

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Opinion of the United States Court of Appeals for the Eighth Circuit (May 31, 2022). App. 1

Appendix B Judgment of the United States Court of Appeals for the Eighth Circuit (May 31, 2022). App. 11

Appendix C Amended Partial Order for Summary Judgment of the United States District Court for the Western District of Missouri (February 11, 2020) App. 13

Appendix D Judgment of the United States District Court for the Western District of Missouri (February 11, 2020) App. 33

Appendix E Opinion of the United States Court of Appeals for the Eighth Circuit (August 12, 2019) App. 35

Appendix F Order of the United States District Court for the Western District of Missouri (February 9, 2018) App. 42

Appendix G Order of the United States Court of Appeals for the Eighth Circuit Denying Rehearing and Rehearing En Banc (July 14, 2022). App. 56

App. 1

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 20-1526

[Filed: May 31, 2022]

N.S., Only child of decedent,)
Ryan Stokes, by and through her)
natural mother and next friend,)
Brittany Lee; Narene James)

Plaintiffs - Appellants)

v.)

Kansas City Board of Police Commissioners;)
Michael Rader; Leland Shurin;)
Angela Wasson-Hunt; Alvin Brooks;)
Mayor Sly James)

Defendants - Appellees)

David Kenner)

Defendant)

William Thompson;)
Darryl Forte, in his individual capacity;)
Richard Smith, in his official capacity)
as Chief of Police of the Kansas City,)

App. 2

MO Police Department)
)
Defendants - Appellees)
_____)

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: December 14, 2021

Filed: May 31, 2022

Before LOKEN, ARNOLD, and STRAS, Circuit Judges.

STRAS, Circuit Judge.

Kansas City Police Officer William Thompson shot and killed Ryan Stokes during a foot chase. Despite the tragic circumstances, the district court¹ concluded that Officer Thompson was entitled to both qualified and official immunity. We affirm.

I.

We have seen this case before. The last time, we remanded to allow the district court to “specifically identify[] the plaintiff-friendly version of the disputed facts” and “evaluate whether [Officer] Thompson, in light of all of the information available to him at the moment, violated clearly established law when he shot Stokes.” *N.S. v. Kan. City Bd. of Police Comm’rs*, 933 F.3d 967, 970 (8th Cir. 2019). And then we instructed the court to use those same plaintiff-friendly facts to

¹ The Honorable Brian C. Wimes, United States District Judge for the Western District of Missouri.

App. 3

determine whether he was entitled to official immunity under Missouri law. *Id.* at 970–71.

Rather than denying qualified immunity, as it had done before, the district court determined that there had been no constitutional violation at all, clearly established or otherwise. Its conclusion on official immunity was similar: Officer Thompson had been negligent at most, meaning that Stokes’s family could not recover for wrongful death. *See Wealot v. Brooks*, 865 F.3d 1119, 1129 (8th Cir. 2017) (describing Missouri’s official-immunity doctrine).

Now the plaintiffs have appealed. In addition to contesting the grant of summary judgment to Officer Thompson, Stokes’s family argues that they should receive a trial on their claims against the Kansas City Board of Police Commissioners and the other municipal officials named in their complaint. *See Monell v. Dep’t of Social Servs. of City of N.Y.*, 436 U.S. 658 (1978).

II.

We review the district court’s decision to grant summary judgment de novo, viewing the record in the light most favorable to Stokes’s family and drawing all reasonable inferences in their favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *McManemy v. Tierney*, 970 F.3d 1034, 1037 (8th Cir. 2020). In the immunity context, this standard requires us to evaluate the evidence using the plaintiff-friendly version of the facts identified by the district court. *See N.S.*, 933 F.3d at 970.

We then have to determine whether the defendants are entitled to judgment as a matter of law. *See*

App. 4

Phillips v. Mathews, 547 F.3d 905, 909 (8th Cir. 2008). If they are, we will affirm the grant of summary judgment. See *Anderson*, 477 U.S. at 248 (“Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment.”). If not, the case goes on.

A.

Seconds after receiving a police dispatch about a suspected cellphone theft and an ensuing foot chase, Officer Thompson saw Stokes run into a parking lot. His destination was a red car, and once he reached it, he opened and shut the driver’s side door.² He then turned to face the officer who had been chasing him. What happened next is hotly disputed, but the family’s side of the story is what matters at this point.

Officer Thompson, who was standing behind Stokes at the time, saw him raise his hands to his waist. Misinterpreting the gesture as threatening, Officer Thompson fired without warning at Stokes, who was trying to surrender. Stokes later died from his injuries.

Although a search revealed a gun in the car, the car’s owner said that it had been in there all night. So

² We acknowledge the family’s attorney treated this fact as disputed at oral argument. But this position appears to be a late-breaking change: the family’s appellate brief assumes it to be true, and it was never contested before the district court. Appellant’s Br. 19; see *Cole v. Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 533 F.3d 932, 936 (8th Cir. 2008) (“[A] party cannot assert arguments that were not presented to the district court in opposing summary judgment in an appeal contesting an adverse grant of summary judgment”).

App. 5

even if Officer Thompson insists that he saw a gun in Stokes's hand during the chase, we must assume that he did not have one. *See N.S.*, 933 F.3d at 969.

B.

Applying these plaintiff-friendly facts, our task now is to evaluate the family's excessive-force claim against Officer Thompson. *See* 42 U.S.C. § 1983. The key issue is whether he is entitled to qualified immunity, which depends on how we answer two questions. First, did his actions violate a constitutional right? Second, was the right clearly established? *See Morgan v. Robinson*, 920 F.3d 521, 523 (8th Cir. 2019) (en banc). If the answer to either question is no, Officer Thompson gets immunity. *See id.* (explaining that we may answer these questions in either order).

We can skip directly to the second question. The Supreme Court has explained that “the focus” of the clearly-established-right inquiry “is on whether the officer had fair notice that [his] conduct was unlawful.” *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)). Here, “judged against the backdrop of the law at the time of the conduct,” a reasonable officer would not have had “fair notice” that shooting Stokes in these circumstances violated the Fourth Amendment. *Id.* (quoting *Brosseau*, 543 U.S. at 198).

Central to our conclusion is *Thompson v. Hubbard*, 257 F.3d 896, 898 (8th Cir. 2001), which involved “a report of shots fired and two suspects fleeing on foot from the scene of an armed robbery.” One of the

App. 6

suspects climbed over a short fence and fell to the ground. *Id.* When he stood up, he “looked over his shoulder at [an officer], and moved his arms as though reaching for a weapon at waist level.” *Id.* When the suspect’s arms continued to move despite an order to “stop,” the officer fired a single shot into the suspect’s back and killed him. *Id.* No weapon was found. *Id.*

Even so, we concluded that the officer’s “use of force . . . was within the bounds of the Fourth Amendment.” *Id.* at 899. Critical to our decision was the idea that “[a]n officer is not constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun.” *Id.*

Even under the plaintiff-friendly version of the facts, Officer Thompson faced a similar choice here: use deadly force or face the possibility that Stokes might shoot a fellow officer. And just like in *Hubbard*, Officer Thompson could only see the suspect from behind, which obscured his view and required a “split -second judgment[]—in circumstances that [we]re tense, uncertain, and rapidly evolving.” *Id.* (quoting *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)).

It is true that there are some differences here. For one thing, the suspect in *Hubbard* was fleeing from the scene of an armed robbery, *id.* at 898, a much more serious crime than stealing a cell phone. For another, Officer Thompson remained silent in the face of possible danger, whereas the officer in *Hubbard* shouted “stop” before using deadly force. Despite these differences, a reasonable officer in *these* circumstances

App. 7

“might not have known for certain that [his] conduct was unlawful,” particularly given that Stokes had just accessed the inside of an unknown vehicle before raising his hands. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017). This uncertainty, a by-product of *Hubbard*, means that Officer Thompson did not violate a *clearly established* right. See *Kisela*, 138 S. Ct. at 1152.

C.

None of the cases discussed by the family are any closer than *Hubbard*. *Tennessee v. Garner*, 471 U.S. 1, 4 & n.2 (1985), for example, did not involve the same level of potential danger because the minor suspect in that case was busy climbing a fence when an officer shot him. In another case, *Nance v. Sammis*, 586 F.3d 604, 607 (8th Cir. 2009), plain-clothed officers confronted two *children* after dark who were *walking* toward an apartment complex. They shot one of them without warning after seeing what turned out to be a toy gun in the child’s waistband—a different situation than we have here. *Id.* Finally, *Ngo v. Storlie*, 495 F.3d 597, 600–01 (8th Cir. 2007), involved an officer-on-officer shooting, not an officer who fired at a fleeing suspect.

At most, these cases would create uncertainty for someone in Officer Thompson’s shoes. To prevail, however, the family had to establish that “the right’s contours were sufficiently definite that any reasonable official in the defendant’s shoes would have understood that he was violating it.” *Kisela*, 138 S. Ct. at 1153 (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 778–79 (2014)). “Existing precedent,” in other words, “must

App. 8

have placed the statutory or constitutional question beyond debate.” *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011). In light of *Hubbard*, it did not.

III.

Nor has the family shown that Officer Thompson acted “in bad faith or with malice.” *Wealot*, 865 F.3d at 1129 (quoting *Blue v. Harrah’s N. Kan. City, LLC*, 170 S.W.3d 466, 479 (Mo. Ct. App. 2005)). Official immunity shields Missouri police officers from liability for their discretionary decisions, including when they “draw[] and fire[] a weapon,” even if they are negligent. *Seiner v. Drenon*, 304 F.3d 810, 813 (8th Cir. 2002). But immunity ends where bad faith or malice begins. *See Blue*, 170 S.W.3d at 479.

Both are forms of “wrongful intent.” *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443, 447 (Mo. banc 1986). The former requires “a dishonest purpose, moral obliquity, conscious wrongdoing, [or] breach of a known duty through some ulterior motive.” *Id.* (quotation marks omitted). And the latter involves actions that are “so reckless or wantonly and willfully in disregard of one’s rights that a trier of fact could infer from such conduct bad faith or [an] improper or wrongful motive.” *Id.* (quotation marks omitted).

There is no evidence of either here. Nothing suggests, for example, that Officer Thompson was retaliating against Stokes for something that happened earlier or that they had a pre-existing relationship. *See Wealot*, 865 F.3d at 1129 (examining the officers’ prior “treatment” of the plaintiff); *Twiehaus*, 706 S.W.2d at 448–49 (considering what the defendant knew about

decedent's prior suicide attempts). By their own account, the family's best evidence of wrongful intent is that the gun may have been moved from a holster to the driver's side seat. The problem with this theory, however, is that there is no evidence that *Officer Thompson* was the one who moved it. As we have explained before, "speculation and conjecture are insufficient to defeat summary judgment." *See Gannon, Int'l, Ltd. v. Blocker*, 684 F.3d 785, 794 (8th Cir. 2012).

IV.

Nor is there enough to find the municipal defendants liable under a deliberate-indifference theory. *See Monell v. Dep't of Social Servs. of City of N.Y.*, 436 U.S. 658, 690 (1978). The family's argument is that the "Hot Spots" program, which allows non-patrol officers to occasionally work the streets, and the lack of specific foot-pursuit training, amounted to a "deliberate or conscious choice" to ignore public safety. *Parrish v. Ball*, 594 F.3d 993, 997, 1002 (8th Cir. 2010) (explaining the requirements for this type of claim).

To survive summary judgment, the family had to offer evidence that the municipal defendants "had notice that [these] procedures were inadequate and likely to result in" a constitutional violation. *Id.* at 998 (quotation marks omitted). On this point, the family has nothing linking either policy to any other incident involving the use of excessive force. *See Atkinson v. City of Mountain View, Mo.*, 709 F.3d 1201, 1216 (8th Cir. 2013) (holding that the "single incident" of excessive force in *that* case did not give rise to municipal liability). Without notice, there can be

App. 10

no deliberate indifference. *See id.* (“Notice is the touchstone of deliberate indifference in the context of § 1983 municipal liability.”).

V.

We accordingly affirm the judgment of the district court.

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 20-1526

[Filed: May 31, 2022]

N.S., Only child of decedent,)
Ryan Stokes, by and through her)
natural mother and next friend,)
Brittany Lee; Narene James)

Plaintiffs - Appellants)

v.)

Kansas City Board of Police Commissioners;)
Michael Rader; Leland Shurin;)
Angela Wasson-Hunt; Alvin Brooks;)
Mayor Sly James)

Defendants - Appellees)

David Kenner)

Defendant)

William Thompson;)
Darryl Forte, in his individual capacity;)
Richard Smith, in his official capacity)
as Chief of Police of the Kansas City,)

App. 12

MO Police Department)
)
 Defendants - Appellees)
)
 _____)

Appeal from U.S. District Court for the
Western District of Missouri - Kansas City
(4:16-cv-00843-BCW)

JUDGMENT

Before LOKEN, ARNOLD and STRAS, Circuit
Judges.

This appeal from the United States District Court
was submitted on the record of the district court, briefs
of the parties and was argued by counsel.

After consideration, it is hereby ordered and
adjudged that the judgment of the district court in this
cause is affirmed in accordance with the opinion of this
Court.

May 31, 2022

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

Case No. 4:16-CV-00843-BCW

[Filed: February 11, 2020]

N.S., et al.,)
)
Plaintiffs,)
)
v.)
)
KANSAS CITY BOARD)
OF POLICE COMMISSIONERS, et al.,)
)
Defendants.)

**AMENDED PARTIAL ORDER FOR SUMMARY
JUDGMENT**

The above-captioned matter is before the Court pursuant to a judgment and opinion from the United States Court of Appeals for the Eighth Circuit vacating this Court's order finding Defendant Officer Thompson not entitled to official or qualified immunity. The Eighth Circuit remanded the matter for reconsideration of the Defendants' motion for summary judgment on whether Officer Thompson was entitled

to qualified immunity on Count I and/or official immunity on Count III.¹

Accordingly, before the Court on remand from the Eighth Circuit is Officer Thompson's motion for summary judgment on Plaintiffs' Count I for excessive force in violation of § 1983 and Count III for wrongful death. (Doc. #135). The Court, being duly advised of the premises, and consistent with the Eighth Circuit's opinion, grants Officer Thompson's motion for summary judgment.

BACKGROUND

Plaintiffs N.S. and Narene James ("Plaintiffs") are family members of Ryan Stokes who, on July 28, 2013, was fatally shot by Defendant Kansas City, Missouri Police ("KCPD") Officer William Thompson ("Officer Thompson"). Plaintiffs allege the following claims: (I) violation of 42 U.S.C. § 1983 against Officer Thompson, in his personal and official capacities, for unconstitutional use of excessive and deadly force; (II) violation of 42 U.S.C. § 1983 against the Kansas City Board of Police Commissioners and its individual members Michael Rader, Leland Shurin, Angela Wasson-Hunt, Alvin Brooks, Sly James, and David Kenner, in their respective official capacities (collectively, "the Board"); Chief of Police Richard

¹ Because the Eighth Circuit vacated the Court's summary judgment order with respect to Plaintiffs' claims against Officer Thompson only, the Court's order finding the other Defendants entitled to summary judgment on Counts II and III remains in effect. (Doc. #160).

App. 15

Smith, in his official capacity,² and Darryl Forte, in his personal capacity, for unconstitutional policies, practices, customs, patterns of conduct and procedure, and for failure to train and/or supervise; and (III) violation of Mo. Rev. Stat. § 537.080 for wrongful death against the Board and Officer Thompson.

On October 2, 2017, Defendants filed a motion for summary judgment on each of Plaintiffs' Counts I, II, and III, asserting, as respectively applicable to each defendant, sovereign immunity, official immunity, and/or qualified immunity. On February 9, 2018, the Court granted summary judgment for Defendants on Count II for violation of § 1983, and for the Board on Count III for wrongful death. (Doc. #160). The Court otherwise denied Defendants' motion, thus denying Officer Thompson's motion for summary judgment on the basis of qualified immunity with respect to Count I against him for excessive force in violation of § 1983, and Officer Thompson's motion for summary judgment on the basis of official immunity with respect to Count III for wrongful death in violation of Mo. Rev. Stat. § 537.080.

Officer Thompson appealed the Court's denial of summary judgment with respect to Plaintiffs' Counts I and III against him. (Doc. #161). Thereafter, this Court stayed this case, pending resolution of Officer Thompson's appeal. On August 12, 2019, the Eighth Circuit entered its judgment and opinion vacating this Court's denial of Defendants' motion for summary

² KCPD Police Chief Richard Smith is substituted for Darryl Forte in his official capacity. Fed. R. Civ. P. 25(d).

judgment with respect to Officer Thompson. The Eighth Circuit vacated the summary judgment order, and remanded to the district court for reconsideration consistent with the Eighth Circuit opinion. (Doc. #168). On September 5, 2019, the Eighth Circuit issued its mandate. (Doc. #169).

The Eighth Circuit's opinion sets forth the following:

While on patrol early one morning, Thompson and his partner received a radio message that other officers were pursuing two men suspected of theft. Just seconds later, Thompson spotted Stokes, who matched the description of one of the suspects, running into a parking lot. Stokes headed toward the driver's side of a parked car and briefly opened the door. He then quickly turned and moved in the direction of the pursuing officer, who by that point was 'very close' to him. Thompson fired at Stokes three times, hitting him twice in the back. Stokes died shortly thereafter.

Beyond these basic facts, the parties' accounts differ. Thompson claims that he saw Stokes with a gun when he entered the parking lot and believed that he intended to ambush the pursuing officer. Stokes's family argues that Stokes never possessed a gun and was attempting to surrender when he was shot. The parties also dispute whether Thompson said anything to Stokes before firing.

App. 17

Some evidence supports Thompson's account. The police discovered a handgun on the driver's seat of the car, which could mean that Stokes was armed when he entered the parking lot but then tossed the gun into the car. And witnesses who saw Stokes running said that he appeared to be 'holding up his pants as he ran,' which is arguably consistent with Thompson's perception that Stokes was holding a gun. Finally, Thompson's partner claims to have heard Thompson order Stokes to 'get on the ground.'

Other evidence supports [Plaintiffs'] account. No one besides Thompson observed Stokes with a gun, nor was any gun found on or near his body. The car's owner, who was Stokes's friend, claimed that the gun recovered from the car belonged to him and that it had been there all night. Moreover, some officers did not recall hearing Thompson shout anything during the encounter, and at least one officer thought Stokes was trying to surrender when Thompson shot him.

(Doc. #168-1 at 2-3).

The Eighth Circuit found "the district court fell short of its threshold duty to make 'a thorough determination of Thompson's claim of qualified immunity,'" and improperly relied on a general right to be free from excessive force. (Doc. #168-1 at 3). The Eighth Circuit also stated the district court erred in at least two other ways: (1) mistakenly stating the qualified immunity analysis requires the Court to first determine whether the officer's actions amounted to a

constitutional violation before it could address whether the underlying right was clearly established; and (2) suggesting that Stokes' subjective belief that he was not fleeing from the officers had some bearing on the qualified-immunity analysis. (Doc. #168-1 at 4). The Eighth Circuit directed this Court on remand to

begin by specifically identifying the plaintiff-friendly version of the disputed facts, rather than, as it did before, simply reciting the parties' general allegations It must then evaluate whether Thompson, in light of all the information available to him at the moment, violated clearly established law when he shot Stokes. Only if the answer is 'yes' may the court once against deny qualified immunity.

(Doc. #168-1 at 4).

The Eighth Circuit also remanded the summary judgment decision for reconsideration on the issue of whether Officer Thompson is entitled to official immunity on Count III. The Eighth Circuit directed the district court to undertake more than a cursory analysis of whether Officer Thompson was entitled to official immunity.

UNCONTROVERTED MATERIAL FACTS

Officer Thompson is a KCPD police officer, employed by the Board, who has been a KCPD officer for more than 20 years. In the early morning hours of July 28, 2013, Officer Thompson and his partner Officer Tamara Jones were on foot patrol in the parking lot located at McGee and 12th Streets in Kansas City, Missouri. Officers Thompson and Jones

were assigned to clear the lower parking lot along the west side of Grand Boulevard between 12th and 13th Streets. Eventually, Officers Thompson and Jones moved to the upper level of the parking lot where the shooting at issue occurred.

Over dispatch radio, Officer Thompson heard from Officer Albert Villafain that a foot chase was headed in his direction. Officer Thompson heard the description of two suspects (black males wearing white T-shirts and shorts), the direction of the two suspects' travel, and the crime that had allegedly been committed, which was stealing. Seconds after Officer Thompson heard this information over the radio, he saw a black male, wearing a white T-shirt, come running around the corner of a building in the parking lot. This individual was Ryan Stokes.

At the time of the incident, Stokes held his right hand closed, in front of himself, at waist level. Stokes jogged in Officer Thompson's direction, toward a red Monte Carlo that was parked just past the corner of the building in the parking lot. Stokes held his hands and arms close to his body as he ran, with his elbows bent, stationary, and close to his body.

Officer Thompson testified he saw a gun in Stokes' right hand, and Stokes looked at Officer Thompson and knew of his presence. Officer Jones testified she did not see Stokes with a gun, but she did not see Stokes' hands. Liberty, Missouri Police Officer Greg Powell testified he did not see a gun in Stokes' hand, but it was dark, and he could not see Stokes' hands. KCPD Officer Gregory Williams testified he did not see Stokes with a gun or anything that would have appeared as a

gun. KCPD Officer Straub testified he did not see Stokes with a gun, but he also did not see Stokes' hands. Other witnesses testified Stokes was holding up his pants. Other witnesses testified they did not see Stokes with a gun at any point earlier that evening, including immediately before Officer Thompson saw Stokes.

Officer Thompson pointed a gun at Stokes as Stokes ran to the driver's side door of the Monte Carlo. Stokes' back was to Officer Thompson, at which point Officer Thompson could not see Stokes' hands. Stokes stepped away from the door of the vehicle. In his peripheral vision, Officer Thompson saw another police officer running around the same corner of the building around which Stokes had run. Stokes ran in the direction of the approaching officer, Officer Straub. Officer Straub saw Stokes stepping away from the Monte Carlo, and believed Stokes was obeying Officer Straub's commands to stop running and show Officer Straub his hands.

As Stokes moved away from the Monte Carlo, his back was to Officer Thompson, who could not see Stokes' right hand. However, Officer Thompson believed Stokes was armed and intended to ambush and shoot Officer Straub.

Officer Thompson shot Stokes from behind, and saw Stokes fall to the ground. Officer Thompson stopped shooting once he saw Stokes falling. About seven to ten seconds elapsed between when Officer Thompson saw Stokes and when Officer Thompson shot Stokes. Stokes was unarmed at the time of the shooting.

Thereafter, a gun was discovered on the driver's seat of the Monte Carlo. The gun belonged to Stokes' friend and owner of the Monte Carlo, Ollie Outley.

LEGAL STANDARD

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party who moves for summary judgment bears the burden to establish that there is no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

When considering a motion for summary judgment, the court evaluates the evidence in the light most favorable to the nonmoving party and the nonmoving party is entitled to "the benefit of all reasonable inferences." Mirax Chem. Prods. Corp. v. First Interstate Commercial Corp., 950 F.2d 566, 569 (8th Cir. 1991); White v. McKinley, 519 F.3d 806, 813 (8th Cir. 2008).

ANALYSIS

Consistent with the Eighth Circuit's direction, this Court "begin[s] by specifically identifying the plaintiff-friendly version of the disputed facts." As identified by the Eighth Circuit opinion, the following facts are either not in dispute, or support Plaintiffs' position that Officer Thompson is not entitled to immunity under the circumstances: (i) while on early morning patrol, Officer Thompson and his partner

heard a radio message that other officers were pursuit two men suspected of theft; (ii) seconds after Officer Thompson heard the message, he saw Stokes, who matched the description of one of the suspects, running into a parking lot; (iii) Stokes moved toward the driver's side of a parked car and briefly opened the door; (iv) Stokes quickly turned and moved in the direction of the officer pursuing him who was, at that point, very close by; (v) Officer Thompson fired at Stokes three times, hitting him twice in the back, leading to Stokes' death; (iv) Officer Thompson is the only one who observed Stokes with a gun; (v) no gun was found on or near Stokes' body; (vi) the gun recovered from the front seat of the vehicle belonged to Outley, who also owned the car, and the gun had been in the vehicle all night; (vii) Officer Thompson may not have given Stokes verbal commands during the encounter; and (viii) at least one officer on the scene thought Stokes was attempting to surrender when he turned back toward the pursuing officer before Officer Thompson shot him.

A. Officer Thompson is entitled to qualified immunity on Count I.

In Count I, Plaintiffs allege a claim against Officer Thompson for excessive force under 42 U.S.C. § 1983. Defendants assert Officer Thompson is entitled to summary judgment on Plaintiffs' excessive force claim based on qualified immunity.

In the remand opinion, the Eighth Circuit set forth the issue as follows: "whether Thompson, in light of all the information available to him at the moment, violated clearly established law when he shot Stokes.

Only if the answer is ‘yes’ may the court once against deny qualified immunity.” (Doc. #168-1 at 3).

Title 42 U.S.C. § “1983 provides a cause of action against government officials who deprive persons of rights, privileges, or immunities secured by the Constitution.” Hayek v. City of St. Paul, 488 F.3d 1049, 1054 (8th Cir. 2007) (citing 42 U.S.C. § 1983). The doctrine of “[q]ualified immunity shields a government official from liability in a § 1983 action unless the official’s conduct violates a clearly established constitutional or statutory right of which a reasonable person would have known.” Estate of Morgan v. Cook, 686 F.3d 494, 496 (8th Cir. 2012) (citing Brown v. City of Golden Valley, 574 F.3d 491, 495 (8th Cir. 2009)).

A district court considering a motion for summary judgment asserting qualified immunity should make a “thorough determination” of two analytical prongs: “(1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant’s alleged misconduct.” Robbins v. Becker, 715 F.3d 691, 694-95 (8th Cir. 2013); Morgan, 686 F.3d at 496. The court need not consider these two questions in a particular order; rather, the court may decide “which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” Boude v. City of Raymore, Mo., 855 F.3d 930, 933 (8th Cir. 2017) (citing Pearson v. Callahan, 555 U.S. 223, 236 (2009)). A government official performing discretionary functions is entitled to qualified

immunity unless the answer to both prongs is “yes.” Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982).

1. No constitutional violation occurred.

“Under the Fourth Amendment, police officers are liable for excessive force that is not objectively reasonable under the circumstances.” Boude, 855 F.3d at 933 (citing Brown v. City of Golden Valley, 574 F.3d 491, 496 (8th Cir. 2009)). As set forth by Defendants, “[s]hooting a suspect is a seizure under the Fourth Amendment, so the question is whether doing so was objectively reasonable under the circumstances.” (Doc. #135 at 10) (citing Morgan, 686 F.3d at 496-97 (8th Cir. 2012)). In assessing whether Officer Thompson’s use of force was objectively reasonable, the Court considers “the facts and circumstances confronting [Officer Thompson], without regard to [Officer Thompson’s] underlying intent or motivation.” Morgan, 686 F.3d at 497 (citing Nance v. Sammis, 586 F.3d 604, 610 (8th Cir. 2009)).

Whether an officer’s use of force was reasonable depends on “the totality of the circumstances, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade by flight.” Id. “The use of deadly force is not constitutionally unreasonable if an officer has probable cause to believe that the suspect poses a threat of serious harm, either to the officer or others,” even if the objectively reasonable belief or perception of the threat turns out to be objectively unreasonable. Morgan, 686 F.3d at 497; Billingsley v. City of Omaha, 277 F.3d 990, 995 (8th Cir. 2002).

However, when, under the totality of the circumstances, it is not objectively reasonable for an officer to believe a suspect poses an immediate threat, “deadly force is not justified.” Raines v. Counseling Assocs., Inc., 883 F.3d 1071, 1074 (8th Cir. 2018). “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 v. Connor, 490 U.S. 386, 396-97 (1989).

The Eighth Circuit has identified the following factors as relevant to determine whether an officer’s use of force is objectively reasonable: (a) the relationship between the need of force and the amount of force used; (b) the extent of the injury; (c) any effort made to limit the amount of force; (d) the severity of the security problem at issue; (e) the threat reasonably perceived by the officer; and (f) whether the plaintiff was actively resisting. Zubrod v. Hoch, 907 F.3d 568, 577 (8th Cir. 2018).

In this case, with all reasonable factual inferences drawn in Plaintiffs’ favor, Officer Thompson was the only witness who observed Stokes with a gun in his hand. Officer Thompson saw Stokes failing to obey Officer Thompson’s commands and, when he saw Stokes move away from the Monte Carlo and turn toward Officer Straub and the other pursuing officers, Officer Thompson did not again see Stokes’ hands, or have any reason to think Stokes no longer held a gun at his waist. Officer Thompson also testified he

observed Stokes by the vehicle's driver's side door, and the car door open and close.³ Officer Thompson observed Stokes to be a threat because he initially had a gun and considered Stokes' movement toward the front of the Monte Carlo to be an act of aggression because Stokes was not obeying Officer Thompson's commands. The circumstances of this case demonstrate Officer Thompson observed Stokes with a gun, and saw Stokes engaged in "[m]aximum resistance" through his failure to follow verbal commands and continuing to run away.

Under the applicable factors to determine objective reasonableness, Officer Thompson believed Stokes was armed and turned to ambush the pursuing officers, and Officer Thompson discharged his weapon to protect the approaching officers. The extent of the injury in this case is a fatality. There is at least some record evidence to suggest Officer Thompson gave Officer Thompson commands to drop the weapon and show his hands in the moments before Officer Thompson discharged his weapon. The crime at issue was stealing, with no other indication, beyond Officer Thompson's observation, that a weapon was involved. Officer Thompson perceived Stokes' turn away from the Monte Carlo as conduct indicating an attempt to fight or shoot at the officers in pursuit, although Officer Straub perceived Stokes' turn away from the vehicle as an attempt to surrender and comply with commands. Finally, Officer Thompson observed Stokes as active resistance in

³ The Court notes Defendants' motion for summary judgment does not state, as an uncontroverted material fact, that the door to the Monte Carlo was opened or closed at any point during this incident

Stokes' failure to follow officer commands. Zubrod, 907 F.3d at 577.

Based on the application of these factors, the Court concludes Officer Thompson's use of deadly force was reasonable, even though at the time of the shooting, Stokes was not in fact armed. Morgan, 686 F.3d at 497; Billingsley, 277 F.3d at 995 (use of deadly force is not constitutionally unreasonable even if the officer's reasonable perception of threat turns out to be objectively unreasonable). Consequently, the record does not demonstrate the violation of a constitutional right, and Officer Thompson is thus entitled to qualified immunity on Count I.

2. The right at issue was not clearly established.

Though the conclusion on the "violation of a constitutional right" prong entitles Officer Thompson to qualified immunity, the Court also analyzes the "clearly established" prong.

A constitutional right is clearly established if it has contours "sufficiently clear that a reasonable official would understand that what he or she is doing violates that right." Atkinson v. City of Mountain View, Mo., 709 F.3d 1201, 1211 (8th Cir. 2013). For an officer to have violated a clearly established right, the illegality of that conduct must be "beyond debate." Aschcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011). "At least since Garner was decided, officers have been on notice that they may not use deadly force unless the suspect poses a significant threat of death or serious physical injury to the officer or others." Wealot v. Brooks, 865 F.3d

1119, 1125 (8th Cir. 2016 (citing Craighead v. Lee, 399 F.3d 954, 962 (8th Cir. 2005) (citing Tennessee v. Garner, 471 U.S. 1, 11 (1985))).

“The 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. Hernandez v. Mesa, 137 S. Ct. 2003, 2007 (2017) (citing Saucier v. Katz, 533 U.S. 194, 202 (2001)). Stated differently, a constitutional right is clearly established if a reasonable officer would have known that his conduct was unlawful. Rohrbough v. Hall, 586 F.3d 582, 585 (8th Cir. 2009). “The qualified immunity analysis thus is limited to ‘the facts that were knowable to the defendant officers at the time they engaged in the conduct in question.’” Hernandez, 137 S. Ct. at 2007 (citing White v. Pauly, 137 S. Ct. 548, 550 (2017)). “Facts an officer learns after the incident ends – whether those facts would support granting immunity or denying it – are not relevant.” Hernandez, 137 S. Ct. at 2007.

In this case, with all reasonable factual inferences drawn in Plaintiffs’ favor, Officer Thompson discharged his weapon as Stokes turned away from the Monte Carlo toward pursuing officers to prevent Stokes from ambushing the pursuing officers with the gun Officer Thompson believed Stokes had in his right hand. Although no other witness testified to seeing Stokes with a gun, and the radio call did not mention a weapon, and Officer Straub believed Stokes was surrendering when he turned back toward the pursuing officers, Officer Thompson believed he saw

Stokes was carrying a gun and observed Stokes failing to comply with Officer Thompson's commands. The fact that Stokes was not, in reality, holding a gun when Officer Thompson shot him is not relevant. Hernandez, 137 S. Ct. at 2007. Under these circumstances, Officer Thompson relied on his observations to conclude Stokes posed a threat of death or serious physical injury to other officers such that Officer Thompson's use of deadly force cannot be said to violate a clearly established constitutional right of which a reasonable officer would have known. Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (citing Brosseau v. Haugen, 543 U.S. 194, 198 (2004)).

For these reasons, the Court grants summary judgment in Officer Thompson's favor on Count I based on qualified immunity.

B. Officer Thompson is entitled to official immunity on Count III.

Plaintiffs' Count III alleges violation of Mo. Rev. Stat. § 537.080, which is Missouri's wrongful death statute. Defendants argue Officer Thompson is entitled to summary judgment on Count III based on official immunity.

"Missouri's doctrine of official immunity applies to wrongful death claims under Missouri law." Wealot v. Brooks, 865 F.3d 1119, 1128-9 (8th Cir. 2017) (citing Seiner v. Drenon, 304 F.3d 810, 813 (8th Cir. 2002)). Under this official immunity doctrine, public employees are protected "from liability for alleged acts of negligence committed during the course of their official duties for the performance of discretionary acts."

Wealot, 865 F.3d at 1129 (Southers v. City of Farmington, 263 S.W.3d 603, 610 (Mo. 2008)).

“Police officers are not liable for negligent acts that are related to discretionary functions.” Wealot, 865 F.3d at 1129 (citing Blue v. Harrah’s N. Kan. City, LLC, 170 S.W.3d 466, 479 (Mo. Ct. App. 2005)). “The use of force is a discretionary duty.” Id. (citations omitted). However, the official immunity doctrine “does not apply to discretionary acts done in bad faith or with malice.” Id. (citing Blue, 170 S.W.3d at 479). In this context, “bad faith” means “more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, or breach of a known duty through some ulterior motive.” Wealot, 865 F.3d at 1129 (citing State ex rel. Twiehaus v. Adolf, 706 S.W.2d 443, 447 (Mo. 1986)). “Malice” means “conduct which is so reckless or wantonly and willfully in disregard of one’s rights that a trier of fact could infer from such conduct bad faith or any improper or wrongful motive.” Wealot, 865 F.3d at 1129 (citing Twiehaus, 706 S.W.2d at 447 (“A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another.”)).

“In Missouri, a bad-faith allegation survives summary judgment if a plaintiff states facts from which it could reasonably be inferred that [the defendant] acted in bad faith or from an improper or wrongful motive.” Boude v. City of Raymore, 855 F.3d 930, 935 (8th Cir. 2017).

In this case, Officer Thompson testified he saw a gun in Stokes right hand, and other witnesses saw Stokes holding his hands and arms close to his body. Further, the entirety of the incident occurred over a time period of not more than ten seconds. Even with all reasonable factual inferences in Plaintiffs' favor, there is no basis in the record to support that Officer Thompson's use of force was more than bad judgment, negligence, and/or recklessly, wantonly, or willfully in disregard of Stokes' rights. Wealot, 865 F.3d at 1129. Plaintiffs have demonstrated no facts from which the reasonable conclusion might be drawn that Officer Thompson discharged his weapon pursuant to any malice or bad faith. To the contrary, the uncontroverted facts demonstrate Officer Thompson's use of force against Stokes was in response to the circumstances presented at the scene as Officer Thompson perceived them: (a) the incident was ten seconds in duration; (b) Stokes had a gun; and (c) Stokes turned toward Officer Straub. Consequently, even though Officer Thompson was mistaken that Stokes had a gun as he turned to face Officer Straub, Officer Thompson's use of force, which falls within his discretion, amounts to no more than a negligent act in the course of his official duties and Officer Thompson is entitled to official immunity. Defendants' motion for summary judgment on Count III is granted. Accordingly, it is hereby

ORDERED Defendants' motion for summary judgment (Doc. #135) is GRANTED. Officer Thompson is entitled to summary judgment on Count I based on qualified immunity and Count III based on official immunity.

App. 32

IT IS SO ORDERED.

DATED: February 11, 2020

/s/ Brian C. Wimes
JUDGE BRIAN C. WIMES
UNITED STATES DISTRICT COURT

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

Case No. 4:16-CV-00843-BCW

[Filed: February 11, 2020]

N.S., et al.,)
)
Plaintiffs,)
)
v.)
)
KANSAS CITY BOARD OF POLICE)
COMMISSIONERS, et al.,)
)
Defendants.)

JUDGMENT IN A CIVIL ACTION

X **Decision by Court.** The issues have been considered and a decision has been rendered by the Court.

IT IS ORDERED AND ADJUDGED, Defendants' motion for summary judgment (Doc. #135) is GRANTED. Officer Thompson is entitled to summary judgment on Count I based on qualified immunity and Count III based on official immunity, consistent with

App. 34

the order entered by the Honorable Brian C. Wimes
this date.

AT THE DIRECTION OF
THE COURT

February 11, 2020
Dated

/s/Paige Wymore-Wynn
Court Executive

February 11, 2020
Entered

By: Joella Baldwin
Deputy Clerk

APPENDIX E

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 18-1537

[Filed: August 12, 2019]

N.S., Only child of decedent,)
Ryan Stokes, by and through her)
natural mother and next friend,)
Brittany Lee; Narene James)
)
<i>Plaintiffs - Appellees</i>)
v.)
)
Kansas City Board of)
Police Commissioners; Michael Rader;)
Leland Shurin; Angela Wasson-Hunt;)
Alvin Brooks; Mayor Sly James;)
David Kenner)
)
<i>Defendants</i>)
)
William Thompson)
)
<i>Defendant - Appellant</i>)
)
Darryl Forte)
)
<i>Defendant</i>)

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: April 16, 2019

Filed: August 12, 2019

Before LOKEN, WOLLMAN, and STRAS, Circuit
Judges.

STRAS, Circuit Judge.

Officer William Thompson shot and killed Ryan Stokes during a police chase. The district court ruled that Thompson was not entitled to official or qualified immunity. We vacate and remand for reconsideration.

I.

While on patrol early one morning, Thompson and his partner received a radio message that other officers were pursuing two men suspected of theft. Just seconds later, Thompson spotted Stokes, who matched the description of one of the suspects, running into a parking lot. Stokes headed toward the driver's side of a parked car and briefly opened the door. He then quickly turned and moved in the direction of a pursuing officer, who by that point was "very close" to him. Thompson fired at Stokes three times, hitting him twice in the back. Stokes died shortly thereafter.

Beyond these basic facts, the parties' accounts differ. Thompson claims that he saw Stokes with a gun when he entered the parking lot and believed that he intended to ambush the pursuing officer. Stokes's family argues that Stokes never possessed a gun and was attempting to surrender when he was shot. The

parties also dispute whether Thompson said anything to Stokes before firing.

Some evidence supports Thompson's account. The police discovered a handgun on the driver's seat of the car, which could mean that Stokes was armed when he entered the parking lot but then tossed the gun into the car. And witnesses who saw Stokes running said that he appeared to be "holding up his pants as he ran," which is arguably consistent with Thompson's perception that Stokes was holding a gun. Finally, Thompson's partner claims to have heard Thompson order Stokes to "get on the ground."

Other evidence supports the family's account. No one besides Thompson observed Stokes with a gun, nor was any gun found on or near his body. The car's owner, who was Stokes's friend, claimed that the gun recovered from the car belonged to him and that it had been there all night. Moreover, some officers did not recall hearing Thompson shout anything during the encounter, and at least one officer thought Stokes was trying to surrender when Thompson shot him.

Stokes's family sued Thompson for excessive force, *see* 42 U.S.C. § 1983, and wrongful death, *see* Mo. Rev. Stat. § 537.080. Thompson moved for summary judgment, claiming qualified immunity from the federal claim and official immunity from the state claim. In its order, the court recounted the parties' general allegations and then denied both forms of immunity.

II.

Cases in which a district court denies qualified immunity at the summary-judgment stage typically follow one of two paths on appeal. First, we may affirm, but only when it is apparent that, if the plaintiff's version of the facts is right, the officer violated a clearly established right. *See Raines v. Counseling Assocs., Inc.*, 883 F.3d 1071, 1074 (8th Cir. 2018). Second, we may reverse because, even under the plaintiff-friendly version of the facts, there was no constitutional violation or the underlying right was not clearly established. *See id.* (“We have authority to decide the purely legal issue of whether the facts alleged by the plaintiff are a violation of clearly established law.” (brackets and citation omitted)). This case falls into a third category.

Here, the district court fell short in its threshold duty to make “a thorough determination of [Thompson’s] claim of qualified immunity.” *Robbins v. Becker*, 715 F.3d 691, 694–95 (8th Cir. 2013) (citation omitted). In its summary-judgment order, the court did little more than summarize the parties’ allegations and decide that the combination of a “*general . . .* right to be free from excessive force” and the presence of “genuine issues of material fact[]” precluded summary judgment. (Emphasis added).

Yet the Supreme Court has warned courts not to “define clearly established law at [such] a high level of generality.” *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (citation omitted); *see also City of Escondido v. Emmons*, 139 S. Ct. 500, 502–04 (2019) (per curiam). Although there need not be “a case

directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question *beyond debate*,” or else “officers are entitled to qualified immunity.” *Kisela*, 138 S. Ct. at 1152–53 (emphasis added) (citations omitted). “[O]utside [of] an obvious case,” the Court has explained, it is not enough “to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness.” *Id.* at 1153 (internal quotation marks and citation omitted).

The district court did no more than that here, so the case needs to go back for a second look.¹ *See Robbins*, 715 F.3d at 694–95. On remand, the court should begin by specifically identifying the plaintiff-friendly version of the disputed facts, rather than, as it did before, simply reciting the parties’ general allegations. *See id.*; *cf. Kisela*, 138 S. Ct. at 1152–53 (“Use of excessive force is an area of the law in which the result depends very much on the facts of each case” (internal quotation

¹ The district court made at least two other errors in its summary-judgment order. First, it was mistaken in its belief that it had to decide whether Thompson’s actions amounted to a constitutional violation before it could address whether the underlying right was clearly established. Although addressing the steps in this order was once mandatory, *see Saucier v. Katz*, 533 U.S. 194, 200–01 (2001), it is not any longer, *see Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Second, it suggested that if Stokes *subjectively* believed that he was not fleeing from the officers, then Thompson should not have concluded that he was resisting arrest. Even assuming that this is a provable fact, it is completely irrelevant to the qualified-immunity analysis, which considers only the facts actually available to the officer at the time. *See Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (per curiam).

marks and citation omitted)). It must then evaluate whether Thompson, in light of all of the information available to him at the moment, violated clearly established law when he shot Stokes. *See Kisela*, 138 S. Ct. at 1152–53; *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (per curiam). Only if the answer is “yes” may the court once again deny qualified immunity.

III.

We also remand for reconsideration of Thompson’s claim to official immunity. Official immunity, like qualified immunity, is a threshold issue and subject to interlocutory appellate review. *See Div. of Emp’t Sec. v. Bd. of Police Comm’rs*, 864 F.3d 974, 978 (8th Cir. 2017); *cf. State ex rel. Barthelette v. Sanders*, 756 S.W.2d 536, 539 (Mo. banc 1988); *State ex rel. Mo. Dep’t of Agric. v. McHenry*, 687 S.W.2d 178, 181 (Mo. banc 1985). But the similarities largely end there.

Official immunity, for example, is available unless the officer acted “in bad faith or with malice,” which requires “more than [just] bad judgment or negligence.” *Wealot v. Brooks*, 865 F.3d 1119, 1129 (8th Cir. 2017) (citations omitted). Qualified immunity, on the other hand, asks a different question: were the officer’s actions “unreasonable” under clearly established law? *See id.* at 1125–28. Different questions can produce different answers. *See, e.g., id.* at 1125–29 (holding that officers were entitled to official but not qualified immunity).

Yet the district court treated the two inquiries as interchangeable, explaining that “[t]he same factual disputes as to whether . . . Stokes posed a threat[] or

resisted arrest preclude[d it] from determining if . . . Thompson acted maliciously in his use of force.” In fact, nowhere did the court say which facts would allow a reasonable jury to “conclude [that Thompson] acted with malice or in bad faith.” *Id.* at 1129; *cf. Schmidt v. City of Bella Villa*, 557 F.3d 564, 575 (8th Cir. 2009) (noting that neither “innuendo regarding [a defendant’s] mindset” nor “speculation and conjecture” can defeat official immunity). Though the facts may justify denying both kinds of immunity in some cases, *see, e.g., Div. of Emp’t Sec.*, 864 F.3d at 979–80, the analysis is too cursory for us to say whether they do here.

IV.

We accordingly vacate the district court’s decision and remand for reconsideration of Thompson’s motion for summary judgment.

APPENDIX F

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

Case No. 4:16-CV-00843-BCW

[Filed: February 9, 2018]

N.S., <i>et al.</i> ,)
)
Plaintiffs,)
)
v.)
)
KANSAS CITY, MISSOURI, BOARD, OF POLICE COMMISSIONERS, <i>et al.</i> ,)
)
Defendants.)

ORDER

Before the Court is Defendants' motion for summary judgement (Doc. #135). The Court, being duly advised of the premises, grants in part and denies in part said motion.

BACKGROUND

Plaintiffs allege claims against Defendants for excessive force in violation of 42 U.S.C. § 1983 against Officer William Thompson (Count I). Plaintiffs allege

Failure to Train and Supervise claims in violation of 42 U.S.C. § 1983 against Kansas City, Missouri Board of Police Commissioners and Chief Richard Smith in their official capacities (Count II). In Count II, Plaintiffs also allege claims against Darryl Forte in his individual capacity and assert liability against the Board on the basis of Monell¹. Lastly, Plaintiffs allege a wrongful death action against Kansas City, Missouri Board of Police Commissioners and Officer William Thompson (Count III). These claims stem from an incident that occurred on July 28, 2013 in Kansas City, Missouri. For purposes of the instant motion, the parties agree that the following facts are uncontroverted.

On July 28, 2013, Officer William Thompson (“Officer Thompson”) and Officer Tamara Jones (“Officer Jones”) of the Kansas City, Missouri Police Department (“KCPD”) were on foot patrol in a parking lot located at 12th and McGee Street. Officer Thompson heard through dispatch radio that officers were running towards his direction because they were involved in a foot chase of two black males wearing white t-shirts. The men were alleged to have been involved in an incident where a cell phone was stolen. Seconds later, Officer Thompson saw a black male, wearing a white t-shirt, run around the corner of a building in the parking lot. The male was later

¹ Monell v. Dep’t. of Soc. Servs., 436 U.S. 658, 659 (1978) (A local government may be liable for injuries that were caused pursuant to an official municipal policy, which includes the decisions of a government’s lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law).

identified as Ryan Stokes (“Mr. Stokes”). Subsequently, Officer Thompson pointed his gun at Mr. Stokes. Mr. Stokes turned his back to Officer Thompson and ran towards the driver’s side door of a vehicle parked in the parking lot. From his peripheral vision, Officer Thompson saw an officer also come running from the direction that Mr. Stokes had just come from. Mr. Stokes left the vehicle and ran back towards the direction of the building, causing him to run towards the officer chasing him. These observations led Officer Thompson to believe that Mr. Stokes was armed and going to shoot and kill the officer chasing him (Doc. #135-1). Officer Thompson discharged his firearm a single time, fatally shooting Mr. Stokes from behind. Mr. Stokes was unarmed at the time he was shot. A handgun was recovered on the driver’s seat of the vehicle.

LEGAL STANDARD

A moving party is entitled to summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A party who moves for summary judgment bears the burden to establish that there is no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

When considering a motion for summary judgment, the court must evaluate the evidence in the light most favorable to the nonmoving party and the nonmoving party is entitled to “the benefit of all reasonable

inferences.” Mirax Chem. Prods. Corp. v. First Interstate Commercial Corp., 950 F.2d 566, 569 (8th Cir. 1991).

DISCUSSION

A. DEFENDANT’S MOTION FOR SUMMARY JUDGMENT ON THE BASIS OF QUALIFIED IMMUNITY IS DENIED.

Plaintiffs’ claim for excessive force arises under § 1983, which “provides a cause of action against government officials who deprive persons of rights, privileges, or immunities secured by the constitution.” Hayek v. City of St. Paul, 488 F.3d 822, 824 (8th Cir. 2005) (citing 42 U.S.C. § 1983). Defendant Officer Thompson argues that he is entitled to qualified immunity on the excessive force claim. In defending a claim asserted under § 1983, a defendant may be immune from suit on the basis of qualified immunity. Hanig v. Lee, 415 F.3d 822, 824 (8th Cir. 2005). The doctrine of qualified immunity may provide a basis for dismissal if the conduct in which the defendant is said to have engaged “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Hayek, 488 F.3d at 1054 (citation omitted).

Courts routinely assess the application of qualified immunity at the summary judgment stage because the doctrine immunizes a defendant from suit, rather than merely providing a defense to liability. Id. Generally, a court assessing qualified immunity at the summary judgment stage views the facts and draws all reasonable inferences in the light most favorable to plaintiff, and then assesses the constitutionality of the

conduct at issue. Shannon v. Koehler, 616 F.3d 855, 861-62 (8th Cir. 2010).

Whether qualified immunity applies involves a two-step analysis. Scott v. Harris, 550 U.S. 372, 377 (2007) (quotation omitted). The first step is considered a threshold question; the Court must first determine whether “[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right?” Id. If, and only if, this threshold question is answered in the affirmative, then the second step is triggered, which asks whether the right at issue was one that was “clearly established in light of the specific context of the case.” Id.

Under the qualified immunity analysis, the Court first considers whether Plaintiffs’ alleged Defendant’s conduct violated a constitutional right. Plaintiffs’ allege Officer Thompson violated Mr. Stokes’ Fourth Amendment right by using unreasonable deadly force to seize Mr. Stokes. All claims of excessive force “in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard[.]” Graham v. Connor, 490 U.S. 386, 395 (1989).

“The reasonableness of a particular use of force depends on the circumstances of each case, including the severity of the crime at issue, whether the subject poses an immediate threat to the safety of the officer or others, and whether the subject is actively resisting arrest or attempting to evade arrest by flight.” Wertish v. Kruger, 433 F.3d 1062, 1066 (8th Cir. 2006)(citing Graham v. Connor, 490 U.S. 386, 396 (1989)). Stated

differently, “the key question is whether the officers’ conduct was objectively reasonable under the circumstances, as judged from the perspective of a reasonable officer on the scene at the time the force was applied.” Wilson v. Lamp, No. C 15-4070-MWB, 2015 WL 6692251 at *7 (N.D. Iowa Nov. 3, 2015). “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstance that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.” Lawyer v. City of Council Bluffs, 361 F.3d 1099, 1105 (8th Cir. 2004) (citing Graham, 490 U.S. at 396-97). A seizure-by-shooting is objectively reasonable when “the officer [using the force] has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.” Gardner v. Buerger, 82 F.3d 248, 252 (8th Cir. 1996).

The test of reasonableness is “not capable of precise definition or mechanical application[;]” however, there are three important factors to consider under the totality of circumstances, including whether: (1) the suspect committed a violent or severe crime; (2) the suspect posed an immediate threat to officers or others; and (3) the suspect actively resisted arrest. Kuha v. City of Minnetonka, 365 F.3d 590, 597 (8th Cir. 2003). Here, the second consideration, whether Mr. Stokes posed an immediate threat to officers or others, is in dispute. Plaintiffs allege Mr. Stokes did not pose an immediate threat to officers because “he did not have a gun or other weapon, he made no threatening movement towards officers or bystanders and he did not make any verbal threats toward any officer as he

headed to the red Monte Carlo.” (Doc. 152 at 77). Officer Thompson averred that he saw a gun in Mr. Stokes’ right hand at waist level. (Doc. 135-1). Thus, with the record viewed in the light most favorable to Plaintiffs, genuine issues of material facts exist regarding whether Mr. Stokes posed an immediate threat to officers or others.

The third consideration, whether Mr. Stokes actively resisted arrest, is in dispute. Plaintiffs allege when Mr. Stokes was shot, he was surrendering and following the verbal commands of another KCPD officer. They further allege Mr. Stokes was not fleeing arrest, instead, he was jogging to the vehicle to pick up his friends who had been pepper sprayed by officers. Officer Thompson averred that after Mr. Stokes left the vehicle, he turned his back towards Officer Thompson, and ran in the direction of officers chasing him. He further averred that he believed Mr. Stokes was going to shoot and kill the officers. (Doc. #135-1). Thus, genuine issues of material fact exist regarding whether Mr. Stokes resisted arrest. Thus, genuine issues of material fact exist regarding whether Mr. Stokes was resisting arrest.

Under the second prong of the qualified immunity analysis, the Court considers whether Mr. Stokes’ constitutional right was clearly established at the time of the alleged violation, such that a reasonable officer would have known that his conduct was unlawful. Rohrbough v. Hall, 586 F.3d 582, 585 (8th Cir. 2009). For a right to be deemed clearly established, the “contours of the right must be sufficiently clear that a reasonable official would understand that what he is

doing violates that right.” Atkinson v. City of Mountain View, Mo, 709 F.3d 1201, 1211 (8th Cir. 2013).

As a general matter, [t]he right to be free from excessive force is a clearly established right under the Fourth Amendment’s prohibition against unreasonable seizures of the person. Guite v. Wright, 147 F.3d 747, 750 (8th Cir 1998). The Court concludes that denying qualified immunity is proper because genuine issues of material facts exist concerning whether Mr. Stokes posed an immediate threat to officers or others and whether he was resisting arrest. At the summary judgment stage, granting qualified immunity “is not appropriate where . . . a dispute remains regarding facts material to the qualified immunity issue.” Rohrbough, 586 F.3d at 587.

Thus, with the record viewed in the light most favorable to Plaintiffs, a genuine issue of material fact exists as to whether the use of force was reasonable such that a violation of a constitutional right occurred. Thus, summary judgment is denied based on qualified immunity.

B. DEFENDANT’S MOTION FOR SUMMARY JUDGMENT ON THE BASIS OF FAILURE TO TRAIN AND SUPERVISE IS GRANTED.

In Count II, Plaintiffs allege a claim against Chief Smith² and the Board in their official capacities for violation of 42 U.S.C. § 1983 on the basis of failure to

² Pursuant to Rule 25(d) Chief Richard Smith is automatically substituted as Chief of Police of the Kansas City Missouri Police Department.

train and supervise officers. Defendants argue Plaintiffs have not provided evidence demonstrating that Defendants neither lacked supervision nor had notice that its procedures were inadequate and likely to cause a constitutional violation.

To sustain a failure to train claim, Plaintiffs must show: (1) the Defendants training practices were inadequate; (2) Defendants were deliberately indifferent to the rights of others in adopting its training practices such that its failure reflects a deliberate or conscious choice by Defendants; and (3) the alleged deficient training procedures actually caused Mr. Stokes' injuries. Andrews v. Fowler, 98 F.3d 1069, 1076 (8th Cir. 1996). Plaintiffs "must demonstrate that the [Board] had notice that its procedures were inadequate and likely to result in a violation of constitutional rights." Parrish v. Ball, 594 F.3d 993, 997-98 (8th Cir. 2010) (citations omitted).

Plaintiffs allege the Board, Chief Smith, and Darryl Forte made a deliberate and conscious choice not to adequately train and supervise KCPD officers engaging in foot pursuits or working the Hot Spots³ program. They further assert the Board was deliberately indifferent to the rights of others because they failed to implement a foot pursuit policy. Lastly, Plaintiffs assert Defendants failure to train officers in foot pursuits resulted in the death of Mr. Stokes.

³ The Hot Spot Saturation Program was implemented by Darryl Forte during his tenure as Chief of Police of the Kansas City Missouri Police Department. The program was designed to add a heavy police presence in high crime areas.

Here, the evidence establishes that Officer Thompson and other officers received several training exercises regarding the use of force. The Supreme Court held that “the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform. The fact that a “particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the [municipality], for the officer’s shortcomings may have resulted from factors other than a faulty training program.” City of Canton, Ohio v. Harris, 511 U.S. 378, 390-91 (1989). To the extent Plaintiffs attempt to assert claims against Chief Smith in his official capacity, the Court construes this as a suit against the Board. Kentucky v. Graham, 473 U.S. 159, 166 (1985) (. . . an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity).

In Count II, Plaintiffs also allege the Board is liable for failure to train and supervise on the basis of Monell. Plaintiffs assert the Board is liable because, as a final policymaker, Darryl Forte implemented policies and procedures that placed non-patrol officers on Hot Spot assignments without adequate training. Plaintiffs also assert failure to train and supervise claims against Darryl Forte in his individual capacity.

Under § 1983, the Board and its members are treated as a municipality. Darby v. Branch, 287 F.3d 673, 679 (8th Cir. 2002). It is well-established that a municipality cannot be held liable under § 1983 based on a respondeat superior theory. See Connick v. Thompson, 563 U.S. 51, 60 (2011) (“[U]nder § 1983, local governments are responsible only for their own

illegal acts. They are not vicariously liable under § 1983 for their employees' actions.") (citations and quotation marks omitted); Bd. of County Comm'rs of Bryan County, Okla. v. Brown, 520 U.S. 397, 403 (1997) ("We have consistently refused to hold municipalities liable under a theory of respondeat superior."); City of Canton v. Harris, 489 U.S. 378, 384 (1989) ("Respondeat superior or vicarious liability will not attach under § 1983."); Loch v. City of Litchfield, 689 F.3d 961, 967 (8th Cir. 2012) ("It is well-established, however, that a municipality cannot be held liable under § 1983 on a respondeat superior theory."); Dahl v. Rice County, Minn., 621 F.3d 740, 743 (8th Cir.2010) ("Under 42 U.S.C. § 1983, a governmental entity may not be held liable for the unconstitutional acts of employees.").

It is well established that the Board cannot be held liable based on a respondeat superior theory under § 1983. The Board cannot be held liable for Officer Thompson's alleged unconstitutional acts nor can they be held liable for the alleged improper acts of Darryl Forte.

To the extent Plaintiffs argue Darryl Forte is liable in his individual capacity, the Court disagrees. Darryl Forte may be subject to individual liability under § 1983 if: (1) he had notice of a pattern of unconstitutional acts committed by officers; (2) demonstrated deliberate indifference to or tacit authorization of the offensive acts; (3) failed to take sufficient remedial action; and (4) that such failure proximately caused Mr. Stokes' injury. Andrews v. Fowler, 98 F.3d 1069, 1078 (8th Cir. 1996). The record

does not establish that Darryl Forte had notice of a pattern of unconstitutional acts by Officer Thompson or other officers in the Hot Spots program, directed or authorized Officer Thompson to discharge his firearm, nor failed to take sufficient remedial actions, such that his failure proximately caused Mr. Stokes' injury. Based on these reasons, the Court finds that the Board, Chief Smith, and Darryl Forte are entitled to summary judgment on Plaintiffs' Count II.

C. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE BASIS OF OFFICIAL IMMUNITY AND SOVEREIGN IMMUNITY IS GRANTED IN PART AND DENIED IN PART.

In addition to their § 1983 claims, Plaintiffs assert a wrongful death action against the Board and Officer Thompson. Defendants argue they are entitled to summary judgment on Plaintiffs' wrongful death action because the official immunity doctrine shields Officer Thompson from liability and the doctrine of sovereign immunity shields the Board from liability. Plaintiffs concede that the Board should be dismissed from Count III because the doctrine of sovereign immunity is applicable.

Under Missouri law, official immunity shields a public official from tort liability for injuries arising from the official's discretionary functions. Southers v. City of Farmington, 263 S.W.3d 603, 610 (Mo. 2008). However, discretionary acts are not protected by official immunity if the conduct was wilful or malicious. Id. The decision to use force is considered an inherently discretionary function. Coates v. Powell, 650 F. Supp 2d 932, 943 (W.D. Mo 2009). Therefore, whether

Defendant is entitled to official immunity depends on whether the use of force at issue was willful or malicious. “A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another.” State ex rel. Twiehaus v. Adolf, 706 S.W.2d 443, 447 (Mo. 1986) (quotation omitted). Malice “ordinarily requires actual intent to cause injury.” Austell v. Sprenger, 690 F.3d 929, 938 (8th Cir. 2012) (quotation omitted). Bad faith means “dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive, or ill will partaking of the nature of fraud”. Id.

In this case, Plaintiffs argue that Officer Thompson acted maliciously because Mr. Stokes was unarmed and posed no immediate threat of serious bodily harm to officers. Officer Thompson argues he is protected by official immunity because he was performing a discretionary act when he discharged his firearm.

The same factual disputes as to whether Mr. Stokes posed a threat, or resisted arrest preclude the Court from determining if Officer Thompson acted maliciously in his use of force. A reasonable jury may determine that Officer Thompson acted maliciously in fatally shooting Mr. Stokes. “Whether or not an officer acted maliciously or willfully is usually a question of fact to be resolved by the jury.” Brown v. City of Golden Valley, 574 F.3d 491, 496 (8th Cir. 2009). The Court finds that Officer Thompson is not entitled to summary judgment on Plaintiffs’ wrongful death claim based on official immunity. Furthermore, The Board is entitled

to summary judgment on Plaintiffs' wrongful death claim based on sovereign immunity.

CONCLUSION

The Court finds that there remain issues of material fact regarding Defendant Officer Thompson. However, the Court finds that there are no issues of material fact as to Defendant Kansas City, Missouri Board of Commissioners, Chief Richard Smith, and Darryl Forte, and as such is entitled to judgment as a matter of law. Accordingly, it is hereby

ORDERED Defendants' Motion for Summary Judgment (Doc. #135) is DENIED in part and GRANTED in part. Defendants' Motion is GRANTED as to Count II- Failure to Train and Supervise against all Defendants, and Count III-Wrongful Death against the Board only. The Motion is DENIED as to the remaining allegations.

IT IS SO ORDERED.

DATED: February 9, 2018

/s/ Brian C. Wimes
JUDGE BRIAN C. WIMES
UNITED STATES DISTRICT COURT

APPENDIX G

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 20-1526

[Filed: July 14, 2022]

N.S., Only child of decedent,)
Ryan Stokes, by and through her)
natural mother and next friend,)
Brittany Lee and Narene James)
)
Appellants)
)
v.)
)
Kansas City Board)
of Police Commissioners, et al.)
)
Appellees)
)
David Kenner)
)
William Thompson, et al.)
)
Appellees)

Appeal from U.S. District Court for the Western
District of Missouri - Kansas City
4:16-cv-00843-BCW

App. 57

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Grasz did not participate in the consideration or decision of this matter.

July 14, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans