UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPEAL NO. 20-6145

(1) CHARLESETTA REDD, Individually and as Personal Representative of the ESTATE of BRIAN SIMMS, JR., deceased,

Plaintiff-Appellant,

v.

PAUL GALYON, Individually,

CITY OF OKLAHOMA CITY, a municipality, ex rel. CITY OF OKC POLICE DEPARTMENT.

And WILLIAM CITTY, individually,
Defendants-Appellees.

Pursuant to 10th Cir.

Rule 28.2(C)(4), Appellant Requests

Oral Argument.

OPENING BRIEF OF APPELLANT CHARLESETTA REDD

Appealed from The United States District Court
for the Western District of Oklahoma
The Honorable Judge Robin J. Cauthron
Case No. CIV-15-263-C

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I. STATEMENT OF JURISDICTION

The United States District Court for the Western District of Oklahoma had federal question jurisdiction in this case under 28 U.S.C. § 1331 and supplemental or pendent jurisdiction pursuant to 28 U.S.C. § 1367. The order appealed was entered on May 3, 2018, disposing of all claims against all Appellees herein but other claims against other defendants remained. Final disposition of all claims against all parties was entered on August 26, 2020.[1] Appellant timely filed her notice of appeal on September 22, 2020, in accordance with FED. R. APP. P. 4(a)(1)(A). Appellate jurisdiction derives from 28 U.S.C. § 1291 as this appeal lies from a final decision of the district court.

II. PRIOR OR RELATED APPEALS

Appeal No. 17-6073 was brought in this Court by Event Security, LLC and Ms. Murray from a separate declaratory action filed in the Court below as Case No. CV-2016-1300-C. Although the appeal involved some parties in the underlying action, the issues were substantively unrelated to those raised herein.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in recharacterizing Ms. Murray's claims of

[1] The remaining parties below have been disposed of as follows: Big Dog Holding, LLC d/b/a Oklahoma City Farmer's Market, Voluntarily Dismissed on July 29, 2016; 365 Live Entertainment, Summary Judgment granted in favor of Appellant on November 28, 2016; Event Security, LLC was voluntarily dismissed with prejudice on August 26, 2020.

negligence and/or gross negligence to claims for Assault and Battery, to find that such claim was time barred.

2. Whether Qualified Immunity is properly available to Officer Galyon while he was acting as a private security guard.

3. Whether the District Court erred in failing to analyze both constitutional violations relative to Officer Galyon's asserted Qualified Immunity defense.

4. Whether the District Court improperly drew conclusions of fact.

5. Whether the District Court failed to view the facts in the light most favorable to the non-moving party.

IV. STATEMENT OF THE CASE

A. Relevant Facts

On July 11, 2013, Oklahoma City Police Officer Paul Galyon was "off-duty" working as a private security guard at a rap concert at the Oklahoma City Farmer's Market. Aplt. App. Vol. 1 at 51, 54-56[2], and 188. As part of his training, Officer Galyon had been trained on use of force policies. Aplt. App. Vol. 6 at 1441. A fellow officer, Antonio Escobar, was working with him and both were in full OKCPD Police Uniforms. Aplt. App. Vol. 1 at 54; Vol. 6 at 1446.

[2] Citations to the Record refer to Appellant's Appendix Volumes 1-7 which are paginated sequentially. Aplt. App. Vol. 1 at 54 refers to Appellant's Appendix, Volume 1, page 54.

Prior to the concert, there was no discussion or concern expressed by Officer Galyon that this event posed an extraordinary risk of increased criminal activity. Aplt. App. Vol. 6 at 1442, 1461. Officer Galyon was aware that his daughter and her friend were at the concert and he spoke with her before the shooting. Aplt. App. Vol 7 at 1562.

Officer Galyon and Officer Escobar had no specific purpose in walking through the parking lot when they approached the vehicle in which Simms was sitting, it was only "preventative policing." Aplt. App. Vol. 6 at 1307. Brian Simms, Jr. was sitting or sleeping in a parked vehicle in the parking lot of the venue with at least the passenger side window down. Officer Galyon and Officer Escobar approached the vehicle from "passenger side front." Aplt. App. Vol. 6 at 1443.

The first observations Officer Galyon made of Simms, from "maybe 20 feet" away, as he was sitting in the vehicle, were that he was a black male, "sitting upright. His eyes were closed, and his face was leaning to the right." Aplt. App. Vol. 6 at 1444. As Officer Galyon and Officer Escobar approached the vehicle they had no reason to suspect Simms of any criminal activity; Simms had not been arrested, committed a crime, nor was he suspected of any such activity. Aplt. App. Vol. 6 at 1444. Officer Galyon and Officer Escobar did not approach Simms's vehicle to "arrest or detain him" but "to investigate solely." Aplt. App. Vol. 6 at 1526 and 1580.

Just prior to the shooting of Brian Simms, Jr., Officer Galyon observed an individual he believed was crouched near the vehicle Brian Simms, Jr. was sitting in. Aplt. App. Vol. 6 at 1443-1444. Although this drew attention to Mr. Simms' vehicle, Officer Galyon "didn't feel like" this person "was evading contact with us because of criminal behavior or I would have put forth more effort to try and contact him." In fact, it was "more coincidence than anything." Aplt. App. Vol. 6 at 1443-1444.

Although the parking lot area was reasonably lit, Officer Galyon and Officer Escobar approached the vehicle with their flashlights out, shining both of their flashlights into the vehicle. Aplt. App. Vol. 6 at 1445, 1462. Officer Galyon and Officer Escobar observed Simms from approximately five or six feet away, sitting in the driver's side seat with his hands "down to his side with his palms facing up, looked like he was asleep." Aplt. App. Vol. 6 at 1444, 1584.

Officer Galyon and Officer Escobar were a "few feet" from the open passenger side window of the vehicle when they addressed Simms in an "authoritative" tone" saying something "to the affect, 'Hey, man.' Are you okay?'" Aplt. App. Vol. 7 at 1571, 1581. Simms opened his eyes "immediately" when Officer Galyon addressed him. As soon as Simms opened his eyes, Officer Galyon was "drawing" his weapon, and saying "don't do it." Before Officer Galyon knew if Simms had reached for his gun, he "fired my three bursts." Aplt. App. Vol. 7 at

1572. Neither Officer Galyon nor Officer Escobar identified themselves as police officers to Simms prior to the shooting. Aplt. App. Vol. 7 at 1583. The only commands ever given to Simms were "Don't do it" which was said as Galyon began shooting. Aplt. App. Vol. 7 at 1581.

Contemporaneous with his first verbal engagement, Officer Galyon "noticed a nine-millimeter pistol stuck in (Simms') waistband" Aplt. App. Vol. 7 at 1571. Seeing the weapon immediately triggered "tunnel vision" for Officer Galyon; "just that fight, or flight response came in and I was just focused on that gun." Aplt. App. Vol. 7 at 1573. "As soon as I saw the pistol, I just got laser focused on the butt of the gun." Aplt. App. Vol. 7 at 1571. Officer Galyon's view of Mr. Simms' movements was obstructed when he drew his weapon because he was "looking over the sight," and his "line of sight is obstructed by my own gun and my own hands as far as actually the (Simms') hand on the (his) gun." Aplt. App. Vol. 7 at 1573. As a result, Officer Galyon never saw Mr. Simms point a gun at him. Aplt. App. Vol. 7 at 1573.

Officer Galyon had made the decision to shoot and began shooting as soon as he drew the gun from his holster Officer Galyon "made the decision to shoot as (he) was drawing" his gun. There "was no delay. There was no stopping. . .as soon as (he) cleared leather and . . .leveled off on him. . .(he) engaged him." Aplt. App. Vol. 7 at 1578.

Officer Escobar was "standing on the left-hand side of Galyon" Aplt. App. Vol. 4 at 1007. Neither Officer Galyon nor Officer Escobar ever saw Brian Simms touch the gun with his hand or pull it from his waistband. Aplt. App. Vol. 4 at 1009. Although Officer Escobar pulled his service firearm, he did not fire his weapon. Aplt. App. Vol. 4 at 1017.

Officer Galyon continued to shoot at Simms, ultimately discharging at least nine (9) rounds directly at Simms's seated body through the passenger window. Officer Galyon did not pause at any point in his shooting and stopped only when he "felt the threat was diminished." Aplt. App. Vol. 6 at 1329. Brian Simms, Jr. ("Simms"), was shot and killed from point blank range. Aplt. App. Vol 3 at 669-676. Brian had at least four (4) shots to his back; and eight (8) entrance wounds, four of which were perforating. Aplt. App. Vol. 3 at 669-671. His death was ruled a homicide by the Office of the Chief Medical Examiner. Aplt. App. Vol. 3 at 668.

At the time he engaged Mr. Simms, Officer Galyon understood that deadly force was only to be used to protect himself or others from death or serious injury and that "mere suspicion is not sufficient to justify the use of deadly force." Aplt. App. Vol. 6 at 1451. Officer Galyon had been trained that he must be able to articulate some *reasonable suspicion* that a person is involved in criminal activity to initiate a detention encounter. Aplt. App. Vol. 1 at 190-192. Officer Galyon testified that he doesn't recall certain things from the shooting because "you know, being in

a stressful situation like that, you get tunnel vision. You don't see and hear things always the same way." Aplt. App. Vol. 6 at 1328-1329.

B. Procedural History

Appellant Charlesetta Murray (formerly, Redd), on behalf of her son, Brian Simms, Jr., brought claims alleging that Appellee, Officer Paul Galyon, violated her son's civil rights against excessive use of force in violation of his Fourth Amendment rights. Aplt. App. Vol. 1 at 22-47. Ms. Murray also asserts claims against Appellee Chief of Police William Citty for failure to adequately train and supervise officers, and against Appellee City of Oklahoma City for municipal liability, all of which contributed to Mr. Simms' death. *Id.*

Officer Galyon filed a Motion for Summary Judgment asserting a defense of qualified immunity. Aplt. App. Vol. 6 at 1257, *et seq.* The City of Oklahoma City and Chief William Citty also filed Motions for Summary Judgment. Aplt. App. Vol. 1 at 116, *et seq.*; Aplt. App. Vol. 4 at 856. On May 3, 2018, the district court found that Galyon's actions in shooting Mr. Simms were objectively reasonable and he was therefore entitled to qualified immunity. Aplt. App. Vol. 7 at 1767-1777. The motions filed by Chief Citty and City of Oklahoma City were granted based upon the dismissal of Officer Galyon. The remaining claim against another defendant below was dismissed with prejudice on August 26, 2020. Aplt. App. Vol. 7 at 1779-1781.

C. Rulings (Errors) Presented for Review

Generally, Ms. Murray contends it was error for the district court to grant the Motion for Summary Judgment as to Officer Galyon's defense of qualified immunity. The district court did not conduct a full and proper analysis of the facts and law vis a vis qualified immunity and there are questions of fact for a jury to decide. It was also error for the district court to presume Officer Galyon was acting under color of law when he was off-duty and to offer qualified immunity without no consideration of the facts.

Additionally, the district court recharacterized Ms. Murray's claims of negligence/gross negligence as claims for assault and battery and dismissed that claim as time barred. Ms. Murray also contends it was improper to grant judgment to the City of Oklahoma City and Chief William Citty with no analysis of the individual claims against them. Appellant now raises these issues to the Tenth Circuit for review.

The Order Appealed does not reflect the necessary analysis to determine whether Ms. Murray's claims against Officer Galyon and the others should go before a jury. As discussed below, the Court's opinion makes analytical leaps which invite logically absurd results.

The most glaring of the deficiencies in the district court's order is the failure to consider the two (2) distinct constitutional violations arising under these facts: 1)

the initial approach of the vehicle without reasonable suspicion; and 2) the unnecessary use of excessive force. The district court only considered the second violation, when of course, it would not have occurred but for the initial violation.

The district court then conducted only a cursory analysis of the second constitutional violation and quickly concluded that "Galyon's actions were objectively reasonable when viewed from the perspective of a reasonable officer at the scene." Aplt. App. Vol. 7 at 1773. The district court should have taken the facts in the light most favorable to the *non-movant,* but it reached this conclusion because "Plaintiff does not allege any genuine issues of material fact regarding Defendant Galyon's and Officer Escobar's *testimony.*" Aplt. App. Vol. 7 at 1774. (emphasis added) This requires an oddly clinical construction of the "any material fact in dispute" standard and in a proper context, it is simply untenable to reason that the state actor is immune simply because the only other witness to the excessive force is dead.

The district court conducted an obligatory "even if" consideration of the second prong of an excessive force analysis finding that "Plaintiff would fail on the second qualified immunity prong because there was no 'clearly established' right at the time of Defendant Galyon's conduct." Aplt. App. Vol. 7 at 1774. (citing to *Pearson v. Callahan,* 555 U.S. 223, 243-44 (2009)) With no substantive analysis of the facts, the opinion then cites several cases dealing with "suspects" and

"brandishing a weapon" and concludes that excessive force is appropriate anytime an individual with a gun is in the presence of a state actor. To reach this conclusion, however, the district court went further than simply considering whether facts were disputed, it had to make its own findings of fact. To support the conclusion that Officer Galyon was "objectively reasonable" in using excessive force, the opinion states:

> Simms posed a threat to Defendant Galyon and Officer Escobar when Simms drew his weapon and, most importantly, as Simms continued drawing his weapon after Defendant Galyon warned Simms to stop. When Simms did not stop drawing the weapon, Defendant Galyon responded with objectively reasonable force under the circumstances.

Aplt. App. Vol. 7 at 1775. A cursory review of the facts taken from Galyon's own testimony, disputes these conclusions. The importance of a thorough analysis of qualified immunity cannot be overstated. This process involves far too many twists and turns and each one must be carefully navigated. To protect Constitutional rights from potential abuses of power, any deficiencies must give the benefit to the non-movant and let a jury decide the claims. Thus, Ms. Murray brings these issues before this Court for appellate review.

V. SUMMARY OF THE ARGUMENT

A threshold issue exists regarding the district court's recharacterization of the negligence and/or gross negligence allegations as claims for assault and battery. The district court failed to consider the transactional approach Oklahoma uses to interpret

pleadings. If the pleadings provide adequate notice of the *underlying facts* at issue, as they do here, then various theories of liability may be raised as the case progresses.

The process on summary judgment is clear in this Circuit: the moving party must assert undisputed facts which entitle them to judgment on the law. The non-movant must then respond and show there *is* a material fact in dispute and that those disputed material facts must go before a jury for trial. When qualified immunity is asserted, the progression is modified and the burden shifts to the non-movant to first establish facts showing that 1) the state actor violated a constitutional right of the non-movant; and 2) that such constitutional right was well-established at the time of the violation.

When the non-movant makes that prima facie showing, the burden shifts back to the moving party to show there is no material fact in dispute as to those elements and that they are entitled to judgment as a matter of law. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299-1300 (10th Cir. 2004) ("…defendant must show that there are no material factual disputes as to whether his or her actions were objectively reasonable in light of the law and the information he or she possessed at the time.")

As a matter of law, the doctrine of qualified immunity should not be extended to police officers working as private security, for a private employer, at a private event, on private property. The doctrine of qualified immunity is intended to shield public employees performing their official duties in furtherance of a public purpose

or the public interest. There is no historical tradition of recognizing qualified immunity when a police officer is acting in a private capacity for a private employer. Additionally, extending the qualified immunity defense in such situations does not further a governmental purpose or function.

Even if Galyon is entitled to assert the defense of qualified immunity, Appellant meets the two-part test to overcome the defense of qualified immunity. In determining whether an officer is entitled to qualified immunity, a court is to consider (1) whether there has been a violation of a constitutional right, and (2) whether that right was clearly established at the time of the officer's alleged misconduct. *Pauly v. White,* 874 F.3d 1197, 1214 (10th Cir. 2017).

Ms. Murray's claims that Officer Galyon used excessive force on her son Brian arise under the Fourth Amendment; and those claims are reviewed under a standard of "objective reasonableness." *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The district court failed to follow the analytical framework of *Graham* and *Estate of Larsen ex rel. Sturdivan v. Murr,* 511 F.3d 1255, 1260 (10th Cir. 2008). Furthermore, the district court improperly construed facts in the light most favorable to Galyon and not to the non-moving party. If the district court had utilized the analytical framework set forth in *Graham* and *Estate of Larson,* and had construed the facts in the light most favorable to the non-moving party, it would have found that there were issues of fact that prevented summary judgment

that Galyon's conduct was objectively reasonable.

Considering the second factor, the right to be free from excessive and disproportionate force was clearly established at the time that Galyon shot and killed Simms. The district court again erred by construing a fact in favor of the moving party, rather than the non-moving party – namely whether Simms was brandishing a weapon. This error led to the district court committing a second error – utilizing the wrong conduct to determine whether the right to be free of excessive force existed. The district court relied on case law where a suspect had been brandishing a weapon or threatening officers. The district court should have focused on precedent for the unlawful use of excessive force when a suspect is not brandishing a weapon.

VI. STANDARD OF REVIEW

An order granting summary judgment is reviewed "*de novo* applying the same standard as the district court embodied in Rule 56(c)" which allows for summary judgment "if the movant demonstrates that there is 'no genuine issue as to any material fact' and that it is 'entitled to a judgment as a matter of law.'" *Alder v. Wal- Mart*, 144 F.3d 664, 670 (10th Cir. 1998). The court is obligated to examine the factual record presented to it and draw reasonable inferences in the light most favorable to the party opposing summary judgment. *Id.*; *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348 (1986); *Hirase-Doi*

v. U.S. West Commc'ns, Inc., 61 F.3d 777, 781 (10th Cir. 1995). This standard does not change when summary judgment is based upon qualified immunity. *Trask v. Franco*, 446 F.3d 1036, 1043 (10th Cir. 2006) ("On appeal, we review the award of summary judgment based on qualified immunity *de novo*.")).

As this Court emphasized in *Olsen v. Layton Hills Mall,* 312 F.3d 1304 (10th Cir. 2002), the reasonableness of an officer's conduct in an excessive force case is "heavily fact dependent" and "this court will not approve summary judgment in excessive force cases – based on qualified immunity or otherwise – if the moving party *has not quieted all disputed issues of material fact.*" *Id.* at 1314. "We have held that summary judgment motions may not be granted on any excessive force claim under §1983 for which *any* genuine issue of material fact remains – regardless of whether the potential grant would arise from qualified immunity or from a showing that the officer merely had not committed a constitutional violation." *Id.* (emphasis in original). *See also Cordova v. Aragon,* 569 F.3d 1183, 1188 (10th Cir. 2009) ("There is no easy-to-apply legal test for whether an officer's use of deadly force is excessive, instead we must slosh our way through the fact-bound morass of reasonableness") (internal quotations omitted).

Because the standard is *de novo,* this Court may review all facts available to the district court and take them in the light most favorable to the non-movant. *Weigel v. Broad*, 544 F.3d 1143, 1147 (10th Cir. 2008) (internal quotation marks

omitted). But the Court must also consider whether the district court improperly considered some facts and ignored others. Importantly, a summary judgment motion does not empower a court to act as the jury and determine witness credibility, weigh the evidence, or choose between competing inferences. *Windon Third Oil & Gas v. Fed. Deposit Ins.*, 805 F.2d 342, 346 (10th Cir. 1986), *cert. denied*, 480 U.S. 947 (1987). "Practically speaking, this means that the court may not grant summary judgment based on its own perception that one witness is more credible than another; these determinations *must* be left for the jury. *Fogarty v. Gallegos,* 523 F.3d 1147, 1165-1166 (10th Cir. 2008) (emphasis added).

Tenth Circuit qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant. In cases alleging unreasonable searches or seizures, the Supreme Court instructs that courts should define the "clearly established" right at issue on the basis of the "specific context of the case." *Saucier v. Katz,* 533 U.S. 194, at 201, 121 S.Ct. 2151 (2001); see also *Anderson v. Creighton,* 483 U.S. 635, 640–641, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

In the case at bar, there is a question of fact whether the decedent posed a threat to the officers when he was sitting peacefully inside of a car with the windows rolled down, even with an alleged gun near his lap, before Galyon ever started shooting in the first place. From there, there is a question of fact as to whether Galyon's decision to start firing was objectively reasonable under the facts and

circumstances with many of those very "facts and circumstances" being in dispute. These are the questions which must be considered with the facts in the light most favorable to Ms. Murray on behalf of her son, Brian Simms, Jr.

VII. ARGUMENT AND ANALYSIS

A. The District Court Improperly Recharacterized Negligence/Gross Negligence Claims as Assault & Battery

Initially, Ms. Murray asks this Court to review the district court's reconstruction of the pleadings on the assertion that Ms. Murray "substantively alleges an assault and battery claim, instead of a gross negligence claim." Aplt. Apx. Vol. 7 at 1771. This construction allowed the district court to grant summary judgment as to its newly created "assault and battery claim" on the grounds that it was not brought within the applicable one-year statute of limitations for intentional torts under Oklahoma law. *Id.* **(***See* 12 Okla. Stat. § 95(A)(4)). Although Ms. Murray asserted that she had not alleged intentional acts and that her factual pleading described a claim for negligence and/or gross negligence, the district court stated:

> In this instance, "[w]hat controls is not the pleader's designation of the nature of the cause of action; rather, it is the substance of the pleading and the nature of the issues raised thereby." *Kimberly v. DeWitt*, 1980 OK CIV APP 2, ¶ 6, 606 P.2d 612, 614. It is undisputed that Appellee Galyon intended to discharge his firearm aimed at Simms. Plaintiff is substantively pleading a cause of action for assault and battery. … The shooting occurred on July11, 2013, and Plaintiff's lawsuit was not filed until March 13, 2015. Plaintiff has exceeded the statute of limitations for an assault and battery claim.

Aplt. App. Vol. 7 at 1770. This reconstruction was not consistent with Oklahoma law on such pleading interpretation which uses a *transactional approach.*

> The operative event that underlies a party's claim delineates the parameters of his cause of action. ***This conceptual approach ensures that litigants will be able to assert different theories of liability without violating the purposes of the statute of limitations.*** … The *wrongful act analysis* of a "cause of action" does not conflict with the purpose of statutory limitations.

Chandler v. Denton, 1987 OK 38, ¶ 10- ¶ 13, 741 P.2d 855, 862-863 (emphasis added). This approach allows the responding parties to be "*on notice of the factual setting* underlying the legal demands pressed against him." *Id.* But this does prejudice him "if the plaintiff, at a later time, adds any new theory of liability which rests upon the very same operative events." *Id.*

This precise issue was considered *in the same district* as the present case. Law enforcement officers argued that a Plaintiff was "pursuing an inappropriate tort theory in order to avoid a statute of limitations that would bar the type of tort claims supported by his factual allegations, namely, false arrest and assault and battery." *Tucker v. City of Okla. City*, 2013 U.S. Dist. LEXIS 134750, *54-56, 2013 WL 5303730 (WDOK 2013). The officers in *Tucker* also relied upon *Kimberly,* and that case is referenced by the district court here below. *See Kimberly v. DeWitt*, 1980 OK CIV APP 2, 606 P.2d 612, 614 (Okla. Civ. App. 1980.

The district court in *Tucker* acknowledged the standards in *Chandler,* as described above and noted that Oklahoma law permits "the pursuit of multiple

theories of recovery based on the same operative facts." *Tucker v. City of Okla. City*, 2013 U.S. Dist. LEXIS 134750, *54-56, 2013 WL 5303730 (WDOK 2013). The Court noted that *Chandler* allowed the Plaintiff "to press tort theories of liability governed by the two-year statute of limitations - including trespass, extortion, and intentional infliction of emotional distress - even though an assault and battery claim based on the same operative event was time-barred." *Id.* Going further, the district court stated:

> The Court's research reveals that courts in other jurisdictions have permitted persons involved in altercations with police officers to proceed under multiple tort theories, including intentional infliction of emotional distress, and to address the issue as one of overlapping theories and duplicative damages. *See, e.g., Bender v. City of New York*, 78 F.3d 787, 791-92 (2d Cir. 1996); *see also* Carol Schultz Vento, Annotation, *Recovery of Emotional Distress Resulting From Actions of Law Enforcement Officers*, 101 A.L.R.5th 515, § 4 (2002). Accordingly, the Court finds that if Plaintiff can establish a viable tort claim, he should not be precluded from pursuing it simply because another claim is time-barred.

Id. (emphasis added). Thus, the district court's interpretation of the pleadings was in error and Ms. Murray requests remand so that the negligence and/or gross negligence claims may be sent to a jury.

B. As a Matter of Law, Qualified Immunity Should Not be Available to Off Duty Officers Acting on Behalf of Private Employers at Private Events.

The fundamental purpose of the qualified immunity defense is to provide *state actors* protection from incidents occurring from *reasonable* performance of their job duties. At the time that Galyon shot and killed Simms, he was working as a private

security guard, for a private security company, during a private event, on private property. He was not performing any governmental functions. As such, Galyon should not be entitled to assert the defense of qualified immunity, which is intended to protect the public good and governmental interests.

1. State Action for Purposes of § 1983 is not Co-extensive With State Action for Which Qualified Immunity is Available.

Galyon admits that he was acting under color of state law when he shot and killed Simms. This *admission* alone does not determine his right to such a defense. If it did, he could *admit* he was under color of law any time he chooses and invoke immunity for *any* act he chooses. As discussed in Justice Thomas' dissent, *infra,* that is not the purpose of the qualified immunity defense.

Similarly, state action for § 1983 purposes is not precisely co-extensive with state action for which qualified immunity is available. *Richardson v. McKnight,* 521 U.S. 399, 117 S.Ct. 2100; 138 L.Ed.2d 540 (1997); *Wyatt v. Cole,* 504 U.S. 158, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992). "The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt,* 504 U.S. at 161, 112 S.Ct. 1827. Qualified immunity, on the other hand, "protect[s] government's ability to perform its traditional functions." *Id.* at 167, 112 S.Ct. 1827. Courts, therefore,

> have recognized qualified immunity for government officials where it

> was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service. In short, … qualified immunity … acts to safeguard government, and thereby to protect the public at large, not to benefit its agents.

Id. at 167-168; 112 S.Ct. 1827. Thus, the availability of immunity does not necessarily overlap with state action under § 1983 when a government officer uses the "badge of their authority," *Id.* at 161, 112 S.Ct. 1827, in service of a private non-governmental goal. *See generally Richardson,* 521 U.S. at 404-12, 117 S.Ct. 2100. To determine whether a government actor's conduct is entitled to protection, the Court must look to the tradition and purpose of the qualified immunity doctrine.

2. Neither a Firmly Rooted Tradition of Immunity nor the Purposes Underlying the Qualified Immunity Doctrine Justify Recognizing Qualified Immunity for Officer Galyon.

Neither this Court nor the Supreme Court has squarely addressed the general availability of qualified immunity to off-duty police officers acting as private security guards. Other courts have noted this uncertainty or simply assumed, without analysis, that immunity was available to an off-duty officer acting as a security guard. *Bracken v. Okura,* 869 F.3d 771, 777 & n.4 (9th Cir. 2017). *See, Saenz v. G4S Secure Sols. (USA), Inc.,* 224 F.Supp.3d 477, 481-82 (W.D. Tex. 2016) (noting "nation-[wide] uncertainty regarding this issue"); *see also Morris v. Dillard Dep't Stores, Inc.,* 277 F.3d 743, 753 (5th Cir. 2001)(assuming without analysis that immunity was available to an off-duty officer acting as a security guard);

Pourghoraishi v. Flying J, Inc., 449 F.3d 751, 763 & n.5 (7th Cir. 2006).

In other contexts when courts are evaluating the general availability of qualified immunity to a government employee, they look at the Supreme Court's instruction that they should "look both to history and to the purposes that underlie government employee immunity in order to find the answer." *Richardson,* 521 U.S. at 404, 117 S.Ct. 2100.

The first inquiry is whether "[h]istory … reveal[s] a 'firmly rooted' tradition of immunity." *Richardson,* 521 U.S. at 404, 117 S.Ct. 2100. To answer this, courts should look principally to "the common law as it existed when Congress passed § 1983 in 1871." *Filarsky v. Delia,* 566 U.S. 377, 384, 132 S.Ct. 1657, 182 L.Ed.2d 662 (2012). After what feels like a tidal wave of qualified immunity cases, Justice Thomas eloquently articulated the *original* purpose of this body of law.

> In the wake of the Civil War…Armed with its new enforcement powers, Congress sought to respond to "the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States." *Briscoe* v. *LaHue*, 460 U. S. 325, 337, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983). Congress passed a statute variously known as the Ku Klux Act of 1871, the Civil Rights Act of 1871, and the Enforcement Act of 1871. Section 1, now codified, as amended, at 42 U. S. C. §1983, provided that
>
>> "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured in any action at law, suit in equity, or other

> proper proceeding for redress . . . ." Act of Apr. 20, 1871, §1, 17 Stat. 13.
>
> Put in simpler terms, §1 gave individuals a right to sue state officers for damages to remedy certain violations of their constitutional rights.

Baxter v. Bracey, 140 S. Ct. 1862, 207 L. Ed. 2d 1069, 1069-1070 (2020). It seems clear that like qualified immunity in general, the traditional purpose of § 1983 does not reveal extensions to off-duty state actors.

The next question is whether granting immunity would serve the purposes underlying the immunity doctrine – such as "protecting government's ability to perform its traditional functions," "preserv[ing] the ability of government officials to serve the public good," "ensur[ing] that talented candidates [are] not deterred by the threat of damages suits from entering public service," and "protecting the public from unwarranted timidity on the part of public officials." *Richardson,* 521 U.S. at 407-408, 117 S.Ct. 2100 (citations and internal quotation marks omitted). In *Bracken,* 869 F.3d 771, the Ninth Circuit squarely addressed the issue whether qualified immunity is available to an off-duty police officer while acting as a private security guard at a private event.

The facts in *Bracken* showed a private company hired a Hawaii Police Department employee, Chung, as a special duty officer to provide security for a special event at a hotel. Chung was paid directly by the hotel – not by the police department. Even though Chung was "off-duty," he wore his police uniform during

the event. During the special event, Bracken stepped over a crowd control rope to enter the event without a wristband indicating that he was entitled to be there. Chung and another security guard confronted Bracken. Shortly thereafter, other security guards arrived, who tackled and assaulted Bracken, resulting in some physical injuries. Bracken sued the hotel, the hotel security guards, and Chung. Bracken's § 1983 claims against Chung arose under the Fourth and Fourteenth Amendments for unlawful seizure, excessive force, and failure to intercede. The district court granted summary judgment in favor of Chung based on qualified immunity. On appeal, the Ninth Circuit reversed and concluded that qualified immunity was unavailable.

In evaluating the history of qualified immunity, the Ninth Circuit first noted that there is no "firmly rooted" tradition of immunity for off-duty or special duty officers acting as private security guards. *Cf. Filarsky,* 556 U.S. at 387-89, 132 S.Ct. 1657 (explaining that immunity was historically available to "public servants and private individuals engaged in public service" when they were "carrying out government responsibilities"); *Richardson,* 521 U.S. at 404; 117 S.Ct. 2100 ("History does *not* reveal a 'firmly rooted' tradition of immunity applicable to privately employed prison guards."). *Bracken,* 869 F.3d at 777. The Court of Appeals noted:

> We are not aware of any state that offers immunity where an officer serving as a private security guard did not act in service of a public duty, and some states have held immunity is simply unavailable in this context.

Bracken, 869 F.3d at 777 and n.5. The Ninth Circuit concluded that the historical inquiry did not support qualified immunity for Chung. Although *Richardson* and *Filarsky* appear to have inconsistent holdings (whether private persons are entitled to qualified immunity when performing government functions), neither addresses the applicability of qualified immunity of public servants who are engaged in *private* endeavors.

Next, the Ninth Circuit concluded that Chung had not shown that the policies underpinning qualified immunity warrant invoking the doctrine in his instance.

> In detaining Bracken, Chung did not act "in performance of *public* duties" or to "carry[] out *the work of government*." *Filarsky,* 566 U.S. at 389-390, 132 S.Ct. 1657 (emphasis added) (citing *Richardson,* 521 U.S. at 409-411, 117 S.Ct. 2100). He does not contend, for example, that he was preventing Bracken from committing a crime. Instead, Chung – acting on behalf of the hotel, at the hotel's direction and while being paid by the hotel – aided the hotel in realizing *its* goal of issuing Bracken a warning. Thus, shielding Chung from suit would not advance the policies underlying qualified immunity. *See id.* at 389-91, 132 S.Ct. 1657. We hold that qualified immunity is not available to Chung. The district court erred in concluding otherwise.

Bracken, at 778 (emphasis supplied).

This Court should come to the same conclusion as the Ninth Circuit did in *Bracken.* First, there is no "firmly rooted" tradition of immunity for off-duty or special duty officers acting as private security guards in Oklahoma. Second, granting immunity would not serve the purposes underlying the immunity doctrine. Galyon was working in a completely private context – he was not performing a traditional

function of serving the public good – he was performing a function on behalf of a private employer at a private event on private property. Society is replete with private security agencies and non-public law enforcement security guards for private events and private property. Security is not a traditionally exclusive public function. *Gallagher v. Neil Young Freedom Concert,* 49 F.3d 1442, 1457 (10th Cir. 1995). Those individuals are advancing private interests, not governmental interests. Granting immunity in this situation does not preserve the government's ability to perform its traditional police functions. Additionally, denying qualified immunity would not deter qualified candidates from entering law enforcement, nor would it cause timidity among law enforcement in the course of their ordinary law enforcement duties. The most significant consequence of denying qualified immunity to off-duty officers working for a private employer would be the officers would need to ensure that the private employer had sufficient liability insurance to cover them for their off-duty conduct.

C. The District Court Failed to Utilize the Full and Proper Qualified Immunity Analysis and Ignored Clear Questions of Material Fact Precluding Summary Judgment

In the event this Court determines that off-duty police officers working for a private security firm are entitled to assert the defense of qualified immunity, Ms. Murray asserts that the district court did not conduct a full analysis of this case vis a vis Officer Galyon's qualified immunity defense. The district court cut their analysis

short and thus, failed to consider several factors this Circuit uses to review such cases. A full analysis as described below reveals issues of material fact that should be presented to a jury.

In determining whether an officer is entitled to qualified immunity, a court is to consider (1) whether there has been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct. *Pauly v. White,* 874 F.3d 1197, 1214 (10th Cir. 2017); *Redd v. Love,* 848 F.3d 899, 906 (10th Cir. 2017); *Levington v. City of Colorado Springs,* 643 F.3d 719, 732 (10th Cir. 2011). If the plaintiff satisfies this two-part test, the defendant (movant) bears the usual burden of a party moving for summary judgment to show that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. *Pauly,* 874 F.3d at 1214.

As mentioned above, there are two distinct constitutional violations at issue in this case. The first was a violation of Brian Simms' Fourth Amendment right to be free from unreasonable search and seizure and the second is his right to be free from the use of excessive (and in this case, deadly) force. The district court did not consider the initial violation Officer Galyon in approaching Simms' vehicle in an investigatory manner *without reasonable suspicion*. This error alone requires the case be remanded for consideration, but analysis of each of these violations, reveals gaps and inconsistencies in the lower court's review on summary judgment.

In this case, the district court improperly presumed the start of the legal analysis of Qualified Immunity began when Officer Galyon commenced shooting his firearm. However, Brian Simms' constitutional rights were violated well before Officer Galyon killed him. The district court's legal analysis should have started with Officer Galyon's unreasonable choice to approach Brian Simms' vehicle.

Although these violations have distinct characteristics, they are analyzed under the same two-prong framework described above.

> As in other Fourth Amendment contexts, however, the "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. See *Scott* v. *United States*, 436 U.S. 128, 137-139 (1978); see also *Terry* v. *Ohio, supra*, at 21 (in analyzing the reasonableness of a particular search or seizure, "it is imperative that the facts be judged against an objective standard")

Graham v. Connor, 490 U.S. 386, 397, 109 S. Ct. 1865, 1872 (1989). *See also, Zia Trust Co. v. Montoya,* 597 F.3d 1150, 1154 (10th Cir. 2010) (We examine excessive force claims "under the Fourth Amendment standard of objective reasonableness." (quoting *Jiron v. City of Lakewood,* 392 F.3d 410, 414 (10th Cir. 2004).)

1. The District Court Ignored the Initial Constitutional Violation

When a person alleges excessive force during an investigation or arrest, the federal right at issue is the Fourth Amendment right against unreasonable seizures. *Graham v. Connor,* 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989);

Pauly, 874 F.3d at 1214-1215.

Brian Simms, Jr. was simply sitting in a vehicle in a parking lot, likely sleeping. Mr. Simms had every right to be "free from all restraint or interference of others, *unless by clear and unquestionable authority of law.*" *Terry v. Ohio*, 392 U.S. 1, 9, 88 S. Ct. 1868 (1968) Despite this, the facts are undisputed that Officer Galyon engaged Mr. Simms with no suspicion of criminal activity whatsoever. Prior to any communication or verbal engagement, however, Officer Galyon noticed a weapon on the person of Mr. Simms. Once he "noticed" the "pistol," his "mindset" changed; he developed "tunnel vision," became "laser focused" on the weapon and not on Mr. Simms' actions. Officer Galyon already felt like he was a in "gun fight" and decided, as he was "drawing" his own gun, to shoot Brian Simms, Jr. without delay "as soon as his gun "cleared the leather." Aplt. App. Vol. 7 at 1577-1578. Several seconds and nine shots later, Brian Simms, Jr. was dead.

Brian was not an arrestee or detainee at the time Office Galyon approached his vehicle *without reasonable suspicion,* but Galyon profiled him anyway, assumed without a basis that he was suspicious and started a deadly chain of events. The district court ignored this violation, but the law is clear that the *entirety* of the circumstances must be reviewed. Any force used "leading up to and including an arrest" may be actionable under the Fourth Amendment as an unreasonable seizure under the Fourth Amendment. *Porro v. Barnes*, 624 F.3d 1322, 1325-1326 (10th Cir.

2010).

Officer Galyon gathered up his biases and went looking for an altercation. He saw Brian Simms, Jr., a black man at a rap concert and immediately assumed, without any reasonable basis, that he was going to be a "problem." Then Galyon's bias and fear escalated further as soon as he saw that the black man had a weapon. It was not until Brian was dead that Officer Galyon started talking about why he thought he needed to approach the car, and then why he needed to shoot. After the fact, he claimed that his actions were *reasonable* and that he should have *qualified immunity* protecting him from liability for Brian's death. Despite his training, however, Galyon did not articulate anything close to a reasonable suspicion to approach the vehicle. It is obvious that armed with his presumptions and his service weapon, once Galyon decided to approach Brian's car, the outcome was inevitable.

When an officer asserts the "affirmative defense of qualified immunity, Plaintiff must satisfy a familiar two-part test. *Lindsey*, 918 F.3d at 1113. Plaintiff must demonstrate that: (1) the defendant violated a constitutional right and (2) the right was clearly established at the time of the violation. *Id."* *Bickford v. Hensley*, 2020 U.S. Appx. LEXIS 33400, *5-10, __ Fed. App. __, 2020 WL 6227029. (10th Cir. 2020) (UNPUBLISHED).

In this case, the first prong was satisfied when Officer Galyon approached the vehicle without reasonable suspicion. In *Bickford*, the Plaintiff was arrested, so the

question was whether *probable cause* existed for the arrest. *Id.* In the case at bar, the threshold question is whether Officer Galyon approached Brian Simms' vehicle without *reasonable suspicion*, which is a clear violation of Brian's Fourth Amendment right to be free from unreasonable searches and seizures. (*See Bickford,* "A warrantless arrest violates the Fourth Amendment unless probable cause exists to believe a crime has been or is being committed." *Id.* (quoting *Corona v. Aguilar,* 959 F.3d 1278, 1282 (10th Cir. 2020).)

Instead of analyzing the initial constitutional violation and the cascading consequences that followed, the district court simply found that Officer Galyon's actions were "objectively reasonable." In fact, in the context of a summary judgment motion, the district court opined that Ms. Murray could not dispute Officer Galyon's version of the night Brian was killed. Not only does this method fail to view the facts in favor of Brian, but it also makes it convenient for state actors when the victims of their actions do not survive.

> Moreover, "since the victim of deadly force is unable to testify, courts should be cautious on summary judgment to 'ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story – the person shot dead – is unable to testify.'" *Id.* (quoting *Scott v. Henrich,* 39 F.3d 912, 915 (9th Cir. 1994)).
>
> *Pauly,* 874 F.3d. 1197, at 1217-1218.

Fourth Amendment claims are analyzed under a "reasonableness standard." *Graham v. Connor,* 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). But

this standard does not exist in a vacuum. Indeed, the reasonableness of an officer's actions depends "both on whether the officers were in danger at the precise moment that they used forced *and* on whether [Defendants'] own *reckless or deliberate conduct during the seizure* unreasonably created the need to use such force." *Sevier v. City of Lawrence,* 60 F.3d 695, 699 (10th Cir. 1995) (citing to *Bella v. Chamberlain,* 24 F.3d 1251 (10th Cir. 1994)).

Officer Galyon violated Mr. Simms right to be free from unreasonable searches and seizure when he approached the vehicle in which Mr. Simms was sleeping, without reasonable suspicion or probable cause and instigated an encounter which ended in Mr. Simms' death. Officer Galyon's actions leading up to, and during, the encounter were unreasonable under the circumstances and he is therefore not entitled to the defense of qualified immunity.

2. Officer Galyon Violated Simms' Fourth Amendment Rights Against Excessive Force

In reviewing the second violation, the district court jumped from the threshold to that question of Galyon's actions in shooting Brian Simms, Jr. Although there is no mandatory progression through the analysis, a full review is necessary, and the district court left too many questions unanswered to allow their order to stand.

Excessive force claims are reviewed under a standard of objective reasonableness judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight. *Graham,* 490 U.S. at 396; *Pauly,* 874 F.3d

at 1215; *Jiron v. City of Lakewood,* 392 F.3d 410, 414 (10th Cir. 2004). "In determining the reasonableness of the manner in which a seizure is effected, '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Scott v. Harris,* 550 U.S. 372, 383, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (quoting *United States v. Place,* 462 U.S. 696, 703, 103 S.Ct. 2673, 77 L.Ed.2d 110 (1983)).

This balancing test "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." Pauly,* 874 F.3d at 1215 (emphasis in original), quoting *Graham,* 490 U.S. at 396, 109 S.Ct. 1865. And the court's balancing must always account "for the fact that police officers are often forced to make split-second judgment – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 397, 109 S.Ct. 1865. Ultimately, "the inquiry is always whether, from the perspective of a reasonable officer on the scene, the totality of circumstances justified the use of force." *Pauly,* 874 F.3d at 1215, quoting *Estate of Larsen,* 511 F.3d 1255, 1260 (10th Cir. 2008).

What follows is the analysis the district court should have conducted.

Construing the facts in the light most favorable to the non-movant, Ms. Murray, it is clear questions of fact remain about the evening Brian was killed, and they must be presented to a jury.

3. The District Court Did Not Analyze this Case Under the *Graham* and *Larsen* Factors

Relying upon *Graham* and *Larsen,* this Court has set forth a detailed analytical framework to guide a district court when a defendant asserts the defense of qualified immunity to a charge of excessive force. *Pauly*, 874 F.3d 1197 (10th Cir. 2017). The district court, however, failed to utilize this framework when reaching its conclusion that Galyon's conduct was objectively reasonable. Whether an officer acted reasonably in using deadly force is "heavily fact dependent." *Romero v. Board of County Commissioners,* 60 F.3d 702, 705 n.5 (10th Cir. 1995).

As the district court acknowledged "[w]here a disputed issue of material fact remains, that ends the matter for summary judgment, and the court will not consider whether an officer's actions were objectively reasonable." Aplt. App. Vol. 7 at 1772. Moreover, "since the victim of deadly force is unable to testify, courts should be cautious on summary judgment to 'ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story – the person shot dead – is unable to testify.'" *Pauly,* 874 F.3d at 1217-1218. Issues of fact should have precluded a finding of objective reasonableness.

a. The First Graham Factor

The first *Graham* factor, “the severity of the crime at issue,” 490 U.S. at 396, 109 S.Ct. 1865, weighs in favor of Ms. Murray. There were no exigent circumstances necessitating Galyon and Escobar to approach Simms’ vehicle. Galyon and Officer Escobar admit that they had no reason to suspect that any criminal activity involving Simms was afoot. Galyon admits that Simms’ eyes were closed and that he appeared to be asleep. Simms had not committed any crime, there was no reason to question Simms, and there was no probable cause for his arrest. *Casey v. City of Fed. Heights,* 509 F.3d 1278 (10th Cir.2007). Even if Galyon reasonably believed Simms was committing a crime by sleeping in a parked car with a weapon in his lap, such a crime does not justify the use of deadly force. *See Estate of Ronquillo by and through Estate of Sanchez v. City and County of Denver,* 720 Fed. Appx. 434, 438 (10th Cir. 2017) (finding first factor weighed in favor of the plaintiff estate where the alleged crimes were not accompanied by violence).

b. The Second Graham Factor

The second *Graham* factor, “whether [the suspect] pos[e]d an immediate threat to the safety of the officers or others,” 490 U.S. at 396, 109 S.Ct. 1865, is undoubtedly the most important and fact intensive factor in determining the objective reasonableness of an officer’s use of force. *Pauly,* 874 F.3d at 1216, quoting *Bryan v. MacPherson,* 630 F.3d 805, 806 (9th Cir. 2010). In evaluating

whether there was a serious threat to physical safety, the Tenth Circuit utilized the four factors test set forth in *Estate of Larson v. Murr,* 511 F.3d 1255, 1260-1261 (10th Cir. 2008). *See also Jiron v City of Lakewood,* 392 F.3d 410, 418 (10th Cir. 2004); *Zuchel v. Spinharney,* 890 F.3d 273, 275 (10th Cir.1989).

i. The *Estate of Larsen* 4 Part Test.

In this case, Officer Galyon used deadly force, and the use of deadly force is only justified if the officer had "probable cause to believe that there was a threat of serious physical harm to himself or others." *Pauly,* 874 F.3d at 1216, quoting *Estate of Larsen,* 511 F.3d at 1260, and *Jiron v City of Lakewood,* 392 F.3d 410, 415 (10th Cir. 2004). Accordingly, in evaluating the degree of threat facing an officer, a court should utilize a four-component test first highlighted in *Estate of Larson:*

> (1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect.

Id. The district court, however, failed to utilize this test. Applying the facts to this four part test, it is clear either that there was no probable cause to believe that Simms posed a threat of serious physical harm to himself, to the officer, or to others or, at the least, there is an issue of fact.

a) The First *Larsen* Component

The fist *Larsen* component, "whether the officers ordered the suspect to drop

his weapon, and the suspect's compliance with the police commands," *id.,* favors Ms. Murray. First, neither Galyon nor Escobar identified themselves to Simms as police officers. Consequently, any subsequent "order" to do something could have come from any person in the venue's parking lot. Second, Galyon never told Simms to drop the gun. The only statements Galyon made to Simms were "Hey buddy, are you okay?" followed immediately with "Don't do it" uttered three times in rapid succession. To the recipient, being told "Don't do it" is ambiguous and could mean any number of things.

Further, Simms did not have the opportunity to comply with Galyon's vague order. In excessive force cases, "if the suspect threatens the officer with a weapon … deadly force may be used if necessary, to prevent escape, and *if, where feasible,* some warning has been given." *Tennessee v. Garner,* 471 U.S. 1, 11-12, 105 S.Ct. 1694 (1985); *see also Vaughn v. Cox,* 343 F.3d 1323 (11th Cir. 2003) (fact issue as to whether warning was feasible before deadly shot fired). *Pauly,* 874 F.3d at 1216. In this instance, Galyon admits that he shot Simms after the second "Don't do it". Simms was not given a fair opportunity to comply with Galyon's ambiguous directive before Galyon began shooting him. There is an issue of fact whether the warning was feasible before the Galyon began firing at Simms. Here, there is an ambiguous warning and Simms was not given an opportunity to comply with the warning before he was shot nine times.

b) The Second *Larsen* Component

The second *Larsen* component, "whether any hostile motions were made with the weapon towards the officers," 511 F.3d at 1260, also weighs in favor of Ms. Murray's arguments. While both Galyon and Escobar said that Simms' body movement indicated he was moving towards the gun, neither officer saw Simms handle the gun, much less point it at either of them. *Galyon admitted that he could not see if Simms grabbed the gun because his view of Simms was obstructed since he had already raised his gun to shoot Simms.* In short, in the light most favorable to Ms. Murray, there were no hostile motions directed towards Galyon at the time that Galyon began shooting Simms.

Construing the facts in the light most favorable to the *moving party,* the district court found that Simms continued to draw his gun after being given a warning. Aplt. App. Vol. 7 at 1774. This finding is not supported by the record. Significantly, even when a person *actually* points a gun at an officer (which is disputed here), this Court has expressly rejected a *per se* rule of objective reasonableness in the use of deadly force. In distinguishing cases in *Pauly,* this Court noted:

> "Moreover, none of our cases have created a per se rule of objective reasonableness where a person points a gun at a police officer. *See Allen,* 119 F.3d 837 (denying qualified immunity to police officers who shot *armed man* because fact issues remained as to whether the officers' actions unreasonably precipitated the need to use deadly force); *see also Sledd v. Lindsay,* 102 F.3d 282, 288 (7th Cir. 1996) (denying qualified immunity to police officers who shot *armed man* because there were fact questions as to whether officers announced their presence and

> whether a reasonable officer would have thought the plaintiff posed such a risk under all the circumstances that the immediate use of deadly force was justified); *Yates v. City of Cleveland,* 941 F.2d 444, 445, 449 (6th Cir. 1991) (denying qualified immunity to police officer who shot *armed man* because act of entering private residence late at night without identifying himself was enough to show he had unreasonably created the encounter that led to the use of force).

Pauly, 874 F.3d at 1217. In construing the facts in the light most favorable to the non-moving party, there is a question of fact whether Simms even touched the gun. The expert report showed that Simms' fingerprints were not even on the gun. The only DNA on the gun belonging to Simms was his blood from having been shot. Aplt. App. Vol. 6 at 1355-1359. This evidence suggests that Simms did not take any overtly hostile actions towards Galyon.

c) The Third *Larsen* Component

The third *Larsen* component, "the distance separating the officers and the suspect," 511 F.3d at 1260, also favors Ms. Murray. Although Galyon testified that he was approximately 6 feet from Simms when he yelled at Simms in an authoritative voice, Simms was seated in the driver's seat of the car with his eyes closed. Galyon approached Simms from the passenger side. Although the distance may have been six feet, it was Galyon who was approaching Simms and he had the ability to retreat and expand that distance. Additionally, there were physical and positional barriers between Simms and Galyon that prevented Simms from placing Galyon in a direct threat. Simms was seated in a vehicle facing forward and did not

have a direct line of sight to Galyon. Galyon, on the other hand, approached from the side and had a direct line of sight to Simms. Significantly, when Galyon saw the gun, he could have chosen to place himself in a better tactical position at a greater distance and safely removed himself from harm's way before waking Simms. Instead, Galyon chose to initiate the gunfight from close range.

d) The Fourth *Larsen* Component

The fourth *Larsen* component, "the manifest intentions of the suspect," 511 F.3d at 1260, also weighs in favor of Ms. Murray. Simms either expressed no intentions or his manifest intentions are a question of fact. Simms was asleep as Galyon and Escobar approached the vehicle and showed no movement until Galyon awakened him unexpectedly. When Galyon awakened Simms, neither Galyon nor Escobar identified themselves as police officers. The only communication was Galyon's question "Hey, are you alright?" while shining a light in Simms' face, followed immediately with the ambiguous statement "Don't do it" in a parking lot, at night, during a rap concert. There is no objective reason to believe Brian had nefarious intentions in that moment. Whatever natural reflexes a person has when they are rudely and violently awakened, it is entirely possible that Simms moved his arms in a reflexive manner.

ii. The Reckless Conduct of the Officers Effecting the Seizure.

Tenth Circuit jurisprudence recognizes that "[t]he reasonableness of the use

of force depends not only on whether the officers were in danger at the precise moment that they used deadly force, but also on whether the officers' own 'reckless or deliberate conduct during the seizure unreasonably created the need to use such force.'" *Pauly,* 874 F.3d at 1219, quoting *Jiron,* 392 F.3d at 415 and *Sevier v. City of Lawrence,* 60 F.3d 695, 600 (10th Cir. 1995). Courts are to consider an officer's conduct prior to the suspect's threat of force if the conduct is 'immediately connected" to the suspect's threat of force. *Allen,* 119 F.3d at 840 (quoting *Romero v. Bd. of Cty. Comm'rs,* 60 F.3e 702, 705 n.5 (10th Cir. 1995). The officer's conduct prior to a suspect threatening force "is only actionable if it rises to the level of recklessness." *Thomson v. Salt Lake County,* 584 F.3d 1304, 1320 (10th Cir. 2009); *Pauly,* 874 F.3d at 1220. In *Pauly,* this Court acknowledged that *Allen* remains the seminal case on this issue.

Galyon's reckless conduct precipitated the unnecessary use of deadly force. Galyon had no legitimate reason to approach the vehicle in the first place. Galyon approached a car with a person apparently asleep in the driver's seat. Neither Galyon nor Escobar identified themselves as police officers. Galyon shined a light in Simms' face and asks, "Hey buddy, are you okay?" Neither Galyon nor Escobar identified themselves as police officers. Galyon sees a gun in Simms' lap, develops tunnel vision, fixated on the gun. When Simms reacts to being awakened, Galyon says "Don't do it" twice and then starts shooting Simms even though he never saw

Simms draw the gun or point it to him. Galyon could have (a) identified himself as a police officer, (b) retreated to a tactically safer position before awakening Simms, and (c) told Simms to drop the gun. Instead, Galyon created an emergent situation and then used that situation to justify deadly force. Galyon's reckless conduct requires that the issue should have been presented to the jury rather than decided as a matter of law.

iii. Whether Officer Galyon Reasonably Feared for his safety or the safety of others.

While Officer Galyon believed that Simms was reaching for the butt of the gun, Galyon admits that he never saw Simms handle the gun. Galyon admits that his view was obstructed because he believed he was already in a gun fight and he had already raised his gun to shoot Simms. Officer Escobar also testified that he never saw Simms holding the gun. This was a classic case of shoot first and ask questions later. As the Court held in *Pauly,* 874 F.3d at 1221, this Court should also conclude that there is an issue of fact whether it was reasonable for Galyon to fear for his safety when there is no evidence that Simms handled the gun or even pointed the gun at Galyon or anybody else. A jury could conclude that Galyon's fear for his safety was not reasonable.

c. The Third Graham Factor

The third *Graham* factor, "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight," 490 U.S. at 396, 109 S.Ct. 1865, also weighs

in favor of Ms. Murray. Galyon and Escobar never attempted to place Simms under arrest, nor did Simms attempt to flee or evade arrest. If Simms reaching for the butt of a gun is the predicate for the notion that Simms was actively resisting arrest, then there is a question of fact whether Simms *actually* reached for the gun.

d. Applying Graham and Larson, Galyon's use of deadly force was not objectively reasonable.

In evaluating the three *Graham* Factors, and its constituent four *Larsen* factors, it becomes clear that there are issues of fact that preclude a finding that Galyon's use of deadly force was objectively reasonable. The district court ignored objective circumstances: two officers approached a vehicle with a black male apparently sleeping in the driver's seat. With no reason to suspect him of a crime, Galyon moved close enough to look in the passenger side window and noticed a gun lying in Simms' lap. Simms made no movement nor acknowledged the officers' presence until he was verbally engaged, with a flashlight shining on him. Galyon's own testimony suggests that his actions were unreasonable.

Notably, the mere presence of a gun caused Galyon to develop "tunnel vision" and immediately sensing – even before speaking to Simms – that he was "already in a gun battle" or a "shootout". Aplt. App. Vol. 3 at 648, 649 (shootout) and Vol. 6 at 1315, 1328, 1331 and 1452 (gun battle). In fact, Galyon mentioned a "shootout" three times in his recorded statement and once in his deposition; and he mentioned "gun battle" twice in his deposition. *Id.* In Galyon's mind, he was in a gun fight; but

objectively, we know that "fight" was with a man who was sleeping in a parked car.

Even though Galyon testified that he saw Simms reach for the butt of the gun, neither Galyon nor Officer Escobar ever saw Simms handle the gun or point it at them. Further, based on the physical evidence, a jury could reasonably decide to reject Galyon's testimony since Simms' fingerprints were not on the gun. *Pauly,* 874 F.3d 1217; *Abraham v. Raso,* 183 F.3d 279, 294 (3rd Cir. 1999). In evaluating whether there is an issue of fact regarding objective reasonableness, this Court should remember that the only person who can dispute Galyon's version of facts is dead.

> Moreover, "since the victim of deadly force is unable to testify, courts should be cautious on summary judgment to 'ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story – the person shot dead – is unable to testify.'" *Id.* (quoting *Scott v. Henrich,* 39 F.3d 912, 915 (9th Cir. 1994)). As the Ninth Circuit noted in *Scott,* 39 F.3d at 915, "the court may not simply accept what may be a self-serving account by the police officer." Rather, "[i]t must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidenced could convince a rational factfinder that the officer acted unreasonably." *Id.*

Pauly, 874 F.3d. at 1217-1218. *See also, C.V. by and through Villegas v. City of Anaheim,* 823 F.3d 1252, 1255 (9th Cir. 2016) *quoting Gonzalez v. City of Anaheim,* 747 F.3d 789, 795 (9th Cir. 2014) (en banc). Thus, if the evidence is viewed in the light most favorable to the non-movant, Brian Simms did not pick up or brandish the gun, much less point it at either Officer Galyon or Escobar. This

issue of fact warrants reversal of the district court's order. Even the district court acknowledged that an issue of fact such as this ends the inquiry into objective reasonableness of the officer's conduct. Aplt. App. Vol. 7 at 1772-1773. Ms. Murray, therefore, has met the first prong of the qualified immunity test.

4. The Right to be Free from Excessive and Disproportionate Force Was Clearly Established at the Time Galyon Shot Killed Simms.

The second prong of the qualified immunity analysis asks whether the right in question was "clearly established" at the time of the violation. *Hope v. Pelzer,* 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). The district court held that Plaintiff failed on this prong because there "there is substantial case law approving the reasonably objective standard for officers defending themselves when faced with an individual brandishing a weapon." Aplt. App. Vol. 7 at 1774-1775.

The district court committed two errors. First, the district court clearly erred by construing a disputed fact in favor of the moving party, rather than in favor of the non-moving party – whether Simms was brandishing or pointing a gun. Although it is undisputed that Galyon and Escobar saw a gun, neither Galyon nor Escobar saw Simms touch the gun – must less brandish or point the gun as the district court found. Resolving this disputed material fact in Galyon's favor was clear error. Second, the district focused on the wrong precedent for its analysis whether the right was clearly established. The district court should have focused on whether there was clear precedent for the unlawful use of excessive or disproportionate force when a person

possesses a gun, not when a person is brandishing or pointing a gun.

a. The legal test for evaluating whether a right is clearly established.

To defeat qualified immunity, plaintiff must also demonstrate that his right to be free [from excessive force] was clearly established at the time of the violation. *Hope v. Pelzer,* 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002); *Lindsey v. Hyler,* 918 F.3d 1109, 1113 (10th Cir. 2019). 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,* 577 U.S. 7, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015) (per curium) (internal quotations marks and citations omitted); *Hope v. Pelzer,* 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). Stated another way, "a preexisting Supreme Court or Tenth Circuit decision, or the weight of authority from other circuits, must make it apparent to a reasonable officer that the nature of his conduct is unlawful." *Carbajal v. City of Cheyenne,* 847 F.3d 1203, 1210 (10th Cir. 2017).

In deciding whether a precedent provides fair notice, the Supreme Court has directed courts "not to define clearly established law at a high level of generality." *Kisela v. Hughes,* 138 S.Ct. 1148, 1152 (citations omitted). Instead, "the clearly established law must be particularized to the facts of the case." *White v. Pauly,* 137 S.Ct. 548, 552, 196 L.Ed.2d 463 (2017) (per curium) (internal quotations marks and citations omitted). 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." *Kisela v. Hughes,* 138 S.Ct. 1148, 1152 (2018) (quoting *White,* 137 S.Ct. at 551). *Mullenix,* 136 S.Ct. at 308.

The more obviously egregious the conduct in light prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation. *Perea v. Baca,* 817 F.3d 1198, 1204 (10th Cir. 2016)."Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082-83 (10th Cir. 2015). "Ultimately, we consider whether our precedents render the legality of the conduct undebatable." *Lowe v. Raemisch*, 864 F.3d 1205, 1211 (10th Cir. 2017) (citing *Aldaba v. Pickens*, 844 F.3d 870, 877 (10th Cir. 2016)). "'After all, some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing.'" *Lowe*, 864 F.3d at 1210 (quoting *Browder*, 787 F.3d at 1082). The dispositive question is whether the violative nature of particular conduct is clearly established, and the inquiry must be undertaken considering the specific context of the case, not as a broad general proposition. *Pauly v. White,* 874 F.3d. at 1222 (citations omitted).

b. Existing precedent clearly put Galyon on notice that the use deadly or disproportionate force was unconstitutional.

At the time of Simms' death, it was clearly established law in the Tenth Circuit that the use of disproportionate force to arrest an individual who is not suspected of committing a serious crime and who poses no threat to others constitutes excessive force. *Morris v. Noe,* 672 F.3d 1185, 1195 (10th Cir. 2012); *Fisher v. City of Las Cruces,* 584 F.3d 888, 895 (10th Cir. 2009); *Fogarty v. Gallegos,* 523 F.3d 1147 at 1160 (10th Cir. 2008); *Casey v. City of Federal Heights,,* 509 F.3d 1278 at 1281, 1285. Even beyond these cases, the specific rule identified in *Graham* or *Garner* that "before using deadly force an officer must have *probable cause…"* to believe that the suspect poses a threat of serious physical harm, either to the officer or to others ...", *Garner,* 471 U.S. at 11, 105 S.Ct. 1694, had been well-established and clear well before July 2013. *See Torres v. White*, 685 F. Supp. 2d 1283, 1289–93 (N.D. Okla. 2010).

It was likewise clearly established that officers may not continue to use force against a suspect who was effectively subdued. *See, e.g., Fancher v. Barrientos,* 723 F.3d 1191, 1201 (10th Cir. 2013) (although a single shot by an officer may have been justified, the following six shots were clearly unlawful because they occurred after arrestee no longer posed a threat of serious harm. "[W]e have held that an officer violated clearly established law by shooting the victim after the officer had 'enough time to recognize and react to the changed circumstances and cease firing

his gun.'"). *Perea v. Baca,* 817 F.3d 1198, 1204-1205 (10th Cir. 2016). In this instance, there was no need for Galyon to continue shooting Simms – Simms was no threat to Galyon or Escobar.

D. CLAIMS AGAINST CITY OF OKLAHOMA CITY AND CHIEF CITTY

Based upon the court's rulings on the issue of qualified immunity, the district court dismissed Ms. Murray's claims against both the City of Oklahoma City and Chief William Citty. Aplt. App. Vol. 7 at 1776-1777. These claims were dismissed based upon the premise that Officer Galyon was entitled to qualified immunity for his actions against Brian Simms, Jr.

Because the district court found no issue of material facts relating to the Fourth Amendment excessive force violation, "there is no need to further analyze this issue. Defendant OKC is entitled to summary judgment on Plaintiff's failure to train and failure to discipline claim." Aplt. App. Vol. 7 at 1776. "And as a result, there is no additional analysis necessary regarding Plaintiff's supervisory claim because there is no constitutional violation at issue. Defendant Citty is entitled to summary judgment on the supervisory claim." Aplt. App. Vol. 7 at 1777.

When Ms. Murray's claims against Officer Galyon are remanded, the corresponding claims against the City of Oklahoma City and Chief Citty should be reinstated.

Because we reverse the district court's qualified immunity

> determination, we likewise reverse the district court's grant of summary judgment to the Sheriff on this claim.

Bickford v. Hensley, 2020 U.S. App. LEXIS 33400, *12, __ Fed. Appx. __, 2020 WL 6227029. (UNPUBLISHED)

VIII. CONCLUSION

The purpose of a 1983 claim is to empower citizens with redress for violations of their constitutional rights by those acting "under color of law." The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . ." This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For, as this Court has always recognized,

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others. . .

Terry v. Ohio, 392 U.S. 1, 8-9, 88 S. Ct. 1868, 1873 (1968) (quoting *Union Pac. R. Co. v. Botsford,* 141 U.S. 250, 251 (1891). Brian Simms, Jr. did not get a chance to verbally assert his constitutional rights and when his mother brought those claims on his behalf, Officer Galyon said he was immune because of *qualified immunity.* Instead of asking Officer Galyon to explain himself, however, the claim of qualified immunity instantly shifted the burden, back to the Ms. Murray, to analyze the

circumstances of the shooting.

Once the district court decided (on a questionable construction of the facts) the district court thought Officer Galyon was "objectively reasonable," it stopped its review. It did not consider the validity of *either* constitutional violation; it did not consider the fundamental – clearly established – nature of the violations by Officer Galyon; it did not consider the totality of the circumstances; and it did not consider whether Officer Galyon was truly a state actor when he was working off-duty.

As if these failures weren't enough, the district court decided that the claims alleged were an intentional tort – assault and battery – instead of negligence and/or gross negligence as pled; and found they were brought after the statute of limitations had expired.

Not a single witness has been able to offer support for Officer Galyon's generic assertion of reasonable suspicion to approach Brian Simms' car. Nor has any witness been able to identify any crime that Brian was committing at the time Officer Galyon decided at the time of Officer Galyon's use of force. Officer Galyon speculated a number of possible crimes he envisioned Brian to be committing and eventually argued that Brian assaulted him with a dangerous weapon by pulling his firearm. But the facts show that Simms was asleep when Officer Galyon and Officer Escobar approached the car with their flashlights blazing in his face. Neither of the officers identified themselves as police officers when they woke him up by yelling

at him, lights and a gun drawn on him by unknown assailants.

> It is the totality of the circumstances that is the touchstone of the reasonableness inquiry. *Id*. at 1080, 1083-84. "Strict reliance" on the "precise moment" factor is inappropriate when the totality must be considered. *Id*. at 1083.

Thomson v. Salt Lake County, 584 F.3d 1304, 1318 (10th Cir. 2009) (citing *Phillips v. James,* 422 F.3d 1075 (10th Cir. 2005)). Looking at the *totality* of the circumstances in this case, there are numerous questions of fact, credibility and reasonableness which exist. These issues must be remanded to the district court and submitted to a jury for trial.

IX. STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Oral argument is requested. The complicated framework of qualified immunity merits oral advocacy to clarify any difficult (or contradictory rulings) produced from the fact patterns that underlie these cases. Spoken advocacy could significantly assist the Court's decision in this matter.

Date: November 17, 2020.

Respectfully Submitted,

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Date: November 17, 2020.

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/s/ Nicole R. Snapp-Holloway_

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I hereby certify that on this the 17th day of November 2020, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

Date: November 17, 2020

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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

CHARLESETTA REDD, individually and as Personal Representative of the ESTATE of BRIAN SIMMS, JR., deceased,

Plaintiff,

vs.

BIG DOG HOLDING COMPANY, L.L.C. d/b/a OKLAHOMA CITY PUBLIC FARMERS MARKET et al.,

Defendants.

Case No. CIV-15-263-C

MEMORANDUM OPINION AND ORDER

On July 11, 2013, the fatal shooting of Brian Simms, Jr., gave rise to the claims of the instant case. Simms was staying with a girlfriend and visiting his friend, Vuntral Brown, in Oklahoma City. Brown had a ticket to a Chief Keef concert that was held on the premises of Defendant Oklahoma City Public Farmers Market ("Farmers Market"). The Farmers Market hired Defendant Event Security, L.L.C. Defendant Event Security hired Defendant Paul Galyon, an off-duty police officer for Defendant Oklahoma City Police Department ("OKCPD").

During a conversation in the Farmers Market parking lot, Brown informed Simms that there was a loaded weapon under the back seat of the car. While Brown attended the concert, Simms sat in the car in the Farmers Market parking lot. At some point, Simms moved the car and backed it into a different parking spot in the Farmers Market parking

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lot. During the concert, Officers Paul Galyon and Antonio Escobar, both off-duty OKCPD officers, patrolled the premises of the Farmers Market.

Officer Galyon alleges that he saw an individual around or near the driver's side of Brown's car and started to approach the vehicle. Officers Galyon and Escobar noted Brown's car was parked straddling the parking lot lines. On their approach, Officers Galyon and Escobar saw a man, Simms, sitting in the driver's seat with his eyes closed. Officer Galyon called out to Simms. Officers Galyon and Escobar allege that Simms had a gun in his lap or waistband. Shortly after the initial encounter, Officer Galyon shot Simms multiple times resulting in Simms' death. Plaintiff filed suit on March 13, 2015.

Defendant Galyon, Defendant City of Oklahoma City ("OKC"), and Defendant Bill Citty ("Citty") have filed separate Motions for Summary Judgment. Plaintiff has filed a Motion for Partial Summary Judgment. All four Motions are now at issue.

I. Standard

A key policy goal and primary principle of Fed. R. Civ. P. 56 is "to isolate and dispose of factually unsupported claims or defenses." Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Fed. R. Civ. P. 56 sets the standard for summary judgment:

> A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(a). "Cross-motions for summary judgment are to be treated separately; the denial of one does not require the grant of another." Buell Cabinet Co., Inc. v. Sudduth, 608 F.2d 431, 433 (10th Cir. 1979). Summary judgment is appropriate "after adequate

time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. "[T]his standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). It is also well established that the "party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp., 477 U.S. at 323, (quoting Fed. R. Civ. P. 56) ("As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248.) "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (footnote omitted). "In its review, the Court construes the record in the light most favorable to the party opposing summary judgment." Garratt v. Walker, 164 F.3d 1249, 1251 (10th Cir. 1998).

II. Analysis

A. Defendant Paul Galyon's Motion for Summary Judgment

1. Gross Negligence

Defendant Galyon argues that Plaintiff substantively alleges an assault and battery claim, instead of a gross negligence claim, and the statute of limitations has run on the assault and battery claim. Plaintiff argues that she is not alleging any type of assault and battery claim; Plaintiff subsequently argues that an assault and battery claim requires the element of intent and Plaintiff has not alleged Defendant acted with intent. In this instance, "[w]hat controls is not the pleader's designation of the nature of the cause of action; rather, it is the substance of the pleading and the nature of the issues raised thereby." Kimberly v. DeWitt, 1980 OK CIV APP 2, ¶ 6, 606 P.2d 612, 614. It is undisputed that Defendant Galyon intended to discharge his firearm aimed at Simms. Plaintiff is substantively pleading a cause of action for assault and battery. Oklahoma prescribes claims for assault and battery are subject to a one-year statute of limitations. See 12 Okla. Stat. §95(A)(4). The shooting occurred on July 11, 2013, and Plaintiff's lawsuit was not filed until March 13, 2015. Plaintiff has exceeded the statute of limitations for an assault and battery claim.

This Court finds that Plaintiff is substantively alleging an assault and battery claim and Plaintiff's claim exceeded the statutorily prescribed timeframe. This Court finds that Defendant Galyon is GRANTED summary judgment on this issue.

2. Qualified Immunity and Excessive Force

Plaintiff brings an excessive force claim under the Fourth Amendment against Defendant Galyon. That this action happened under the color of state law is a predicate

for Plaintiff's § 1983 excessive force claim. Defendant Galyon has conceded he was acting under the color of state law and so this analysis may proceed.* The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The hallmark of the Fourth Amendment is reasonableness." United States v. Harmon, 785 F.Supp.2d 1146, 1157 (D.N.M. 2011). The Supreme Court has held that in the law enforcement environment "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" Katz v. United States, 389 U.S. 347, 357 (1967) (footnotes omitted). When "the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment." Graham v. Connor, 490 U.S. 386, 394 (1989). Excessive force violations are "properly analyzed under the Fourth Amendment's 'objective reasonableness' standard." Id. at 388. In Tennessee v. Garner, 471 U.S. 1 (1985), the Supreme Court stated "[t]o determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" Id. at 8 (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

* Defendant Galyon does not dispute that he was acting under color of law at all times during his encounter with decedent Brian Simms, Jr. (Resp. to Pl.'s Mot. for Partial Summ. J., Dkt. No. 187, p. 8.)

> "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Graham, 490 U.S. at 396 (internal citation omitted). This reasonableness standard "must be judged from the perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight." Id. The main inquiry 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." Id. at 397.

The Tenth Circuit has "recognized that the reasonableness inquiry in excessive force cases overlaps with the qualified immunity question." Medina v. Cram, 252 F.3d 1124, 1131 (10th Cir. 2001). "[T]his overlap renders a qualified immunity defense of less value when raised in defense of an excessive force claim." Id. In the course of their official duties, officers may be entitled to qualified immunity and it "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). "After a defendant asserts a qualified immunity defense, the burden shifts to the plaintiff, who must satisfy a two-part burden: first, that the defendant's actions violated a constitutional or statutory right and, second, that that right was clearly established at the time of the defendant's unlawful conduct." Joseph v. Silver, No. 14-cv-126-JED-TLW, 2015 WL 6624589, at *1, *3 (N.D. Okla. Oct. 30, 2015). "'Where a disputed issue of material fact remains, that ends the matter for summary judgment,' and the court will not consider whether an officer's actions were objectively reasonable."

Silver, 2015 WL 6624589 at *3 (quoting Olsen v. Layton Hills Mall, 312 F.3d F.3d 1304, 1315 (10th Cir. 2002)). A claim of qualified immunity requires that the plaintiff must first satisfy the two-part burden and then the defendant bears the burden of showing there is a genuine issue of material fact and that that individual is entitled to judgment as a matter of law.

Under these circumstances, Defendant Galyon claims qualified immunity so the Court's analysis begins with whether Plaintiff satisfies the two-part burden: (1) whether Defendant Galyon violated Simms' Fourth Amendment protection against excessive force and (2) if that right was clearly established at the time of Defendant Galyon's conduct. Under the instant facts and circumstances, this Court concludes Defendant Galyon's actions were objectively reasonable when viewed from the perspective of a reasonable officer at the scene.

Officer Escobar and Defendant Galyon approached Simms' vehicle while "[h]e was sitting in the driver's side of the vehicle." (Dkt. No.134-78, p. 5.) As Defendant Galyon was about five or six feet from Simms, he "noticed a nine millimeter pistol stuck in [Simms'] waistband. [Galyon] could see the butt of it clearly in the front of [Simms'] pants." (Dkt. No. 163-2, p. 11.) Officer Escobar also noted a handgun in Simms' lap. (Dkt. No. 134-78, p. 5.) Defendant Galyon clearly assessed a threat to not only his safety but also to Officer Escobar's safety. Once Defendant Galyon made contact with Simms, Defendant Galyon noted Simms "immediately looks at me and without changing his facial expression or anything quickly takes his hand and puts it on the butt of the gun and starts to pull it out." (Dkt. No. 163-2, p. 13.) Officer Escobar also noticed that Simms "slowly

moved both of his hands towards his - - or towards the weapon. Prior to going towards the weapon or the direction of the weapon he made faster more sudden movement in the same direction towards the weapon." (Dkt. No. 134-78, p. 12.) Defendant Galyon also warned Simms not to pull the gun from his waistband, "I said, 'Don't do it, don't do it. Don't do it.' And before I could get the third 'don't do it' out, I felt like I was engaged in a gun battle. I didn't know if he had already cleared the gun. I didn't know if he had gotten a shot off." (Dkt. No. 163-2, pp. 13-14.) Officer Escobar also states that "'Sergeant Galyon . . . yells at the subject or suspect. I want to say it was three times don't do it.'" (Dkt. No. 134-78, p. 8.) Defendant Galyon further commented "I could still see [Simms] from the shoulder up, the elbow, the head, the body motion, all continuing with that same drawing motion that he had started when I had a full view prior to pulling my weapon." (Dkt. No. 163-2, p. 21.) Officer Galyon warned Simms to not continue to draw the gun and Simms ignored Officer Galyon and continued to be a threat to the officer's safety. Plaintiff argues that Officer Galyon's behavior was excessive and unreasonable and Simms' behavior was not threatening. (Pl.'s Resp., Dkt. No. 188, p. 16.) However, this is all that Plaintiff argues; Plaintiff does not allege any genuine issues of material fact regarding Defendant Galyon's and Officer Escobar's testimony.

Even if this Court were to entertain an argument that there is a material dispute of fact regarding Officer Galyon's and Officer Escobar's testimony about the events of the evening of July 11, 2013, and satisfy the first qualified immunity prong, Plaintiff would fail on the second qualified immunity prong because there was no "clearly established" right at the time of Defendant Galyon's conduct. See Pearson v. Callahan, 555 U.S. 223,

243-44 (2009). There is substantial case law approving the reasonably objective standard for officers defending themselves when faced with an individual brandishing a weapon. See Allen v. Muskogee, Okla., 119 F.3d 837, 840 (10th Cir. 1997) (holding that when confronted with an individual holding a gun "[t]he excessive force inquiry includes not only the officers' actions at the moment that the threat was presented, but also may include their actions in the moments leading up to the suspect's threat of force."); Sevier v. City of Lawrence, Kan., 60 F.3d 695, 699 (10th Cir. 1995) (holding the reasonableness of an officer's "actions depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants' own . . . conduct . . . created the need to use such force."). Simms posed a threat to Defendant Galyon and Officer Escobar when Simms drew his weapon, and, most importantly, as Simms continued drawing his weapon after Defendant Galyon warned Simms to stop. When Simms did not stop drawing the weapon, Defendant Galyon responded with objectively reasonable force under the circumstances.

As a result of this analysis, Defendant Galyon's Motion for Summary Judgment based on qualified immunity is GRANTED.

B. Plaintiff Redd's Motion for Summary Judgment

At the outset, this Court notes that the same lack of genuine issues of material fact that are present in Defendant Galyon's Motion for Summary Judgment are present in Plaintiff's Motion for Partial Summary Judgment pertaining to Plaintiff's Fourth Amendment excessive force claim. It is also unclear whether Plaintiff is arguing for an additional excessive force claim brought pursuant to the Fourteenth Amendment.

However, it is clear that "the Fourth Amendment, not the Fourteenth, governs excessive force claims arising from 'treatment of [an] arrestee detained *without* a warrant' and '*prior to* any probable cause hearing.'" Estate of Booker v. Gomez, 745 F.3d 405, 419 (10th Cir. 2014) (quoting Austin v. Hamilton, 945 F.2d 1155, 1160 (10th Cir. 1991)).

> "And when neither the Fourth nor Eighth Amendment applies—when the plaintiff finds himself in the criminal justice system somewhere between the two stools of an initial seizure and post-conviction punishment—we turn to the due process clauses of the Fifth or Fourteenth Amendment and their protection against arbitrary governmental action by federal or state authorities."

Id. (quoting Porro v. Barnes, 624 F.3d 1322, 1326 (10th Cir. 2010)). The legal conclusions in this Memorandum Opinion are unaltered by any arguments that Plaintiff makes in her motion regarding excessive force and, as a result, this Court finds that Plaintiff's Motion for Summary Judgment is DENIED.

C. Defendant OKC's Motion for Summary Judgment

This Court has found there is no genuine issue of material fact regarding Plaintiff's excessive force claim brought under the Fourth Amendment and Defendant Galyon is entitled to qualified immunity. Since there is no constitutional issue there is no need to further analyze this issue. Defendant OKC is entitled to summary judgment on Plaintiff's failure to train claim and failure to discipline claim.

D. Defendant Citty's Motion for Summary Judgment

Plaintiff seeks to hold Defendant Bill Citty liable in his supervisory capacity for Defendant Galyon's actions. This Court has found that there is no genuine issue of material fact relating to the alleged Fourth Amendment excessive force violation. And as a result,

there is no additional analysis necessary regarding Plaintiff's supervisory claim because there is no constitutional violation at issue. Defendant City is entitled to summary judgment on the supervisory claim.

E. Oklahoma Governmental Tort Claims Act (GTCA) Claims

This Court has held that what Plaintiff characterizes as a gross negligence claim is, in fact, a claim for assault and which is time barred. As a result, there is no tortious conduct alleged under which any Defendant may be held responsible under the GTCA. Defendant OKC's Motion for Summary Judgment on Plaintiff's state law claim is GRANTED.

CONCLUSION

Accordingly, the Motion for Summary Judgment of Defendant Paul Galyon (Dkt. No. 163) is GRANTED. Plaintiff's Motion for Partial Summary Judgment as to Defendant Galyon (Dkt. No. 164) is DENIED. Defendant City's Motion for Summary Judgment (Dkt. No. 134) is GRANTED. Defendant William Citty's Motion for Summary Judgment (Dkt. No. 135) is GRANTED. A separate judgment will enter.

IT IS SO ORDERED this 3rd day of May, 2018.

ROBIN J. CAUTHRON
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

CHARLESETTA REDD, individually and as Personal Representative of the ESTATE of BRIAN SIMMS, JR., deceased, Plaintiff,	)	
vs.	)	Case No. CIV-15-263-C
BIG DOG HOLDING COMPANY, L.L.C. d/b/a OKLAHOMA CITY PUBLIC FARMERS MARKET et al., Defendants.	)	

J U D G M E N T

Upon consideration of the pleadings herein, the Court finds that the Motion for Summary Judgment of Defendant Paul Galyon should be granted, Plaintiff's Motion for Partial Summary Judgment as to Defendant Galyon should be denied, Defendant City's Motion for Summary Judgment should be granted, and Defendant William Citty's Motion for Summary Judgment should be granted. Judgment is therefore entered on behalf of all Defendants and against Plaintiff.

DATED this 3rd day of May, 2018.

ROBIN J. CAUTHRON
United States District Judge