dkt. 175 at 17), the Court will nevertheless undertake a relation back analysis.

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involving particular conduct or a given transaction or occurrence has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleading." *FDIC v. Conner*, 20 F.3d 1376, 1385 (5th Cir. 1994) (internal quotations omitted). Further, the Court liberally construes Plaintiff's *pro se* filings (Dkts. 1, 9) to allege municipal liability under § 1983 and negligence under Texas law even if these claims are not explicitly labeled as such. *See Haines*, 404 U.S. at 520. Therefore, the Court finds that Plaintiff's municipal liability and negligence claims relate back to the original complaint.

For the claims against newly added Defendant Del Bosque to relate back to the original complaint (Dkt. 1), Plaintiff must show that (1) the claims arise from the "same conduct, transaction, or occurrence"; (2) Del Bosque had notice; and (3) Del Bosque "knew or should have known" the action would have been brought against him "but for a mistake concerning the proper party's identity." *See* Fed. R. Civ. P. 15(c)(1)(C). As explained above, Defendants concede that the claims set forth in Plaintiff's amendment arises out of the tasing incident. (Dkt. 166 at 6–7.)

i. Notice

Notice is sufficient under Rule 15(c)(1)(C) if the party to be added has "received such notice of the action that it will not be prejudiced in defending on the merit." Fed. R. Civ. P. 15(c)(1)(C)(i). Notice must be received within the 90-day period after the complaint's filing, as prescribed by Federal Rule of Civil Procedure 4(m). Notice may be actual or imputed through an "identity of interest" with the party named on the original complaint. *Jacobsen*, 133 F.3d at 320. "Identity of interest generally means that the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other." *Id.* (quoting *Kirk v. Cronvich*, 629 F.2d 404, 408 (5th Cir. 1980) *overruled on other grounds by Sanders-Burns v. City Of Plano*, 594 F.3d 366, 378 (5th Cir. 2010)). Common indicators of such identity include identical or similar names, shared office space,

co-execution of an estate, acquisition of a corporate entity named in the original pleading, a corporate parent-subsidiary relationship, and shared counsel. *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 310 F. Supp. 2d 819, 851–52 (S.D. Tex. 2004).

Absent allegations of actual notice, the Court analyzes whether notice was imputed to Del Bosque through an "identity of interest" with one or more of the named Defendants: Zapata County, Sheriff Lopez, or Deputy Molina. Defendants concede that Del Bosque shares legal counsel with those Defendants and works for the Zapata County Sheriff's Office. (Dkt. 166 at 7.) While Defendants argue that these facts are "not outcome determinative," the Court finds that sharing legal counsel and working in the same law enforcement agency indicate these Defendants are closely related enough in their operations and activities to share an "identity of interest." *See*, *e.g.*, *Jacobsen*, 133 F.3d at 320 (finding identity of interest between a sheriff and later-named sheriff's deputies); *Kirk*, 629 F.2d at 408 n.4. (finding identity of interest between sheriff's office and sheriff); *Taite v. Fort Worth Police Dep't*, 2014 WL 12695943, at *3 (N.D. Tex. Oct. 28, 2014) (fording identity of interest between a police department and later-named officers of that department); *see also Whitley v. Sherrod*, 2012 WL 7001535, at *4 (W.D. La. Nov. 26, 2012) (finding identity of interest between successive wardens of a federal prison), *report and recommendation adopted by* 2013 WL 428457 (W.D. La. Feb. 1, 2013). The record is clear that Del Bosque reports directly to Sheriff Lopez

and is second-in-command of the Zapata County Sheriff's Office. (Ex. 1 at 14; Ex. 4 at 13.) He has significant responsibilities as the Chief Deputy (*see* Ex. 4 (describing Del Bosque's duties)) and appears to have learned about the present action before Sheriff Lopez did (*see* Ex. 1 at 3 (stating Del Bosque advised that Sheriff Lopez "was going to get a lawsuit against [him] and the County")).

Furthermore, Del Bosque was the officer who first attempted to stop Plaintiff on March 1, 2014 and "initiated" the chase that led to the tasing incident. (Dkt. 166 at 11.) He later arrived at the scene of the arrest and appears involved in the search of Plaintiff's vehicle. (*See* Vid. at 8:44–9:40.) This constitutes a significant involvement in the present case. (*See* Ex. 8 at 34 (noting that Del Bosque wrote a report about the events leading up to Plaintiff's arrest).) The Court finds it likely that he would have received imputed notice of a lawsuit against Zapata County and Sheriff Lopez arising from that incident.

Where an "identity of interest" has been established between Del Bosque and the Defendants named in Plaintiff's more definite statement (Dkt. 9), Plaintiff must also show that Del Bosque received the imputed notice within the 90-day period prescribed by Rule 4(m). *See* Fed. R. Civ. P. 4(m). Here, the original complaint was filed on December 11, 2015 (Dkt. 1), and therefore, the Rule 4(m) period expired on March 10, 2016. (*See* Dkt. 148 at 11 n.5.) Nothing in the record suggests that Del Bosque had notice of this action within the 90-day period. In fact, the Magistrate Judge

previously found that no Defendant "received notice of this lawsuit before October 11, 2016, when Plaintiff's more definite statement was mailed by the Court to Defendants Zapata County and the Zapata County Sheriff." (Dkt. 136 at 11–12; *see* Dkts. 13–14, 16–17.) Accordingly, Plaintiff has failed to show that Del Bosque received notice, and the claims against him should be dismissed.

ii. Mistake of Identity

Even if the Court were to assume that Del Bosque did receive notice, Plaintiff's newly added claims against him would not relate back because Plaintiff did not make a "mistake" within the meaning of Rule 15(c)(1)(C)(ii). Rule 15(c)(1)(C)(ii) requires Plaintiff to demonstrate that, within the 90-day period prescribed in Rule 4(m), Del Bosque knew or should have known that the action would have been brought against him, but for a mistake concerning the proper party's identity. *See* Fed. R. Civ. P. 15(c)(1)(C)(ii). A "mistake" for the purposes of relation back, depends on "what the prospective *defendant* knew or should have known during the Rule 4(m) period, not what the *plaintiff* knew or should have known at the time of filing [his or] her original complaint." *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 548 (2010). Rule 15(c) "is meant to allow an amendment changing the name of a party to relate back to the original complaint only if the change is the result of an error, such as a misnomer or misidentification." *Jacobsen*, 133 F.3d at 321. The Fifth Circuit has held that a plaintiff who has named a

pseudonymous "John Doe" defendant has not made a "mistake concerning the party's identity" within the meaning of Rule 15(c). *Id.*

Here, Plaintiff has not offered any evidence of such a mistake, nor does anything in the record suggest that Plaintiff made a mistake when naming Defendants Zapata County, Sheriff Lopez, Molina, and "other Zapata County Deputies on scene of the tasing" in his original complaint (Dkt. 1 at 3) and more definite statement (Dkt 9 at 3–5). On the contrary, the Court finds that Plaintiff would most likely not have made a mistake regarding Del Bosque's identity, given that the two had a personal relationship. Del Bosque testified during his deposition that they "attended school together" since elementary school "on and off" (Ex. 4 at 4), and that Plaintiff dated his cousin, Rachel Gutierrez[21] (*id.* at 40). Del Bosque had even pulled Plaintiff over and arrested him on prior occasions. (*Id.*) There is also indication that Plaintiff may have purposely sought to leave Del Bosque out of this action. Del Bosque testified that Plaintiff called him at some point before his deposition:

> A. [Plaintiff] said that he had spoken to his attorneys and . . . that he had advised his attorneys to leave me out of the trial of the, [*sic*] this.

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[21] In his deposition, Plaintiff stated his girlfriend was "Raquel Gutierrez." (Ex. 5 at 2, 25.) He further stated that he was friends with various members of her family, including her brother, brother-in-law, aunts, and uncles. (*Id.* at 25.) Plaintiff did not, however, mention any relationship with Del Bosque.

Q. Lawsuit?

A. Yes, ma'am.

Q. Did he tell you why he wanted you to be out of [the] lawsuit?

A. [Plaintiff] said his attorneys got upset at him for making that statement and that he wanted me out because we were friends and family.

Q. Any other reason why he wanted you out?

A. Because I wasn't there and I didn't do anything wrong.

(*Id.* at 51–52.)

Because there was neither adequate notice nor evidence of a mistake under the meaning of Rule 15(c), the Court concludes that the claims against newly added Defendant Del Bosque do not relate back to the original complaint. Accordingly, Del Bosque should be dismissed from this case.

2. Equitable Tolling of Denial of Medical Care Claim against Jailer Defendants

Plaintiff concedes that the denial of medical care claim against the newly added Jailer Defendants "do not relate back" to the original complaint. (Dkt. 169 at 3.) However, he argues that "this case presents one of those rare instances where equitable tolling is warranted because [Plaintiff] did his best to build a case as a pro se plaintiff before limitations expired."

(*Id.*) As stated above, the statute of limitations for the denial of medical care claim expired on March 1, 2016.

"The doctrine of equitable tolling preserves a plaintiff's claims when strict application of the statute of limitations would be inequitable." *Lambert v. United States*, 44 F.3d 296, 298 (5th Cir. 1995) (citing *Burnett v. NY. Cen. R.R. Co.*, 380 U.S. 424, 428 (1965)). "Traditional equitable principles preclude a court from invoking equitable tolling, however, when the party seeking relief has an adequate legal or statutory remedy to avoid the consequences of the statute of limitations." *Id.* "Because the Texas statute of limitations is borrowed in § 1983 cases, Texas' equitable tolling principles also control." *Rotella v. Pederson*, 144 F.3d 892, 897 (5th Cir. 1998). When applying equitable tolling, Texas courts consider, *inter alia*, whether a plaintiff diligently pursued his or her rights. *See Myers v. Nash*, 464 F. App'x 348, 349 (5th Cir. 2012) (citing *Hand v. Stevens Transp., Inc. Employee Benefit Plan*, 83 S.W.3d 286, 293 (Tex. App. 2002). Further, the proponent of equitable tolling bears of burden of establishing that he or she is entitled to rely on the doctrine. *Hand*, 83 S.W.3d at 293.

Both federal and Texas courts apply equitable tolling sparingly. *Myers*, 464 F. App'x at 349; *Hand*, 83 S.W.3d at 293. It is only appropriate where a plaintiff (1) "has been pursuing his rights diligently" but (2) "some extraordinary circumstance stood in his way and prevented timely filing." *Sandoz v. Cingular Wireless, L.L.C.*, 700 F. App'x 317, 320 (5th Cir. 2017). Typically, this requires that some force completely

outside of a plaintiff's control prevent him from complying with the statute of limitations. *See*, *e.g.*, *Burnett*, 3580 U.S. at 424 (noting that equitable tolling was appropriate "where a defendant misled the plaintiff into believing that he had more than three years in which to bring" suit); *Green v. Doe*, 260 F. App'x 717, 719 (5th Cir. 2007) (applying equitable tolling where erroneous rulings by the court itself delayed a diligent plaintiff); *Harris v. Boyd Tunica, Inc.*, 628 F.3d 237, 240 (5th Cir. 2007) (holding that equitable tolling did not apply where plaintiff counsel's staff missed a key filing deadline).

Here, Plaintiff offers two bases for equitable tolling. (*See* Dkt. 169 at 36–37.) First, he argues that he could not seek discovery to identify other claims or defendants before the Court ordered Defendants to answer on October 7, 2016 (Dkt. 12)—over six months after the statute of limitations had expired. (Dkt. 169 at 36.) Second, Plaintiff argues that "acting *pro se*, [he] asserted his claims the best he could, as early as he could, with the information that he had." (*Id.* at 37.)

The Court has previously addressed Plaintiff's first argument with regard to Defendant Ramos, who has since been dismissed. (*See* Dkt. 136 at 18–21; Dkt. 148 at 14–15.) In that context, the Magistrate Judge concluded—and the Court agreed—that "where Plaintiff filed his complaint less than three months before the expiration of the statute of limitations, . . . the statute of limitations [will] not be equitably tolled." (*Id.* at 21.) The Court explained:

> [T]here is nothing to attribute the inability to determine the identity of the Unknown Deputies before the limitations period had except Plaintiff's decision to wait until the end of the limitations period to file his complaint, leaving himself too little time to conduct discovery. As a practical matter, filing suit eighty days prior to the expiration of the statute of limitations does not afford enough time for a party to conduct discovery on the identity of John Doe defendants. The deadline for defendants to serve initial disclosures would not fall within that eighty-day period.

(*Id.*) The same reasoning applies here. Plaintiff's own delay in filing his complaint—with no justification other than Plaintiff's *pro se* status—does not constitute the kind of "rare and exceptional circumstance" that warrants equitable tolling. *See Boyd Tunica*, 628 F.3d at 239–40; *see also Balle*, 690 F. App'x at 851 (holding that the plaintiff's "inability to determine the identities of the Jane Does before the limitations period had run was attributable to his own decision to file his suit so close to the end of the limitations period").

As to Plaintiff's second argument, the Fifth Circuit has consistently held that the challenges of proceeding *pro se* do not necessarily justify equitable tolling. *See*, *e.g.*, *Teemac v. Henderson*, 298 F.3d 452, 457 (5th Cir. 2002) (noting that ignorance of the law, even when stemming from illiteracy, cannot justify tolling); *Barrow v. New Orleans S.S. Ass'n*, 932 F.2d 473, 478 (5th Cir. 1991) (stating that "lack of knowledge of applicable filing deadlines," "unfamiliarity with the legal process, "lack of representation during the

applicable filing period, or "ignorance of legal rights" is not a basis for tolling). Thus, Plaintiff's *pro se* status is an insufficient basis for tolling.

The Court fords, therefore, that the statute of limitations should not be equitably tolled, and the denial of medical care claim against Jailer Defendants are now time-barred.[22] Because the denial of medical care claim was the only claim asserted against them, Defendants Hinojosa, Maldonado, Delgado, and Saenz should be dismissed from the case.

In summary, the Court finds that (1) all newly added claims against Defendants Zapata County, Sheriff Lopez, and Molina relate back to Plaintiff's original complaint; (2) Plaintiff's claims against newly added Defendant Del Bosque do not relate back; and (3) Plaintiff's denial of medical care claim against Defendants Hinojosa, Maldonado, Delgado, and Saenz do not relate back and were not equitably tolled. Defendants Hinojosa, Maldonado, Delgado, Saenz, and Del Bosque should therefore be dismissed. The Court reaches the merits of Defendants' motion for summary judgment and will address the surviving claims against all remaining Defendants below.

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[22] In the alternative, Plaintiff requests that the statute of limitations be equitably tolled to at least November 18, 2016, "when he had the ability to determine the scope of his action." (Dkt. 169 at 37.) As Defendants correctly note, however, tolling the statute of limitations to that date fails to provide Plaintiff the relief he seeks. (Dkt. 175 at 18.) Jailer Defendants were not added to this action until March 13, 2018—almost 16 months after November 18, 2016. (*See* Dkt. 71.)

II. Substantive Claims and Motion for Summary Judgment

B. Section 1983 Liability Claims against Defendant Molina

Section 1983 creates a federal cause of action against any person who, acting pursuant to state authority, violates the Constitution or federal law. 42 U.S.C. § 1983; *see Albright v. Oliver*, 510 U.S. 266, 269–71 (1994). To state a constitutional claim under § 1983, "a plaintiff must (1) allege a violation of a right secured by the Constitution . . . and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law." *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013) (quoting *James v. Tex. Collin Cty.*, 535 F.3d 365, 373 (5th Cir. 2008)).

However, even where a plaintiff has adequately alleged a § 1983 violation, the doctrine of qualified immunity will shield "government officials acting within their discretionary authority from liability" as long as "their conduct does not violate clearly established statutory or constitutional law of which a reasonable person would have known." *Wallace v. County of Comal*, 400 F.3d 284, 289 (5th Cir. 2005). Once an official raises a qualified-immunity defense, the burden shifts to the plaintiff, "who must rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established law." *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010).

Courts conduct a two-prong inquiry to determine whether qualified immunity applies. *See Pearson v. Callahan, 555* U.S. 223, 236 (2009). First, a court determines whether a plaintiff has adequately alleged a constitutional violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).[23] Second, a court "ask[s] whether the right was clearly established" at the time of a defendant's alleged misconduct. *Id.* at 201. A "clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). "Courts have discretion to decide the order in which to engage these two prongs." *Tolan v. Cotton*, 572 U.S. 650, 656 (2014). "But under either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Id.*

Here, Plaintiff argues that Molina used excessive force in tasing Plaintiff "while he was lying submissively on the ground, having clearly surrendered several moments earlier." (Dkt. 169 at 1.) Defendants, in turn, assert qualified immunity against Plaintiff's excessive force and denial of medical care claim. (*See* Dkt. 166 at 15–24.)

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[23] The Supreme Court has overruled *Saucier* insofar as it mandated the order in which courts must address the two steps of the qualified-immunity inquiry. *Pearson, 555* U.S. at 232; *see Saucier*, 533 U.S. at 200–01. Nonetheless, while the *Saucier* protocol is no longer mandatory, it is still the preferred approach. *Pearson*, 555 U.S. at 236.

1. Excessive Force Claim Against Defendant Molina

Here, the relevant constitutional protection is the Fourth Amendment right to be free of excessive force. *See Pratt v. Harris Cty.*, 822 F.3d 174, 188 (5th Cir. 2016) ("When a plaintiff alleges excessive force during an investigation or arrest, the right at issue is the Fourth Amendment right against unreasonable seizures.") (internal punctuations omitted); *see also* U.S. Const. amend. W. To establish an excessive-force claim, a plaintiff must show that (1) he suffered an injury (2) resulting "directly and only from a use of force that was clearly excessive," and (3) "the excessiveness of which was clearly unreasonable." *Cooper v. Brown*, 844 F.3d 517, 522 (5th Cir. 2016). "Excessive force claims are necessarily fact-intensive; whether the force used is 'excessive' or 'unreasonable' depends on 'the facts and circumstances of each particular case.'" *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

a. Constitutional Violation

In his first amended complaint, Plaintiff alleges that "[a]s a direct and proximate result of Molina's use of excessive force, [Plaintiff] suffered severe physical and emotional injuries, including severe pain in his back, abrasions, flesh wounds, difficulty breathing, public humiliation, flashback to the assault, lingering fear of officers of the law, isolation, loneliness, and

severe mental stress."[24] (Dkt. 71 at 20.) However, Defendants argue that Plaintiff "cannot show that he had any injury, especially an injury more than *de minimis.*" (Dkt. 166 at 17.) In support of their argument, Defendants cite to the following facts in the record: (1) Zapata County Regional Jail records demonstrating that Plaintiff was medically cleared (Dkt. 166, Ex. B at 19); (2) photographs showing that he did not have any injuries and/or was not in need of medical attention (*id.* at 10); and (3) Plaintiff's testimony that he did not go to a physician or mental health care professional for any of the injuries he suffered from the tasing incident (Ex. 5 at 47; *see* Dkt. 166 at 17–19.)

i. Injury

The Fifth Circuit requires more than a *de minimis* injury to plead a Fourth Amendment excessive force claim.[25] *Sam v. Richard*, 887 F.3d 710, 713 (5th Cir.

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[24] In his more definite statement, Plaintiff listed the following injuries he sustained as a result of the tasing incident: "two taser wounds"; "trauma to the taser wounds" caused when Molina "yanked . . . out the taser probes from Plaintiff's back"; "extensive bleeding"; and "psychological damages." (Dkt. 9 at 6.)

[25] In *Wilkins v. Gaddy*, the Supreme Court rejected the Fourth Circuit's requirement that in the "absence of some arbitrary quantity of injury," an excessive force claim must be dismissed. 559 U.S. 34, 39 (2010) (internal quotes omitted). However, it did not reject the *de minimis* standard used by the Fifth Circuit in Fourth Amendment excessive force claims. *Id.* at 42 n.2. *Wilkins* expressly acknowledged and left untouched the *de minimis* standard used by the Fifth Circuit. *Id.* In fact, the Supreme Court stated that the facts of *Wilkins* would have

2018). However, in determining whether an injury is more than *de minimis*, courts look to the context in which that force was deployed. *Williams v. Bramer*, 180 F.3d 699, 703 (5th Cir. 1999), *decision clarified on reh'g*, 186 F.3d 633 (5th Cir. 1999). "[E]ven insignificant injuries may support an excessive force claim, as long as they result from unreasonably excessive force . . . ." *Richard*, 887 at 713. The Fifth Circuit explained:

> Although a *de minimis* injury is not cognizable, the extent of injury necessary to satisfy the injury requirement is directly related to the amount of force that is constitutionally permissible under the circumstances. *Any* force found to be objectively unreasonable necessarily exceeds the *de minimis* threshold, and, conversely, objectively reasonable force will result in *de minimis* injuries only. Consequently, only one inquiry is required to determine whether an officer used excessive force in violation of the Fourth Amendment. In short, as long as a plaintiff has suffered some injury, even relatively insignificant injuries and purely psychological injuries will prove cognizable when resulting from an officer's unreasonably excessive force.

Id. (quoting *Alexander v. City of Round Rock*, 854 F.3d 298, 309 (5th Cir. 2017)) (quotation marks, citations, and modifications omitted). Thus, the threshold

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survived the Fifth Circuit's *de minimis* standard. *Id.* Notably, the Supreme Court agreed that an inmate who complains of a push or shove, that causes "no discernible injury" almost always certainly fails to state a valid excessive force claim. *Id.* at 38.

inquiry is whether Plaintiff has suffered "some injury." *Id.*

Here, the Court finds that Plaintiff has sustained at least "some injury" when he was tased by Molina. *See id.; see also*, *e.g.*, *Richard*, 887 F.3d at 714 (finding that a plaintiff's alleged injuries, which included "minor bleeding," was more than *de minimis); Schmidt v. Gray*, 399 F. App'x 925, 928 (5th Cir. 2010) (holding that pain, soreness, and bruising was a legally cognizable injury); *Williams*, 180 F.3d 699, 704 (5th Cir. 1999) (finding that "dizziness, loss of breath, and coughing" caused by choking was a sufficient injury to assert a constitutional violation). Thus, the issue before the Court is "not necessarily the degree of injury" but "whether the force used was objectively unreasonable." *See Caffey v. Domingue*, 2018 WL 1936739, at *3 (W.D. La. Apr. 23, 2018); *see also Scott v. White*, 2018 WL 2014093, at *5 (W.D. Tex. Apr. 30, 2018) ("The sufficiency of a plaintiff's injury turns not on the severity of the injury, but on the reasonableness of the officer's use of force.").

ii. Resulting Directly and Only from the Use of Force

Defendants argue that Plaintiff's injuries, if cognizable, did not result directly and only from the use of force because he "reported prior to this incident that he had asthma, back problems and knee problems." (Dkt. 166 at 19.) This argument is unfounded and appears to confuse the inquiry. Whether Plaintiff had underlying health issues that *exacerbated* his injuries

is irrelevant; Defendants take the victim as found. *See Darden v. City of Fort Worth*, 880 F.3d 722, 728 (5th Cir. 2018) (noting that the "eggshell skull rule" applies to § 1983 excessive force cases). The Court thus finds that Plaintiff's alleged injuries resulted "directly and only" from the tasing incident.

iii. Objectively Reasonable

"[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 396. The factors to consider include: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. *Id.*

Defendants rely on the following undisputed facts to show reasonableness: "(1) [Plaintiff] attempted to evade the traffic stop causing a high-speed pursuit; (2) [he] continued to drive at extreme high rates of speed through [a] heavily populated area; (3) [he] drove dangerously, making sharp turns almost losing control of his vehicle; and (4) [he] abruptly stopped his vehicle and quickly exited." (Dkt. 175 at 10; *see* Ex. 4 at 32–34; Ex. 8 at 60.) Defendants further argue that Molina's use of force was reasonable because Molina did not know (1) whether Plaintiff had a weapon; (2) whether Plaintiff was a continued flight risk; and (3) whether

Plaintiff's alleged surrender was a ploy to attack him. (Dkt. 175 at 11.)

There is no dispute that Plaintiff evaded the initial traffic stop that Del Bosque attempted.[26] (Dkt. 169 at 5; Ex. 5 at 36.) The Court agrees that leading law enforcement in a high-speed chase through a heavily populated area is a serious crime that puts at risk not only the lives of Plaintiff and the officers but also those of the general public. *See Cooper*, 844 F.3d at 522 (holding that driving under the influence "is a serious offense"). Therefore, the Court finds that the first *Graham* factor weighs against Plaintiff.

The second *Graham* factor—whether Plaintiff posed an immediate threat to the safety of the officers—is a closer question. In his deposition, Molina testified that he was "really scared at that time" because there had been reports of drug trafficking in the area and he suspected Plaintiff was "evading because he had some drugs in [the vehicle]." (Ex. 8 at 31, 60.) Additionally, the chase took place at night and there were "unknown subjects" in a separate vehicle present at the scene of Plaintiff's arrest. (*See id.*; Dkt. 175 at 11.) Thus, when the highspeed chase came a stop, Molina may have had reason to believe that Plaintiff and the unknown subjects exiting the red pickup truck were "cartel members." (*See* Ex. 8 at 31, 60; *see also* Vid. at 6:08.) *Cf. Cooper*, 844 F.3d 517, 522

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[26] Plaintiff alleges that he was not committing a traffic infraction when Del Bosque initially attempted a traffic stop. (Dkt. 71 at 5.) Regardless, Plaintiff knew he was supposed to stop and chose not to do so, thereby violating the law. (*See* Ex. 5 at 36.)

(5th Cir. 2016) (finding no evidence of immediate threat where the plaintiff was unarmed and not suspected of committing a violent offense). While the Court may consider an officer's fear for his safety in light of the circumstances, the reasonableness inquiry remains an objective one. Accordingly, the mere fact that Molina was afraid does not cause this factor to weigh in his favor.

The video shows that Plaintiff stopped his vehicle, exited, dropped to his knees with arms raised, and then lowered his body to the ground. (Vid. at 6:06–10.) Citing *Escobar v. Montee*, 895 F.3d 387, 394 (5th Cir. 2018), Defendants argue that Molina could "easily conclude that [Plaintiff's] surrender was not genuine" under the totality of circumstances. (Dkt. 175 at 11.) Like the plaintiff in *Escobar*, Plaintiff had led officers on a chase at night through a residential neighborhood. *See Escobar*, 895 F.3d at 395. But unlike the *Escobar* plaintiff, Plaintiff did not have a confirmed weapon within reach, and Molina did not have any information about potentially violent behavior. *See id.* (noting that the officer knew a knife remained within the plaintiff's reach and received a call from the plaintiff's mother saying the police would have to kill plaintiff to catch him). Here, the Court finds that factual disputes remain as to whether a reasonable officer would have believed Plaintiff to be an "immediate threat."

For instance, although the officers deposed in this case identified similar behaviors as "signals" indicating surrender (e.g., putting hands in the air, lying down on the ground after putting hands in air,

following officer commands, and stating their intent to surrender), they disagree about whether Plaintiff surrendered here.[27] (*See*, *e.g.*, Ex. 4 at 25–26, 36–37; Ex. 7 at 78; Ex. 24 at 7; Ex. 25 at 7.) Multiple officers testified that the presence of such signals does not necessarily mean that the suspect is surrendering and the officer must stay vigilant. (*See*, *e.g.*, Ex. 1 at 25; Ex. 4 at 25–26; Ex. 7 at 7.) Depending on the situation, even a subtle movement—such as reaching for one's waistband—may be perceived as a threat. (*See id.*; Ex. 7 at 7; Ex. 22 at 12.)

The Court is mindful that the "reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. Nevertheless, the Court finds that there are material facts in dispute, including, most saliently, whether Plaintiff was repeatedly verbalizing his intent to surrender (and if Plaintiff's voice was audible to Molina)[28]; whether Molina could see the placement of Plaintiff's hands; and whether Plaintiff made any

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[27] Indeed, the Fifth Circuit has "consistently held that a suspect does not pose an immediate threat where he unambiguously surrenders by, for example, placing his hands in the air and complying with the officers' commands." *Escobar*, 895 F.3d at 394 (citing *Darden*, 880 F.3d 722,733 (5th Cir. 2018) and *Cooper*, 844 F.3d at 521–23). The Fifth Circuit cautioned, however, that any application of force to a compliant arrestee is not *per se* unreasonable. *Id.* (quoting *Cooper*, 844 F.3d at 524).

[28] Both Plaintiff and Molina testified that there were sirens sounding at the scene. (Ex. 5 at 41; Ex. 8 at 48.) It is unclear whether this hindered their ability to hear any shouting or commands.

threatening movements. As such, the Court finds there are genuine factual disputes as to whether Plaintiff posed an immediate threat to the safety of anyone at the scene.

Lastly, the third *Graham* factor—whether Plaintiff was actively resisting arrest or attempting to evade arrest by flight—is another close question. Most witnesses and Defendants, including Molina, agree that Plaintiff was not actively resisting arrest at the time he was flat on the ground with his arms placed above his head. (*See*, *e.g.*, Ex. 7 at 19; Ex. 8 at 44.) However, some testified that Plaintiff appeared to be attempting to flee because he exited his vehicle without a command; looked toward an "open area" (Ex. 24 at 12–14); and uncrossed his legs and began to "raise up" (Ex. 8 at 44–45). (*See* Vid. at 6:05–08.)

In their motion for summary judgment, Defendants aver that Plaintiff's uncrossing of his legs and "raising up" triggered Molina's "split-second decision" to deploy his taser. (Dkt. 166 at 20–21; *see* Vid. at 6:14.) Molina, however, testified that he did not remember the tasing at all, nor could he confirm upon reviewing the video that Plaintiff threatened him in any way. (Ex. 8 at 31–32, 45.) Further, whether Plaintiff began to "raise up" before the tasing is disputed. (*See* Vid. at 6:14.) Molina testifies that Plaintiff was "reaching up" or "pushing up" with "his body," but it is unclear from the video if Plaintiff had already been tased at this point. (Ex. 8 at 44; *see* Vid. at 6:14.) If the latter, the "raising up" motion could be a reaction to being tased, rather than an attempt to flee or resist. (*See* Ex. 9 at 2–3.)

Furthermore, while an officer may consider a suspect's refusal to comply with instructions in assessing whether physical force is needed to effectuate the suspect's compliance, officers "must assess not only the need for force, but also 'the relationship between the need and the amount of force used.'" *Deville*, 567 F.3d at 167 (quoting *Gomez v. Chandler*, 163 F.3d 921, 923 (5th Cir. 1999)). Here, it is unclear whether Molina gave any instructions to Plaintiff.[29] (*See* Ex. 8 at 36.) As such, there is a factual dispute as to whether Plaintiff refused to comply with instructions in the present case. This appears to be especially relevant because Defendants interpret Plaintiff's unprompted actions to be a cause for concern. (*See*, *e.g.*, Ex. 1 at 26; Ex. 4 at 38; Ex. 24 at 12–13 (noting that exiting the vehicle without a command is uncommon and could be a "bail-out," or exiting the vehicle to evade arrest); Ex. 25 at 16 (stating Plaintiff "shouldn't have exited his vehicle" and that "[u]sually subjects stay in their vehicle and wait for commands.").)

Even if Molina's initial tasing of Plaintiff was reasonable, there remains a factual dispute as to

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[29] When asked if Molina gave any commands to Plaintiff, Molina stated, "I don't remember if it was when I was walking toward him, like running toward him, or while I was—I don't remember." (Ex. at 36.) But shortly thereafter he stated, "[Y]eah, actually I do remember because that's when I reacted. That's when I was putting the taser in my holster, I believe, and that's when I gave him the command." (*Id.*) In any case, Molina testified that after the taser was deployed, Plaintiff complied with his commands. (*Id.*)

whether Molina discharged the taser multiple times.[30] *See Darden*, 880 F.3d at 731–32 (finding a genuine dispute of material fact as to whether the force used was clearly excessive and unreasonable where suspect was thrown down and twice shocked with a taser); *see also Edwards v. Shanley*, 666 F.3d 1289, 1295–96 (11th Cir. 2012) (holding that use of a dog in the first instance does not mean the dog was reasonable for the *duration* of the attack). Considering the facts in light most favorable to Plaintiff, a jury could conclude that no reasonable officer would have perceived Plaintiff as posing an immediate threat to the officers' safety or thought that he was resisting arrest after he was tased. As such, a jury could reasonably find that "the *degree* of force . . . [Molina] used in this case was not justifiable under the circumstances."[31] *See Deville*, 567 F.3d at 167–68. Therefore, the Court must turn to the second prong of the qualified immunity analysis: whether the right in question was "clearly established" at the time of the alleged violation. *See Tolan*, 572 U.S. at 656.

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[30] Molina testified that each round of the taser charge lasts five seconds, and the user would have to pull the trigger another time in order to second, five-second charge. (Ex. 24 at 15–16.) However, David Moya testified that in his experience, the charge may last longer if the trigger is held down. (Ex. 7 at 23.)

[31] For example, Captain Ramon Montez, who oversees the jail, testified that he believed the initial tasing to be lawful. (Ex. 25 at 17.) But he also stated, "I don't know how long he [Molina] pulled the trigger on the taser. It's usually five seconds. So if it was more than five seconds, . . . I believe it to be excessive." (*Id.*)

b. Clearly Established Constitutional Right

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Lytle v. Bexar County*, 560 F.3d 404, 410 (5th Cir. 2009) (quotations omitted). "When considering a defendant's entitlement to qualified immunity, [a court] must ask whether the law so clearly and unambiguously prohibited his conduct that 'every reasonable official would understand that what he is doing violates [the law]." *Morgan v. Swanson*, 659 F.3d 359, 371–72 (5th Cir. 2011) (en banc) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *al-Kidd*, 563 U.S. at 742. A court may not, for example, deny qualified immunity on the ground that an officer violated the general rule that "deadly force is only permissible where the officer has probable cause to believe that the suspect poses a threat of serious physical harm." *Mullenix*, 136 S. Ct. at 309 (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)). While there need not be a case "directly on point, . . . existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* at 308 (quoting *al–Kidd*, 563 U.S. at 741). In other words,

there must be "controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity." *Swanson*, 659 F.3d at 371–72 (internal quotation marks omitted).

Here, the constitutional question should be framed as whether a suspect, who was initially evading officers but subsequently attempts to surrender, has a right not to be tased when he is lying on the ground with his arms over his head and not actively resisting arrest. The Court finds that law on the excessive use of force as it applies to tasers was clearly established in 2007—several years before the tasing incident at issue here. *See Khansari v. City of Hous. (Khansari II)*, 2015 WL 6550832, at *9 (S.D. Tex. Oct. 28, 2015) (citing *Newman v. Guedry*, 703 F.3d 757, 763–64 (5th Cir. 2012)). In *Khansari II*, the court referred to two cases involving claims of excessive force arising from taser use: *Ramirez v. Martinez*, 716 F.3d 369 (5th Cir. 2013) and *Poole v. City of Shreveport*, 691 F.3d 624 (5th Cir. 2012). In *Ramirez*, the Fifth Circuit held that the use of a taser would constitute excessive force if the officer tased the arrestee after "subduing and handcuffing him." 716 F.3d at 378. In *Poole*, on the other hand, the Fifth Circuit found that the use of a taser was not excessive where the arrestee was actively resisting commands and the officers ceased use of the taser once arrestee was handcuffed and subdued. 691 F.3d at 626, 629. The excessive force analyses in both cases were governed by the *Graham* factors discussed above.

Citing *Zimmerman v. Cutler*, 657 F. App'x 340, 346 (5th Cir. 2016), Defendants argue that the use of a taser on a fleeing suspect was not clearly established as excessive force at the time Plaintiff was tased on March 1, 2014.[32] (Dkt. 166 at 17.) In *Zimmerman*, the Fifth Circuit held that it was not clearly established in 2012 "that the one-time use of a Taser on a person reasonably suspected of a misdemeanor amounts to excessive force." *Zimmerman*, 657 F. App'x at 346. However, the instant case can be distinguished from *Zimmerman* in two significant ways. First, the plaintiff in *Zimmerman* was actively fleeing arrest.[33] *See id.* (finding that the officer reasonably concluded that the suspect was fleeing to avoid an investigatory stop). Second, the defendant officer in *Zimmerman* discharged his taser only once. *Id.* (noting that the suspect "received only a single shock" from the officer's taser).

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[32] While Defendants offer synopses of the various cases Plaintiff cites and argue that they are inapposite (*see* Dkt. 175 at 13–15), these descriptions fail to take into account that "a violation can be clearly established even when there is no materially similar precedent." *Zimmerman*, 657 F. App'x at 346. Further, "[t]he law is clear that the degree of force an officer can reasonably employ is reduced when an arrestee is *not actively resisting*." *Darden*, 880 F.3d at 733 (emphasis added) (finding that, in 2013, it was clearly established that violently slamming or striking a suspect who is not actively resisting arrest constitutes excessive use of force). In fact, Molina conceded that "[m]aybe pressing the button too many—so many times or a lot of times" with a taser may amount to excessive force. (Ex. 8 at 29.)

[33] The Court recognizes that *Zimmerman* was decided in 2016, two years after the events of the present case. However, the *Zimmerman* court's application of the law, as "clearly established" in 2013, remains relevant here, and the facts of that case can be distinguished from the present case.

The present case presents a genuine dispute of material fact as to both aspects. Plaintiff contends that he was not actively fleeing or resisting arrest and that Molina's taser may have been deployed more than once. (Dkt. 169 at 7.)

The Court finds that a jury could conclude that a clearly established right had been violated, especially considering that Molina testified that he does not remember the tasing itself:

> Q. Okay. So then do you remember anything that happened after you stopped your car, that physically happened I should say?
>
> A. When I realized after what had happened is—I don't even remember seeing Ramos there. I just remember just holstering my taser and putting the handcuffs on Salazar and then I just walked him to the unit.
>
> Q. Do you remember the tasing itself?
>
> A. No, I don't.
>
> Q. Do you remember—okay. So you don't remember going up to Mr. Salazar and shooting him with the taser?
>
> A. I do not.
>
> Q. You don't remember what you saw him do?
>
> A. No.

(Ex. 8 at 31–32.)

> Q. You don't remember why you decided to tase him or you don't remember tasing him?

A. I don't remember tasing him.

(*Id.* at 45.)

Specifically, Molina does not remember if he discharged his taser a second time:

Q. Do you remember, Mr. Molina—Investigator Molina, whether you held the trigger of your taser down?

A. No.

Q. You don't remember or you didn't hold it down?

A. I didn't hold it down.

Q. Okay. After releasing it, did you pull it a second time?

A. Not that I remember.

(*Id.* at 47.)

Plaintiff further alleges that he announced multiple times, "I'm not resisting." (Ex. 5 at 40, 44.) Because the facts should be construed in Plaintiff's favor and the video does not have audio to disprove Plaintiff's allegations, the Court finds that there is a genuine dispute of material fact as to whether Plaintiff was surrendering to law enforcement and not actively resisting. Therefore, the Court finds that Defendants' motion for summary judgment on the excessive force claim should be denied.

2. Denial of Medical Care Claim Against Defendant Molina

Plaintiff also seeks the protection of the Fourteenth Amendment, which entitles pretrial detainees to be free from punishment and to be provided with basic human needs, including medical care. *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 650 (5th Cir. 1996) (en banc). Plaintiff argues that Defendants violated his constitutional rights by displaying deliberate indifference to his serious medical needs. (Dkt. 71 at 23–25.) For the reasons discussed above, only the claim against Molina remains to be analyzed at the summary judgment stage.[34]

In the Fifth Circuit, a constitutional claim by a pretrial detainee arising from a one-time denial of medical care is governed by a standard of subjective deliberate indifference. *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 419 (5th Cir. 2017) (citing *Hare*, 74 F.3d at 643). To prove deliberate indifference, Plaintiff must show that he was exposed to an objectively "substantial risk of serious harm" and that Molina "knew of and disregarded a substantial risk of serious harm." *Id.* "Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference."

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[34] In his response to Defendants' motion for summary judgment, Plaintiff makes no attempt to argue that his denial of medical care claim against Molina raises an issue of material fact. Plaintiff focuses instead on his claim against Jailer Defendants. (*See* Dkt. 169 at 35–36 (referring only to the denial of medical care against Jailer Defendants).)

Alton v. Tex. A & M Univ., 168 F.3d 196, 201 (5th Cir. 1999); *see also Thompson v. Upshur County, Tex.*, 245 F.3d 447, 459 (5th Cir. 2001) (stating that negligence or gross negligence cannot be the basis for a deliberate indifference determination).

Here, Plaintiff claims that Molina was "aware of his asthma and/or difficulty breathing as a result of the tasing" because Plaintiff shouted out that he had asthma upon exiting the vehicle and struggled to breathe within "eyesight and earshot" of Molina. (Dkt. 71 at 12, 24.) Despite this, Molina allegedly "made no effort to provide Salazar with medical attention immediately after" the tasing. (*Id.* at 24.) As an initial matter, the scope of Molina's involvement with respect to any alleged denial of medical care is limited to the period between Plaintiff's tasing and placement in Deputy Omar Saldafia's vehicle for transportation to Zapata County Regional Jail. (*See* Ex. 5 at 41 (stating Molina did not transport Plaintiff to the jail); Ex. 22 at 10 (confirming Deputy Saldafia transported Plaintiff to the jail).)

The Court fords that Plaintiff fails to demonstrate that his medical needs were serious, i.e., that his needs were "obvious to the layperson or supported by medical evidence, like a physician's diagnosis." *See Olabisiomotosho v. City of Hous.*, 185 F.3d 521, 526 (5th Cir. 1999). To the contrary, Plaintiff does not allege that he expressly told Molina he had trouble breathing, nor does Plaintiff allege he was outwardly exhibiting symptoms that made the seriousness of his medical

need obvious.[35] *Cf. id.* (finding medical needs were not sufficiently serious where the plaintiff, who had informed officers that she had asthma, was "wheezing and experiencing shortness of breath"). It is further undisputed that Plaintiff did not subsequently seek treatment for any of the injuries he suffered from the tasing incident. (*See* Ex. 5 at 47.) Thus, Plaintiff's conclusory assertion that he struggled to breathe—in and of itself—is insufficient to establish an objectively "substantial risk of serious harm." *See Alderson*, 848 F.3d at 419; *see also*, *e.g.*, *King v. Kilgore*, 98 F.3d 1338, 1338 (5th Cir. 1996) (holding that "[w]hile an asthma attack is a serious and potentially deadly problem," the plaintiff's denial of medical care claim did not rise to the level of a constitutional claim where plaintiff failed to allege facts showing he experienced "substantial harm").

Even assuming *arguendo* that Plaintiff has presented sufficient evidence to establish Molina "could have inferred a substantial risk of serious harm," Plaintiff's claim would fail because there is no evidence that Molina was "actually aware of

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[35] During his deposition, Plaintiff was unable recall whether he had breathing problems at the time of his arrest:

> Q. Okay. And are you saying that on the occasion of this arrest, March 1st of 2014, you were suffering from asthma?
>
> A. Yes, ma'am.
>
> Q. Were you having breathing problems out at the site?
>
> A. I do not recall at the site. I do not recall. It's been years.

(Ex. 5 at 22.)

the risk" of substantial harm and "consciously disregarded it." *See Zimmerman*, 657 F. App'x at 348 (noting that the plaintiff's arm fracture was "not obvious"); *see also Cleveland v. Bell*, 938 F.3d 672, 676 (5th Cir. 2019) (applying subjective standard to deliberate indifference). Defendants' account differs as to Plaintiff's condition immediately after he was tased: Molina described Plaintiff's breathing as "normal," stating that Plaintiff was not coughing, wheezing, or clutching his chest. (Ex. 8 at 54.) As Molina is not a medical professional, his opinion of what constitutes "normal" breathing does not carry any weight, but his lack of knowledge about Plaintiff's difficulty breathing may be used to disprove subjective indifference. Moreover, Molina testified that although he had personally observed tasers cause subjects to "tense up" and, in some instances, bleed, he was never taught about the effect a taser may have on a suspect's heart rate or whether it could cause dizziness, difficulty breathing, paralysis, a heart attack, or brain damage. (Ex. 8 at 21–22.)

Finally, Plaintiff's allegations regarding the veracity of the booking report (Dkt. 166, Ex. B at 16–19) are beyond the scope of Molina's involvement and therefore do not create a dispute of any material fact. Molina neither transported Plaintiff to the jail nor completed the booking report and "Medical Clearance Certification."[36] Similarly, if Plaintiff suffered from

[36] Deputy Omar Saldaña testified that he searched Plaintiff and transported him to the jail. (Ex. 22 at 10.) Deputy Saldaña's signature appears under the heading "Officer Making Report" on the "Medical Clearance Certification." (Dkt. 166, Ex. B at 19.)

breathing problems at the jail, this would have been outside the scope of Molina's knowledge. Without actual knowledge of Plaintiff's condition, Molina could not have "consciously disregarded" the risk of harm. Therefore, even after resolving any factual disputes in favor of Plaintiff, no reasonable jury could conclude that Molina was "deliberately indifferent" to Plaintiff's serious medical needs. Plaintiff's denial of medical care against Molina should therefore be dismissed.

C. Municipal Liability Claim against Defendant Zapata County[37]

Because the Court finds that there is a question of fact regarding Molina's use of excessive force, the Court addresses whether Defendant Zapata County can be held liable. Along with individual defendants, municipalities and other local government entities are considered "persons" who may be sued directly under § 1983. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). However, "a municipality cannot be held vicariously liable for the constitutional torts of its employees or agents." *Gros v. City of Grand Prairie*, 181 F.3d 613, 615 (5th Cir. 1999). Instead, a plaintiff

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[37] Plaintiff also brings a municipal liability claim against Sheriff Lopez in his official capacity. (Dkt. 71 at 25.) However, a claim against a municipal policymaker acting in an official capacity is essentially a claim against the municipality and is considered redundant when a plaintiff also sues the municipality directly. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978); *see also Bellard v. Gautreaux*, 675 F.3d 454, 462 (5th Cir. 2012) ("Claims against the Sheriff in his official capacity are treated as claims against the municipal entity he represents").

must show that the municipality's own "policy" or "custom" caused his injury. *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 403 (1997). "[M]unicipal liability under Section 1983 requires proof of three elements: a policymaker; an official policy; and a violation of constitutional rights whose moving force is the policy or custom." *Zarnow v. City of Wichita Falls Tex.*, 614 F.3d 161, 166 (5th Cir. 2010) (quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001)).

The first element of a § 1983 municipal-liability claim requires proof of an official policymaker with actual or constructive knowledge of the constitutional violation. *Pineda v. City of Hous.*, 291 F.3d 325, 328 (5th Cir. 2002). A policymaker is any person "who takes the place of the governing body in a designated area of city administration." *Zarnow*, 614 F.3d at 167 (quoting *Webster v. City of Hous.*, 735 F.2d 838, 841 (5th Cir. 1984) (en banc)). State law determines whether a particular official has final policymaking authority. *Jett v. Dail. Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989).

The second element—the existence of an official policy—can be proven in several ways. First and most obviously, a plaintiff can point to a policy that has been "officially adopted and promulgated" by the municipality or by an official with policymaking authority. *Burge v. St. Tammany Par.*, 336 F.3d 363, 369 (5th Cir. 2003). Alternatively, a plaintiff can show 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." *Id.* Finally, "even a single decision may constitute municipal policy in 'rare circumstances' when the official or entity possessing 'final policymaking authority' for an action 'performs the specific act that forms the basis of the § 1983 claim.'" *Webb v. Town of Saint Joseph*, 925 F.3d 209, 215 (5th Cir. 2019) (quoting *Davidson v. City of Stafford*, 848 F.3d 384, 395 (5th Cir. 2017)).

The third and final element requires proof that the policy or custom was the "moving force" behind the underlying constitutional violation. *Pineda*, 291 F.3d at 328. To satisfy the moving-force prong, a plaintiff must show either that the policy itself was unconstitutional or that it was "adopted with deliberate indifference to the known or obvious fact that such constitutional violations would result." *Shumpert v. City of Tupelo*, 905 F.3d 310, 316 (5th Cir. 2018) (internal quotation marks omitted). Deliberate indifference is a higher standard of fault "than negligence or even gross negligence." *Valle v. City of Hous.*, 613 F.3d 536, 547 (5th Cir. 2010). It requires "proof that a municipal actor disregarded a known or obvious consequence of his action." *Brown*, 520 U.S. at 410.

There is no dispute that Sheriff Lopez is the policymaker of Zapata County. (Dkt. 169 at 23.) *See Robinson v. Hunt Cty.*, 921 F.3d 440, 448 (5th Cir. 2019) (stating that in Texas, "the county sheriff is the county's final policymaker in the area of law enforcement"). Sheriff Lopez himself acknowledged that his duties include policy and rule making. (Ex. 1 at 17.) He also had actual knowledge of the alleged

policy at issue (*id.* at 21, 44), and Plaintiff relies on his deposition testimony to demonstrate that his policy was "unconstitutional on its face" (*see* Dkt. 169 at 25–26).

Plaintiff argues that Zapata County "had a formal, stated policy that is unconstitutional on its face" and Sheriff Lopez's adoption of such a policy renders a municipality culpable under § 1983. (Dkt. 169 at 24.) Specifically, Plaintiff alleges that Sheriff Lopez's policy (1) allows for "unlimited discretion in the amount of force" officers can use and (2) "explicitly permits officers to use a taser on a suspect who might start resisting even if that suspect is not actively resisting at the time he's tased." (*Id.* at 25–26 (internal quotations omitted).) In support of these allegations, Plaintiff relies almost exclusively on the following portions of Sheriff Lopez's deposition testimony:

> Q. Under your excessive force policy, then, could—actually, strike that. You said that an officer is allowed to use his or her discretion.
>
> A. Yes.
>
> Q. Are there any limits to their discretion?
>
> A. No.
>
> [. . .]
>
> Q. And as part of that policy, you've testified that officers could use force on someone who might start resisting arrest even though they're not actively resisting arrest at the time the officer approaches, correct?
>
> A. Yes.

(Ex. 1 at 21, 44.)

In their reply, Defendants argue that Plaintiff's characterization of the alleged policy, based on two quotes from Sheriff Lopez's deposition, is inaccurate. (*See* Dkt. 175 at 18–22.) The Court agrees. Although Sheriff Lopez did state that there were no limits to an officer's discretion, this statement should be qualified by his testimony that "it's common sense on the officers' discretion that . . . they have to use the minimum force to make an arrest."[38] (Ex. 1 at 21.) Specifically, Defendants indicate an earlier portion of Sheriff Lopez's deposition, clarifying his excessive force policy:

> Q. If they're on the ground, and they're not moving, could that be a sign of not—of—of—could that be a signal of being a physical threat—
>
> A. Yes, like—
>
> Q —not to move?
> So your policy is that it is unlawful to use—strike that.
> Is it your policy that it is unlawful to use force that is excessive to the need?
>
> A. Yes.
>
> Q. Yes?
>
> A. [Moving head up and down.]

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[38] Del Bosque testified that officers' discretion is limited by their training and what they need to do "to successfully do the arrest." (Ex. 4 at 24.) This may vary, depending on the officer. (*Id.*) He further stated that the rule on when an individual deputy can use a taser is dictated by safety concerns. (*Id.*)

Q. Going back, if a person is on the ground, and they're not moving, would it violate our policy—your use of force policy to tase them?

A. It depends on the situation.

Q. Okay. You just said it depends on the situation.
Are there situations where it would not violate policy to tase someone on the ground who is not moving?

A. Probably, yes.

Q. Okay. Can you describe that situation?

A. Probably I know, like—I know if—if that person that's on the ground, if he was advised by the officer—

Q. Okay. Thank you.

(*Id.* at 20–21.)

While Sheriff Lopez agreed with Plaintiff's counsel that "officers could use force on someone who might start resisting arrest even though they're not actively resisting arrest at the time the officer approaches" (*id.* at 44), this admission alone cannot be construed as Sheriff Lopez "explicitly" permitting the use of a taser under such circumstances. In fact, Sheriff Lopez earlier testified:

Q. Once again, your policy you just have stated was to use the minimal—you—your policy on use of force is to use the minimal force needed. Under your excessive force policy, could an officer use a taser on a person who was not

> resisting arrest at the time he or she approaches the suspect but had been evading arrest?
>
> A. Probably it's the officer's discretion. Because if they were evading arrest, that particular stop becomes a felony stop. So actually you can use you—when the stop I know comes to a complete stop—you can draw your actual weapon.

(*Id.* at 21.) Sheriff Lopez repeatedly testified that his unwritten policy on the use of force is "to use the *minimum* amount of force necessary" to make an arrest and that using a taser on a person who is not resisting arrest would violate this policy. (Ex. 1 at 19–21, 26 (emphasis added); *see also* Ex. 4 at 24.) Even when construing all facts in the light most favorable to Plaintiff, the Court cannot find that the present policy—in its totality—is unconstitutional on its face.[39]

Nevertheless, the Fifth Circuit has held that even a facially innocuous policy will support municipal liability "if it was promulgated with deliberate indifference to the known or obvious consequences that constitutional violations would result." *Piotrowski*, 237

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[39] Additionally, Plaintiff cannot demonstrate municipal liability using the "single decision" exception. *See* Webb, 925 F.3d at 215. Although Sheriff Lopez is the policymaker for Zapata County, he was in no way involved in Plaintiff's arrest or his subsequent detention at Zapata County Regional Jail. *See Davidson v. City of Stafford*, 848 F.3d 384, 395 (5th Cir. 2017) (finding that the plaintiff presented no evidence that the officer—presuming he was the policymaker—performed the arrest that formed the basis of his § 1983 claim).

F.3d at 579 (citation and quotation marks omitted). "Deliberate indifference of this sort is a stringent test, and a showing of simple or even heightened negligence will not suffice to prove municipal culpability." *Id.* "[D]emonstrating that a policy reflects deliberate indifference 'generally requires that a plaintiff demonstrate at least a pattern of similar violations.'" *Walker v. Upshaw*, 515 F. App'x 334, 341 (5th Cir. 2013) (citations omitted).

Plaintiff claims that six other incidents establish a pattern of excessive force: "The tasing of [Plaintiff] was just one of many instances in which Sheriff's lax policy led to the use of force on non-resisting people." (*See* Dkt. 71 at 27; Dkt. 169 at 9.) In ruling on the pending motion for summary judgment, however, the only specific incident that can be considered for the purposes of demonstrating Sheriff Lopez's deliberate indifference involves the tasing of a handcuffed juvenile suspect, who attempted to escape while being escorted to a patrol car.[40] (*See* Dkt. 190 at 4.) That incident, whose details were provided by Aaron Sanchez, took

[40] The Magistrate Judge previously excluded paragraphs 11 through 16 of Plaintiff's Exhibit 2 and Exhibits 16 through 21 in their entirety because they described incidents of alleged police misconduct that took place *after* the tasing incident. (Dkt. 188 at 3, 5–6.) *See Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 851 (5th Cir. 2009) (noting that a pattern requires "sufficiently numerous *prior* incidents" (emphasis added)). Later, the Magistrate Judge granted Plaintiff's motion to reconsider the exclusion of paragraphs 11 through 16 of Exhibit 2, allowing the information contained therein to be considered "for the *limited purpose* of demonstrating Sheriff Lopez's deliberate indifference." (Dkt. 190 at 4 (emphasis added).)

place five days after Plaintiff's tasing and is, at most, superficially similar to the facts of the present case. (*See* Dkt. 170, Ex. 2; Dkt. 189, Ex. A at 2.) However, even if the Court were to find that the juvenile's tasing was sufficiently similar to Plaintiff's tasing, these two incidents by themselves are insufficient to demonstrate deliberate indifference. Without additional instances of excessive force to support his claim, Plaintiff fails to establish a pattern of similar violations that would have put Sheriff Lopez and Zapata County on notice of any alleged constitutional violations. *See Peterson v. City of Fort Worth*, 588 F.3d 838, 850 (5th Cir. 2009) ("Where prior incidents are used to prove a pattern, they must have occurred *for so long or so frequently* that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of city employees." (emphasis added and internal quotations omitted)).

Because Plaintiff has failed to establish either an unconstitutional policy or that it was "promulgated with deliberate indifference," the Court need not reach the "moving force" element. *See Zarnow*, 614 F.3d at 171. Therefore, Plaintiff's municipal liability claim cannot survive summary judgment, unless he can demonstrate municipal liability under the alternative failure-to-train theory.

D. Municipal Liability Claim Under Failure-to-Train Theory

Section 1983 liability may also be predicated on a local government's failure to adequately train its police officers. *City of Canton v. Harris*, 489 U.S. 378, 387 (1989). Here, Plaintiff argues that there is evidence that Zapata County "failed to adequately train its deputies in the use of force on citizens." (Dkt. 169 at 24.) To prevail on a failure-to-train claim, Plaintiff must demonstrate that (1) Zapata County's "training policy procedures were inadequate, (2) [the County] was deliberately indifferent in adopting its training policy, and (3) the inadequate training policy directly caused the plaintiff's injury." *Sanders-Burns*, 594 F.3d at 381.

The Fifth Circuit has held that "when officers have received training required by Texas law, the plaintiff must show that the legal minimum of training was inadequate." *Id.* at 381–82. Here, citing to the same quote from Sheriff Lopez above (Ex. 1 at 44), Plaintiff claims that "the Sheriff expressly ***taught*** his deputies ***to violate federal law***." (Dkt. 169 at 27 (emphasis in original).) This allegation, if true, would no doubt constitute an inadequate training policy. However, the Court has previously found that the policy at issue was not unconstitutional, and Plaintiff fails to offer evidence that Sheriff Lopez otherwise taught his officers to use unreasonable or excessive force when effecting an arrest. The Court declines to find that a quote or two of Sheriff Lopez agreeing with Plaintiff's counsel "that officers could use force on someone who

might start resisting even though they're not actively resisting arrest" constitutes an explicit instruction to violate the law. (*See* Ex. 1 at 44.) Nevertheless, the Court addresses whether Plaintiff may have otherwise demonstrated an inadequate training policy.

An adequate training program must "enable officers to respond properly to the usual and recurring situations with which they must deal." *City of Canton*, 489 U.S. at 391. Here, the record indicates that Zapata County adopted policies requiring deputies to follow the Texas Commission on Law Enforcement (TCOLE) standards[41]; state statutes and regulations, including the Code of Criminal Procedure and Penal Code; and professional ethics guidelines. (*See* Ex. 1 at 7, 19; Ex. 3 at 12–13; Ex. 4 at 11–12; *see also* Dkt. 166, Ex. 6 (listing opinions of Defendants' expert).) Sheriff Lopez and Del Bosque on behalf of Zapata County further testified that they rely on officers' training from the police academy and provide no additional training beyond what is mandated by the state. (Ex. 1 at 21; Ex. 3 at 13–14.)

Defendants argue that Plaintiff cannot sustain a failure to train claim because Zapata County "meets the state standards for the training of its law enforcement officers." (Dkt. 166 at 28.) *See Gonzales v. Westbrook*, 118 F. Supp. 2d 728, 737 (W.D. Tex. 2000). However, the Court has previously found such an

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[41] Officers are required to complete 40 hours of continuing education every two years in order to maintain their license. (Ex. 1 at 7.) *See* Commission Rules, Texas Commission on Law Enforcement, http://www.tcole.texas.gov/content/commission-rules.

argument unpersuasive in the failure-to-train context. *See Herrera v. Webb Cty., Tex.*, No. 5:17-CV-237 (S.D. Tex. Sep. 27, 2018). While the Fifth Circuit has held that "compliance with state requirements [is] a *factor* counseling against a 'failure to train' finding," *Zarnow*, 614 F.3d at 171 (emphasis added), it has not held that this factor is dispositive. *See Hobart v. City of Stafford*, 784 F. Supp. 2d 732, 754 (S.D. Tex. 2011) (explaining that when assessing a failure-to-train claim, "compliance with state training requirements [is] a relevant but not dispositive factor"); *see also Benavides v. Cty. of Wilson*, 955 F.2d 968, 973 (5th Cir. 1992) (holding that when an officer receives the level of training required by state law, a plaintiff must show "that this legal minimum of training was inadequate" in order to state a § 1983 claim on failure-to-train grounds). "Thus, even where officers have met state training requirements, the Fifth Circuit permits plaintiffs to prove deliberate indifference from failure to train." *Hobart*, 784 F. Supp. at 754.

Though the Court finds that Defendants cannot escape liability merely by complying with state-mandated standards, Plaintiff fails to demonstrate (1) that such standards are facially unconstitutional; (2) that constitutional violations would result from compliance; or (3) that Defendants departed from the standards.[42] In fact, Plaintiff does not challenge any

[42] Although Plaintiff alleges that Sheriff Lopez's training program "does ***not*** comply with state training standards on excessive force" (Dkt. 169 at 32 (emphasis in original)), Plaintiff fails to present any "affirmative evidence" supporting his claim. *See Anderson*, 477 U.S. at 257 (1986).

of the existing training procedures and instead relies on the aforementioned mischaracterization of Sheriff Lopez's policy as affirmatively teaching deputies to "violate clearly established law on the use of force." (Dkt. 169 at 32; *see id.* at 27–28.) It is not incumbent upon the Court to sift through the entire record in search of evidence to support Plaintiff's opposition to summary judgment. *See Adams v. Travelers Indem. Co.*, 465 F.3d 156, 164 (5th Cir. 2006). Under Rule 56, the burden is on Plaintiff to "'designate' the specific facts in the record that create genuine issues precluding summary judgment." *Jones v. Sheehan, Young & Culp, P.C.*, 82 F.3d 1334, 1338 (5th Cir. 1996).

Because Plaintiff fails to meet its burden of establishing that Zapata County's training policy was inadequate, the Court need not reach the deliberate indifference and causation inquiries. *Sanders-Burns*, 594 F.3d at 381. Accordingly, Defendants are entitled to summary judgment on Plaintiff's municipal liability claim. *See Lincoln Gen.*, 401 F.3d at 349–50 (noting nonmovant must go beyond the pleadings to demonstrate a genuine issue of material fact).

D. Negligence

In addition and alternatively to his § 1983 claims, Plaintiff brings a negligence claim under Texas law against Zapata County for the following breaches of duties owed:

- failing to conduct sufficient training or supervision with respect to constitutional limitations on the use of force;

- failing to investigate adequately or discipline unconstitutional uses of force;
- tolerating the use of unconstitutional force;
- failing to receive, investigate, or act upon complaints of excessive force; and
- failing to provide medical treatment.

(Dkt. 71 at 29.)

Generally, a Texas municipality may not be held liable for state common law causes of action unless the Texas legislature has waived its governmental immunity. *Khansari v. City of Hous. (Khansari I)*, 14 F. Supp. 3d 842, 872 (S.D. Tex. 2014) (citing *Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 177 (Tex. 1994)). Immunity is only waived for claims brought under the Texas Tort Claims Act (TTCA). *Id.* (citing Tex. Civ. Prac. & Rem. Code §§ 101.001, et seq.) As relevant here, the TTCA waives immunity from suits arising both from:

> (1) the negligent conduct of an employee if property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or equipment if the employee would be personally liable to the claimant; and
>
> (2) from injuries caused by a condition or use of tangible personal property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

Tex. Civ. Prac. & Rem. Code § 101.021; *see Jackson v. Harris County*, 2018 U.S. Dist. LEXIS 73481, at *2

(S.D. Tex. May 1, 2018) (citing *Texas Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 581 (Tex. 2001)).

The TTCA does not, however, apply to any claim "arising out of assault, battery, false imprisonment, or any other intentional tort." Tex. Civ. Prac. & Rem. Code § 101.057. "If a plaintiff pleads facts which amount to an intentional tort, no matter if the claim is framed as negligence, the claim generally is for an intentional tort and is barred by the TTCA . . . . A plaintiff cannot circumvent the intentional tort exception by couching his claims in terms of negligence." *Wright v. City of Garland*, 2014 WL 1492356, at *10 (N.D. Tex. Apr. 16, 2014) (internal quotations and citations omitted); *see Lopez-Rodriguez v. City of Levelland, Tex.*, 100 F. App'x 272, 275 (5th Cir. 2004) (per curiam).

Plaintiff argues that a negligence claim can be established against Zapata County because its employee, Molina, negligently misused a taser, causing Plaintiff's injuries. (Dkt. 169 at 34.) As Plaintiff notes, courts have recognized "a taser as 'tangible personal property' for the purposes of [§ 101.021]." (*Id.*) *See*, *e.g.*, *Khansari I*, 14 F. Supp. 3d at 872–73; *City of Lubbock v. Nunez*, 279 S.W.3d 739, 740 (Tex. App. 2007). Plaintiff avers that Molina's "denial of *intentional* wrongdoing would support a jury finding that he acted negligently." (Dkt. 169 at 34 (emphasis added).) Specifically, Plaintiff claims that because Molina does not remember the tasing itself, a jury could infer that (1) Molina "inadvertently activated the trigger" of his taser while it was drawn and pointed at Plaintiff;

and/or (2) Molina "accidentally activated the trigger [again] after the initial tasing." (*Id.* at 34–35.)

Plaintiff's argument is essentially an attempt to "couch" an intentional tort claim in negligence terms. *See Wright*, 2014 WL 1492356, at *10. Although Molina may not remember why he decided to tase Plaintiff or how he did so (*see* Ex. 8 at 45), there is no dispute that Molina intended to arrest Plaintiff. "Claims of excessive force in the context of a lawful arrest arise out of a battery rather than negligence, whether the excessive force was intended or not." *City of Watauga v. Gordon*, 434 S.W.3d 586, 593 (Tex. 2014) (holding that "when an arrest, lawful in its inception, escalates into excessive-force allegations, the claim is for battery alone"); *see Tolan v. Cotton*, 2015 WL 5310801, at *10 (S.D. Tex. Sept. 11, 2015) ("There can be no doubt after *City of Watauga v. Gordon* that, in Texas, use of excessive force by a police officer is an intentional tort . . . ."). As such, the Court fords that Plaintiff's claim against Zapata County based on Molina's misuse of his taser does not defeat the County's immunity and should be dismissed.

Conclusion

For the foregoing reasons, "Defendants' Motion for Judgment on the Pleadings and Motion for Summary Judgment" (Dkt. 166) is hereby GRANTED in part and DENIED in part as reflected above. Specifically, Defendants' motion for judgment on the pleadings is hereby DENIED as to all newly added claims against

Defendants Zapata County, Sheriff Lopez, and Molina, but GRANTED as to (1) Plaintiff's claims against newly added Defendant Del Bosque and (2) Plaintiff's denial of medical care claim against Jailer Defendants. Accordingly, all claims against Defendant Del Bosque and Jailer Defendants are hereby DISMISSED as time-barred.

Further, Defendants' motion for summary judgment is hereby DENIED as to Plaintiff's excessive force claim against Defendant Molina, but GRANTED as to (1) Plaintiff's denial of medical care claim against Defendant Molina; (2) Plaintiff's municipal liability claim against Defendant Zapata County; and (3) Plaintiff's negligence claim against Defendant Zapata County. Finally, Plaintiff's request for attorneys' fees is hereby DENIED.

Only Plaintiff's excessive force claim against Defendant Molina remains. Therefore, the Clerk of Court is hereby DIRECTED to TERMINATE Defendants Zapata County, Sheriff Alonso Lopez, Raymundo Del Bosque, Jr., Jesus Hinojosa, Erasmo Maldonado, Juan Delgado, Jr., and Erica Saenz from this case.

IT IS SO ORDERED.

SIGNED this 23rd day of April, 2020.

/s/ Diana Saldaña
Diana Saldaña
United States District Judge

United States Court of Appeals
for the Fifth Circuit

No. 20-40334

JUAN CARLOS SALAZAR,

Plaintiff—Appellee,

versus

JUAN RENE MOLINA, *Deputy, Zapata County Sheriff's Office*,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:16-CV-292

(Filed Aug. 24, 2022)

ON PETITION FOR REHEARING EN BANC

Before SMITH, ELROD, and OLDHAM, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc

(FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.