No. 20-30442

In the United States Court of Appeals for the Fifth Circuit

CARRINGTON JACKSON, OBO THE MINOR CHILD ON BEHALF OF TRAVON CARTER; TRAVIS WATSON, OBO THE MINOR CHILD ON BEHALF OF TRAVON CARTER; PHYLLICIA CARTER, OBO THE MINOR CHILD ON BEHALF OF TRAVON CARTER; CASSANDRA CARTER, OBO THE MINOR CHILD ON BEHALF OF TRAVON CARTER,
Plaintiffs-Appellants

v.

SIDNEY J. GAUTREAUX, III, SHERIFF, EAST BATON ROUGE PARISH; SHANNON BROUSSARD, DETECTIVE; CHARLES MONTGOMERY, DETECTIVE; SCOTT HENNING, DETECTIVE; CHRISTOPHER MASTERS, DETECTIVE; VERNER BUDD, SERGEANT; MICHAEL BIRDWELL, LIEUTENANT,
Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Louisiana
No. 3:17-CV-00105-JWD-EWD

BRIEF OF APPELLANTS

PAUL L. HOFFMAN,
CA. Bar No. 71244
hoffpaul@aol.com
MELANIE T. PARTOW
CA. Bar No. 254843
melaniepartow@gmail.com
UNIVERSITY OF CALIFORNIA, IRVINE
CIVIL RIGHTS LITIGATION CLINIC
401 East Peltason Drive
Irvine, CA 92697
Tel: (310) 717-7373

NORA AHMED
NY Bar No. 5092374
nahmed@laaclu.org
ACLU OF LOUISIANA
P.O. Box 56157
New Orleans, LA 70156
Tel: (504) 522-0617

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF INTERESTED PERSONS

Appellant certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. **Plaintiffs-Appellants:**

   Chiquita Spears, Representative of the Estate of Travis Stevenson; Carrington Jackson, on behalf of the minor child Travon Carter; Travis Watson, on behalf of the minor child Travon Carter; Phyllicia Carter, on behalf of the minor child Travon Carter; Cassandra Carter, on behalf of the minor child Travon Carter.

2. **Defendants-Appellees:**

   Sidney J. Gautreaux, III, in his official capacity as Sheriff; Shannon Broussard, in his individual capacity; Charles Montgomery, in his individual capacity; Scott Henning, in his individual capacity; Christopher Masters, in his individual capacity; Verner Budd, in his individual capacity; Michael Birdwell, in his individual capacity.

3. **Counsel for Plaintiffs-Appellants:**

   Paul Hoffman; Melanie Partow; UC Irvine Law School Civil Rights Litigation Clinic; Nora Ahmed; ACLU of Louisiana.

4. <u>Counsel for Defendants-Appellees:</u>

Tara L. Johnston; Mary G. Erlingson; Erlingson Banks, P.L.L.C.

/s Paul L. Hoffman
_____
Paul L. Hoffman
Attorney of record for Plaintiffs-Appellants

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants request oral argument as they believe it will aid the Court in the proper disposition of this case.

TABLE OF CONTENTS

Page(s)

Table of Authorities

Cases

Page(s)

Statutes

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because it is an appeal of an order granting summary judgment.[1] Appellants timely appealed by filing their notice of appeal within 30 days of the district court's order of June 17, 2020.[2]

[1] *See* ROA.1204.
[2] *See* ROA.1249.

ISSUES PRESENTED

1. Whether the district court improperly granted summary judgment by ignoring disputed issues of material fact and construing the disputed facts in a light most favorable to the Defendants-Appellees, who were the moving parties.
2. Whether the district court erred in granting qualified immunity when the disputed facts in a light most favorable to Plaintiffs-Appellants demonstrate that Mr. Stevenson posed no immediate threat of death or serious bodily injury at the time deputies fired 21 shots, killing him.
3. Whether the deputies had fair warning based on clearly established law that it was unreasonable to fire 21 rounds and kill a mentally-ill person in a vehicle when, at the time of the shots, none of the deputies were in the path of the vehicle, none of the deputies were struck or were about to be struck by the vehicle, and when the vehicle was in reverse and had moved away from the deputies.
4. Whether Sheriff Gautreaux is liable, in his official capacity, for the failure of the East Baton Rouge Parish Sheriff's Office to adequately train the individual deputy defendants to properly respond to circumstances that they regularly encounter, including interactions with persons who are mentally ill.

STATEMENT OF THE CASE

A. Introduction

This tragic case involves the recurring situation in which police officers are called to deal with a mentally ill person and end up killing him. In this case, Mr. Travis Stevenson was a man suffering from mental illness who was distraught and suicidal over difficulties in his personal relationships. The defendant officers knew these facts when they encountered him.

When officers arrived, they found Mr. Stevenson behaving strangely and driving back and forth in a straight line, as his vehicle was boxed-in between a police unit, a bollard post, a parked SUV and a dumpster. Lt. Birdwell was the officer who had the first encounter with Mr. Stevenson and never believed that Mr. Stevenson was a threat to him justifying the use of deadly force. Instead, other officers arriving on the scene fired 21 shots into Mr. Stevenson's car from the side and back of the car, killing him allegedly to protect Lt. Birdwell who did not need protection.

The district court granted summary judgment on all of plaintiffs' claims. The district court erred because there were significant inconsistencies in the officers' accounts and the physical evidence, requiring a jury decision about whether the officers confronted circumstances justifying the use of deadly force.

Similarly, the district court erred by granting qualified immunity to the defendant officers.

The district court also erred by dismissing plaintiffs' failure to train claim against the Sheriff. Plaintiffs presented evidence of the inadequacy of training in the East Baton Rouge Sheriff's Office concerning dealing with mentally ill persons in the community. A jury should also have been permitted to determine whether the Sheriff was "deliberately indifferent" to the need for such training.

Mr. Stevenson's death was not only a tragedy; it should not have happened. A jury should have been allowed to determine defendants' responsibility in these disputed circumstances.

B. Statement of Facts

1. The Deputies Received Information that Mr. Stevenson was Suicidal and Possibly Mentally Ill.

On February 23, 2016, East Baton Rouge Parish Sheriff's Deputies Kreig Thomas and Verner Budd responded to a 9-1-1 call at the home of Ms. Kimula Porter ("Ms. Porter") and her live-in boyfriend, Travis Stevenson ("Mr. Stevenson") in the Gardere area of Baton Rouge, Louisiana.[3] Ms. Porter told Deputies Thomas and Budd that Mr. Stevenson got upset when she received a phone call from her husband, from whom she was separated.[4] Mr. Stevenson pepper sprayed Ms. Porter and her

[3] ROA.648:6-21.

[4] Ms. Porter's recorded interview was part of a case file containing of all of the investigatory materials gathered during the Louisiana State Police Investigation into this shooting. Appellees

daughter, and insisted that Ms. Porter call 9-1-1, and left the residence in his vehicle (a white Cadillac sedan).[5] Neither Ms. Porter nor her daughter reported to either deputy that Mr. Stevenson hit or otherwise struck them.[6] According to Ms. Porter, nothing like this had ever happened before.[7] Deputy Budd believed that the situation was "not that serious."[8] Deputy Birdwell, who also responded to the residence, characterized the offenses as misdemeanors.[9]

While Deputies Thomas and Budd were at the residence, Mr. Stevenson began calling and texting Ms. Porter that he was going to kill himself.[10] His text messages read, "I loved. You so much. But you don't care bout me. You is to good for me kim I am going to kill my. Self."[11] Deputies Thomas and Budd intercepted Mr. Stevenson's calls and Deputy Budd spoke directly with Mr. Stevenson five times on

---

conventionally filed the entirety of this case file with the district court in support of their motion for summary judgment. ROA.1017-18. The conventional filing consisted of a thumb drive. The files on that thumb drive, including recorded interviews and scene photos, are not individually accessible as .pdf files in the electronic record on appeal. Appellants therefore cite to evidence that was conventionally filed on the thumb drive and is therefore in the record as "ROA.1017-18" (the ROA numbers for the conventional filing), followed by the file path where the document can be located on the thumb drive, followed by the file name. Appellants include time stamps for audio recordings and page numbers for .pdf files, where applicable. For example, Appellants' footnote 10 is to minute 01:21 of Ms. Porter's recorded interview, which is at the file path "Attachment 6\Kimula Porter\Porter Interview.mp3" on the thumb drive. Appellants therefore cite to this portion of Ms. Porter's interview as ROA.1017-18\Attachment 6\Kimula Porter\Porter Interview.mp3.01:21(min).

[5] *Id*., ROA.648:16-25.

[6] *See, e.g.*, ROA.1017-18\Attachment 6\Kimula Porter\Porter Interview.mp3.

[7] ROA.1017-18\Attachment 6\Kimula Porter\Porter Interview.mp3.8:12-8:16(min).

[8] ROA.1017-18\Attachment 13\Sgt. Budd Interview\VIDEO_TS\VTS_01_1.vob.06:05-06:10(min).

[9] ROA.673:17-22.

[10] ROA.1017-18\Attachment 6\Kimula Porter\Porter Interview.mp3.11:47-13:40(min).

[11] ROA.623.

Ms. Porter's cell phone.[12] Mr. Stevenson told Deputy Budd that he was going to kill himself by jumping off the Mississippi Bridge, that he was going to the bridge, that he was under the bridge, and that they would find his car on the bridge.[13] Mr. Stevenson told Deputy Budd "over and over" that he was sick, that he did not want to meet with the deputies,[14] and he spoke at length about his suicidal intentions.[15] The final time that Deputy Budd spoke with Mr. Stevenson, Mr. Stevenson said, I'm under the bridge and I'm going to do it."[16]

Deputy Birdwell also responded to the residence and heard Mr. Stevenson saying on speakerphone that he was going to kill himself by jumping off the bridge.[17] Deputy Scott Henning heard over the radio that Mr. Stevenson "made multiple references to going to the grave tonight, and that he was going to jump off of the Mississippi River bridge."[18] Deputies Charles Montgomery and Shannon Broussard also learned that Mr. Stevenson was threatening suicide by jumping off the bridge.[19]

---

[12] ROA.1017-18\Attachment 13\Sgt. Budd Interview\VIDEO_TS\VTS_01_1.vob.7:50(min).
[13] ROA.1017-18\Attachment 13\Sgt. Budd Interview\VIDEO_TS\VTS_01_1.vob.10:00-12:00(min).
[14] ROA.1017-18\Attachment 13\Sgt. Budd Interview\VIDEO_TS\VTS_01_1.vob.10:00-10:22(min).
[15] ROA.1017-18\Attachment 13\Sgt. Budd Interview\VIDEO_TS\VTS_01_1.vob.10:00-11:00(min).
[16] ROA.1017-18\Attachment 13\Sgt. Budd Interview\VIDEO_TS\VTS_01_1.vob.15:20(min).
[17] ROA.1017-18\Attachment 10 \Lt. Birdwell Interview\VIDEO_TS\VTS_01_1.vtb.2:30-3:00(min).
[18] ROA.1017-18\Attachment 11\Sgt. Henning Interview\VIDEO_TS\VTS_01.vob.6:30-6:47(min).
[19] ROA.1017-18\Attachment 12\Sgt. Montgomery Interview\VIDEO_TS\VTS_01.01.vob.7:50-8:05(min), ROA.1017-18\Attachment 14\Det. Broussard Interview\VIDEO_TS\VTS_01_1.vob.8:45-9:00(min).

Detectives were notified, who pinged Mr. Stevenson's phone and identified his location.[20] The urgent need to locate Mr. Stevenson was in order to prevent him from harming himself. ROA.894:10-895:9. While the deputies had information that Mr. Stevenson had committed a crime (against Ms. Porter and her daughter), the deputies knew who the suspect was, where he lived, what he drove, and, but for his mental health crisis, could have located Mr. Stevenson via less urgent means. ROA.895:11-20.

2. Deputy Birdwell Failed to De-escalate the Situation with Mr. Stevenson.

Deputy Birdwell found Mr. Stevenson's car in a small parking lot just over a mile from the bridge where he told deputies he was going to jump.[21] Birdwell communicated Mr. Stevenson's location over the radio.[22] The Louisiana State Police Criminal Investigation Division later photographed[23] and created a scale diagram of the scene.[24] This evidence shows that Mr. Stevenson's car was parked head-in toward an apartment building, in between a parked Mercedes SUV (on the driver's side of Mr. Stevenson's vehicle)[25] and a dumpster (on the passenger side of Mr.

[20] ROA.649:4-5.
[21] ROA.651:1-24.
[22] ROA.651:10-13.
[23] *See* e.g., ROA.1017-18\Attachment 3\1300 Terrence.
[24] ROA.1059.
[25] ROA.654:1-25, ROA.1059, ROA.1017-18\Attachment 2\ _95_1305.jpg

Stevenson's vehicle).[26] Two metal bollard posts were located at the front bumper of Mr. Stevenson's vehicle.[27] Investigators sketched and photographed a gap of space between the parked Mercedes SUV and the exterior apartment wall, measuring approximately 4.6 feet.[28]

Birdwell parked his marked patrol unit – a full-sized 6,700-pound SUV -- approximately ten to twelve feet behind and perpendicular to the rear of Mr. Stevenson's car.[29] According to photos of the scene, Mr. Stevenson appeared to be boxed-in between the parked SUV on his driver's side, the metal bollard posts and stairwell to the front, the dumpster on the passenger side, and Birdwell's patrol unit to the rear.[30]

It was dark outside, and Birdwell shone his mounted spotlight into Mr. Stevenson's car.[31] While waiting for the other officers to arrive, Birdwell exited his vehicle, drew his gun, and approached the driver's side of Mr. Stevenson's car, positioning himself between Mr. Stevenson's car and the parked SUV.[32] Birdwell

---

[26] ROA.656, ROA.1017-18\Attachment 2_(5)_1305.avi, ROA.1017-18.Attachment 2_(8)_1305.jpg, ROA.1017-18\Attachment 2_(95)_1305.jpg.
[27] ROA.1017-18\Attachment 3\1300 Terrence_(125)_1305.jpg.
[28] ROA.1059, ROA.1017-18\Attachment 3\1300 Terrence._(4)_(1300).avi (Screen shot at 0:13s), ROA.779 (there was a "sidewalk width" between the parking and the apartment building).
[29] ROA.653:18, ROA.1017-1\Attachment 2.2-3.
[30] ROA.652:2-25. ROA.1017-18\Attachment 2.2-4. The following scene photos are located at file path ROA.1017-18\Attachment 3\1300 Terrence: _(2)_1305.avi., _(2)_1305.jpg, _(4)_1305.avi, _(5)_1305.avi, _(11)_1305.jpg.
[31] ROA.652:2-25.
[32] ROA.1017-18\Attachment 10 - Lt. Birdwell Interview\VIDEO_TS\VTS_01_1.vtb 7:45-7:53(min).

was surprised to see Mr. Stevenson sitting in the driver's seat.[33] Birdwell knocked on the window, but Mr. Stevenson did not acknowledge him.[34] Mr. Stevenson did not pull any weapons or threaten Birdwell.[35] Birdwell observed indicators that Mr. Stevenson was mentally ill,[36] but Birdwell pounded on Mr. Stevenson's door with his fist and loudly shouted at Mr. Stevenson to open the door and get out of the car.[37] Mr. Stevenson was surprised,[38] looked up at Birdwell with a blank stare, and started the car.[39] At this point, Mr. Stevenson had still said nothing to Deputy Birdwell and had brandished no weapons.[40] Birdwell had no information that Mr. Stevenson had any criminal history or was under the influence of drugs.[41]

Birdwell then pulled out his knife and banged it against the driver's side window,[42] shattering it.[43] Birdwell yelled, "man, my car is behind you, you can't go anywhere, you can't go nowhere," reached in to grab Mr. Stevenson by the shoulders, and tried to pull him out of the driver's side window while the car was running.[44]

---

[33] ROA.656:17-25.
[34] ROA.656:17-25.
[35] ROA.656:17-25.
[36] ROA.724:5-17.
[37] ROA.657:4-19.
[38] ROA.1017-18\Attachment 10 - Lt. Birdwell Interview\VIDEO_TS\VTS_01_1.vtb 7:45(min).
[39] ROA.1017-18\Attachment 10 - Lt. Birdwell Interview\VIDEO_TS\VTS_01_1.vtb 7:45(min).
[40] ROA.658.
[41] ROA.697:3-10.
[42] ROA.657:4-19.
[43] ROA.657:4-19.
[44] ROA.659:1-25.

3. Mr. Stevenson Posed no Immediate Threat of Death or Serious Bodily Injury to Anyone at the Time Henning Fired.

Deputy Henning arrived on scene to see Birdwell shatter the driver's side window.[45] Henning stood at the front of the parked SUV, which was on the driver's side of Mr. Stevenson's car.[46] Henning had a clear view of Birdwell.[47]

Mr. Stevenson put his car in reverse and backed straight into Birdwell's SUV.[48] Mr. Stevenson went straight backward; he did not turn the wheel of the car to improve or increase the angle of the car.[49] In fact, Mr. Stevenson never turned his wheel during the entire incident, and continued to drive forwards and backwards in a straight line,[50] while, at times, saying "kill me." This behavior made Henning believe that Mr. Stevenson might be suffering from a mental illness.[51] Since Birdwell and Henning were both off to the side near the parked SUV, neither deputy was about to be run over by Mr. Stevenson.

In fact, if necessary, the deputies could have taken cover behind the parked SUV (placing the parked SUV between themselves and Mr. Stevenson's car) or

---

[45] ROA.785:24-25, ROA.786:1-6.
[46] ROA.783:16-21.
[47] ROA.784:11-21.
[48] ROA.528, 788:2-6. The following scene photos are located at file path ROA.1017-18\Attachment 3\1300 Terrence: _(10)_1305, _(121)_1305, _(122)_1305.
[49] ROA.528, ROA.663:8-9. The following scene photos are located at file path ROA.1017-18\Attachment 3\1300 Terrence: _(10)_1305, _(121)_1305, _(122)_1305.
[50] ROA.528, ROA.683:13-19. The following scene photos are located at file path ROA.1017-18\Attachment 3\1300 Terrence: _(10)_1305, _(121)_1305, _(122)_1305.
[51] ROA.829:24, ROA.830:23, ROA.831:1-18-32.

placed some distance between themselves and Mr. Stevenson's car by either backing up or moving into the 4.6 foot gap of space between parked SUV and the apartment wall.[52] According to Henning, at a later point during the incident, Deputy Birdwell did create distance between himself and Mr. Stevenson's car by moving into the 4.6 foot space between the parked Mercedes SUV and the apartment building.[53] However, even though Mr. Stevenson's engine was running and he had already driven backward into Birdwell's patrol unit and forward into the bollard post, Birdwell and Henning approached the driver's side door of Mr. Stevenson's car and made a second attempt to extract Mr. Stevenson from the car.[54] A reasonable inference from the fact that neither deputy took cover behind the SUV or moved into the 4.6 foot gap of space between the SUV and the apartment before Deputy Henning fired - and instead moved closer to Mr. Stevenson, is that Mr. Stevenson was not a serious threat. Birdwell even claims that he approached Mr. Stevenson's car a third time, when Mr. Stevenson backed up into Birdwell's patrol unit.[55]

Deputy Henning's version of events differs from Birdwell's in several material ways. While Birdwell claims that he pursued Mr. Stevenson's vehicle and

---

[52] ROA.1017-18\Attachment 3\1300 Terrence_(97)_1305.jpg, ROA.1017-18\Attachment 3\1300 Terrence_(4)_1305.avi (screen shot), ROA.1017-18\Attachment 3\1300 Terrence_(5)_1305.avi, ROI.326-7, 526, 791:17-792:13 (at one point before he fired, Deputy Henning did back up and create distance between himself and the car).
[53] ROA.801:1-14, ROA.806:2-5.
[54] ROA.661:16-23, ROA.788:2-6.
[55] ROA.668:23-25.

attempted to extract Mr. Stevenson from the car as it moved forward and backward, Henning claims that Birdwell stayed next to the parked SUV during the entire incident. Although Henning saw Birdwell break the driver's side window, Henning never saw Birdwell approach the driver's side window after Mr. Stevenson's car began to move.[56] According to Henning, if Birdwell had approached Mr. Stevenson and attempted to pull him from the car when Mr. Stevenson had backed up and into Birdwell's patrol unit, Henning would have seen it.[57] This is because, according to Henning, when Mr. Stevenson backed into Birdwell's patrol unit, Henning had Mr. Stevenson at gunpoint from the driver's side and was repeatedly yelling at him to "get out of the car."[58] Henning claims that Mr. Stevenson responded by yelling, "Kill me, kill me, just kill me."[59] Mr. Stevenson's car was not moving at this point and remained in contact with Birdwell's SUV for roughly ten (10) seconds.[60]

Henning moved back to a position closer to the parked SUV.[61] Mr. Stevenson drove straight forward again and Henning fired a single shot.[62] Henning claims that he fired because he subjectively believed that Mr. Stevenson was aiming for Birdwell.[63] However, Henning's subjective belief is contradicted by the record.

---

[56] ROA.796:11-17, ROA.804:1-22.
[57] ROA.804:1-22.
[58] ROA.788:12-18.
[59] ROA.788:12-18.
[60] ROA.788:19-25.
[61] ROA.792-3.
[62] ROA. 528, 793:6-13.
[63] ROA.793.

Henning last saw Birdwell positioned off to the side near the parked SUV,[64] saw that Mr. Stevenson was driving straight forward,[65] and never saw Birdwell directly in the path of or about to be run over by Mr. Stevenson's car.[66] In fact, Henning does not say that he fired because he saw that Birdwell was about to be run over; Henning did not even see Birdwell at the time Henning fired.[67] Rather, Henning fired because Mr. Stevenson was travelling in the general direction where Henning believed he last saw Birdwell.[68]

Birdwell and Henning also have inconsistent accounts of what transpired when Henning fired his first and only shot. Birdwell claims that Henning fired when Mr. Stevenson reversed into Birdwell's patrol unit the first time.[69] Henning claims that he fired when Mr. Stevenson backed up for the third time.[70] Regardless, Henning claims that Birdwell was still standing near the parked SUV when Henning fired,[71] which means that Birdwell was to the side of Mr. Stevenson's car, and that Birdwell was not about to be run over by Mr. Stevenson at the time that Henning fired. Henning concedes that he never saw Birdwell in front of Mr. Stevenson's

---

[64] ROA.676:11-23.
[65] ROA.528, 799:4-7.
[66] ROA.798:13-20.
[67] ROA.797:8-18.
[68] ROA.798:16-799:3.
[69] ROA.1017-18\Attachment 10 - Lt. Birdwell Interview\VIDEO_TS\VTS_01_1.vtb 9:33 (min).
[70] ROA.1017-18\Attachment 11- Sgt. Henning Interview\VIDEO_TS\VTS_01.vob 19:14 (min).
[71] ROA.798:3-8.

car.[72] Henning claims that he would have seen Birdwell when he was shooting directly into the vehicle if Birdwell was standing there.[73] Henning also concedes that he did not shoot again because he realized that Birdwell was not run over and that Birdwell was not in any danger when Henning fired his weapon.[74] According to Henning, Deputy Birdwell was in the 4.6 foot gap between the parked Mercedes SUV and the apartment building.[75] Henning was the first to fire. And, according to Henning, after he fired, he never saw Birdwell leave that space between the parked SUV and the apartment building,[76] which places Deputy Birdwell out of the path of Mr. Stevenson's vehicle for the remainder of the incident.[77]

4. The Disputed Facts in Appellants' Favor Show that Mr. Stevenson Posed No Threat of Death or Serious Bodily Injury to Anyone During the Incident.

Deputies Broussard, Montgomery, Budd, and Masters arrived on scene after Birdwell and Henning. Broussard arrived as Mr. Stevenson's car had just reversed into Birdwell's patrol unit.[78] Broussard saw Mr. Stevenson drive straight back and

[72] ROA.798:16-20.
[73] ROA.798:1-20.
[74] ROA.798:8-15.
[75] ROA.806:22-25.
[76] ROA.806:22-25.
[77] ROA.1017-18\Attachment 3\1300 Terrence_(97)_1305.jpg, ROA.1017-18.Attachment 3\1300 Terrence_(4)_1305.avi (screen shot), ROA.1017-18\Attachment 3\1300 Terrence_(5)_1305.avi, ROA.326-7, ROA.526.
[78] ROA.1017-18\Attachment 14\Det. Broussard Interview\VIDEO_TS\VTS_01_1.vob. 24:00(min).

forth two more times.[79] When Mr. Stevenson reversed backward a third time, Officer Broussard fired two or three shots at Mr. Stevenson.[80] According to Broussard, he could see Birdwell during the incident and, like Henning, could see that Birdwell stayed in the area near the parked SUV and the apartment complex pretty much the whole time.[81]

Deputy Budd arrived on scene as Mr. Stevenson's vehicle was driving forward toward the concrete post for a third time,[82] which would have been after Henning fired. As Budd ran toward the deputies and Mr. Stevenson's car, he, like Henning and Broussard, saw Deputy Birdwell positioned near the parked SUV to the side of Mr. Stevenson's car.[83] Budd moved past Birdwell towards the driver's side of Mr. Stevenson's car and Mr. Stevenson again reversed his car away from the deputies toward Birdwell's patrol unit.[84] According to Birdwell, Budd stepped in front of Birdwell and fired six (6) rounds at Mr. Stevenson into the front of the car as Mr. Stevenson was about to drive forward again.[85]

---

[79] ROA.1017-18\Attachment 14\Det. Broussard Interview\VIDEO_TS\VTS_01_1.vob.24:00(min), ROA.528.
[80] ROA.878:15-18.
[81] ROA.1017-18\Attachment 14\Det. Broussard Interview\VIDEO_TS\VTS_01_2.vob.5:17 (min), ROA.806:22-25.
[82] ROA.1017-18\Attachment 13 - Sgt. Budd Interview\VIDEO_TS\VTS_01_1.vob.22:30(min).
[83] ROA.1017-18\Attachment 13 - Sgt. Budd Interview\VIDEO_TS\VTS_01_1.vob.22:38(min).
[84] ROA.1017-18\Attachment 13 - Sgt. Budd Interview\VIDEO_TS\VTS_01_1.vob.23:20(min).
[85] ROA.1017-18\Attachment 10 - Lt. Birdwell Interview\VIDEO_TS\VTS_01_1.vtb 22:19-22:33(min).

As Budd fired six rounds at Mr. Stevenson, Deputies Montgomery and Broussard also fired six and ten rounds, respectively, from their weapons.[86]

Deputy Montgomery positioned himself on the driver's side of Mr. Stevenson's car, approximately six to ten feet away.[87] Montgomery saw Mr. Stevenson drive forward and backward, although he cannot say how many times.[88] Deputy Montgomery did not shoot Mr. Stevenson when he saw the car move back toward the patrol unit and forward in Deputy Birdwell's direction. Montgomery then saw Broussard fire a couple of rounds and disable the rear tire,[89] when Mr. Stevenson "had just struck Birdwell's vehicle."[90] All the deputies were yelling very loudly at Mr. Stevenson.[91] Mr. Stevenson appeared "incoherent."[92] Mr. Stevenson said nothing to the deputies.[93] Montgomery then fired six additional rounds at Mr. Stevenson.[94]

---

[86] ROA.1017-18\Attachment 14 - Det. Broussard Interview\VIDEO_TS\VTS_01_1.vob.21:43-21:54(min).
[87] ROA.876:23-877:3.
[88] ROA.874:7-15, 892:5-9.
[89] ROA.879:15-18.
[90] ROA.1017-18\Attachment 12 – Sgt. Montgomery Interview\VIDEO TS\VTS_01_2.vob.12:26:48-12:27:15.
[91] ROA.1017-18\Attachment 12 – Sgt. Montgomery Interview\VIDEO TS\VTS_01_2.vob.12:24:58-12:25:28.
[92] ROA.1017-18\Attachment 12 – Sgt. Montgomery Interview\VIDEO TS\VTS_01_2.vob.12:25:29-12:25:35.
[93] ROA.1017-18\Attachment 12 – Sgt. Montgomery Interview\VIDEO TS\VTS_01_2.vob.12:26:38-12:26:47.
[94] ROA.887:13-14.

Although Appellees argue that it was reasonable for Montgomery to shoot based on his subjective belief that the car was moving forward and was about to strike Birdwell, this is disputed by the record. Montgomery did not actually see Mr. Stevenson shift the car into drive.[95] Montgomery saw Mr. Stevenson drive back and forth several times,[96] saw that Deputy Birdwell was positioned in between the parked SUV and the apartment building,[97] and saw that Deputy Birdwell was unharmed by the prior movements of Mr. Stevenson's car.[98] Montgomery also saw Broussard disable Mr. Stevenson's rear tire.[99] Moreover, after the shooting, Montgomery claims that he saw Mr. Stevenson slump over to the right and that he and Deputy Masters approached the vehicle to secure it.[100] According to Montgomery, the vehicle's engine was revving when he fired, and it stopped after the shooting.[101] There is no testimony that the car continued forward for a several feet after the shooting or that it rolled to a stop, which would have logically occurred if Mr. Stevenson's car was driving forward as Montgomery claims it was when he fired. In fact, scene photos documenting the shooting show that after the shooting, the rear

[95] ROA.877:25-878.
[96] ROA.874:7-15.
[97] ROA.882:22-883:1.
[98] ROA.878:12-25, 879:13-880:10.
[99] ROA.879:15-18.
[100] ROA.1017-18\Attachment 12 – Sgt. Montgomery Interview\VIDEO_TS\VTS_01_2.vob.12:38:30-12:39:40(min).
[101] ROA.1017-18\Attachment 12 – Sgt. Montgomery Interview\VIDEO_TS\VTS_01_2.vob.12:38.40-12:40:05(min).

of Mr. Stevenson's car was up against Birdwell's patrol unit.[102] The fire department turned the engine off, but the keys were still in the ignition, the gear shift was in *reverse,* and Mr. Stevenson's right foot was resting on the gas pedal.[103]

Deputy Birdwell never fired during the incident.[104] Birdwell continued to believe that Mr. Stevenson was going to comply, stop the car, and get out of the vehicle.[105]

5. The Physical Evidence, Combined with the Deputies' Testimony, Demonstrates that Mr. Stevenson was Not About to Strike Anyone with his Car During Any of the Shots.

Mr. Stevenson sustained seven (7) gunshot wounds in his head and chest areas. All of the entry wounds appeared to have come from the front-left, left side, and left rear of the car.[106] Mr. Stevenson died at the scene.[107]

After the incident, Louisiana State Police detectives and forensic technicians investigated the shooting. They inserted trajectory rods into Mr. Stevenson's car. The trajectory rods, once placed, were photographed and the photos were included among the evidence and case file.[108] The photographs show rods placed through the bullet holes in Mr. Stevenson's car to demonstrate the bullet paths and trajectory of

[102] ROA.1017-18\Attachment 3\1300 Terrence_(8)_1305.
[103] ROA.1017-18\Case Report.13.
[104] ROA.688:12-17.
[105] ROA.688:18-24.
[106] ROA.626.
[107] ROA.618.
[108] ROA.1017-18\Attachment 3\18745-16 OIS (EBRSO) Follow-up 3465 Harding_(42)_1460.jpg-_(83)_1460.jpg.

the shots fired by the deputies during the incident.[109] The photographed trajectory rods in the car show that none of the shots were fired from a dead-on position straight into the front of Mr. Stevenson's car. Rather, the three bullet defects to the front windshield show that the shots were fired from the front *driver's side* of the car and, as a logical corollary, would have had a left-to-right and slightly front-to-back trajectory. The photographed trajectory rods also show that the remainder of the shots were fired from the *driver's side* and from the rear *driver's side* of Mr. Stevenson's car, which would have had left-to-right and or slightly left-to-right / slightly back-to-front trajectories.

Forensic Pathologist. Dr. Karen F. Ross performed an autopsy on Mr. Stevenson, documenting the bullet paths.[110] Dr. Ross noted the following gunshot wounds: (1) to the left side of the chest with a left-to-right, front-to-back, and slightly upward trajectory; (2) to the left side of the neck with a left-to-right and slightly front-to-back trajectory; (3) to the left back side of the head with a back-to-front, upward, and slightly left-to-right trajectory; (4) and (5) two gunshot wounds to the left side of the head, with entrance wounds at the left ear and left side of the head, and with a left-to-right and slightly front-to-back trajectory; (6) to the left side of the

[109] ROA.1017-18\Attachment 3\18745-16 OIS (EBRSO) Follow-up 3465 Harding_(42)_1460.jpg-_(83)_1460.jpg.
[110] ROA.1017-18\Attachment 15\Baton Rouge OIS 022316\EBR Coroner Report.2-3.

chin and lower lip with a slightly left-to-right and upward trajectory; and (7) a graze wound to the left upper shoulder with a left-to-right and slightly upward trajectory.

The physical evidence demonstrates that all shots were fired from the driver's side of the car. When considered in combination with the deputies' testimony that Mr. Stevenson never turned his wheel and only drove straight backwards and forwards, the objective evidence is that none of the deputies were directly in the path (either in front or behind) of Mr. Stevenson's car – and therefore were not about to be run over – at the time they fired. The deputies' testimony that Birdwell could be seen positioned near the parked SUV and off to the driver's side of Mr. Stevenson's car during the entire incident also indicates that there no objective facts, when taken in a light most favorable to Appellants on summary judgment, to justify a reasonable belief that Deputy Birdwell was about to be run over by Mr. Stevenson's car during any of the shots.

6. The Record Contains Evidence that the Deputies in this Case were Inadequately Trained on Police Interaction with Mentally Ill Subjects.

A Procedural Order from the East Baton Rouge Parish Sheriff's Office regarding "Mentally Ill Persons and Substance Abuse Patients," effective January 1, 2009, informs deputies that "suicide attempts," particularly when combined with "unusual or criminal behavior," "are indications of mental illness."[111] However,

[111] ROA.1099.

according to Deputy Montgomery, there is no policy in the East Baton Rouge Parish Sheriff's Department regarding how to approach and deal with a suspect who may be suffering from a mental illness.[112] Deputy Montgomery claims that according to his training, he need only approach mentally ill suspects with "a little more caution" and "talk to them… a little bit more" (ROA.861:24-862:2), but he is not trained to act any differently toward persons with mental illnesses as far as his approach, initial contact, or aggressiveness.[113] Similarly, Deputy Birdwell acknowledges that suicidal intentions indicate a mental illness, however like Montgomery, this knowledge did not cause him to change his approach to Mr. Stevenson.[114]

In support of their motion for summary judgment, Appellees provided in-service training records for the years 2014-2019 for Deputies Montgomery, Birdwell, Henning, Budd, Broussard, and Masters.[115] The scope of the courses listed have a range of topics from detention and arrest procedures to human trafficking and investigating sexual assault.[116] According to the affidavit of Captain Randy Lorio, filed by the Appellees to accompany these records, while P.O.S.T.[117] "does not require any training regarding dealing with persons with mental issues as a part of

[112] ROA.857:3-9.
[113] ROA.861:13-17.
[114] ROA.724:12-17.
[115] ROA.911-966.
[116] ROA.911-966.
[117] Peace Officer Standards and Training. These are minimum standards, by which all officers are trained.

the annual in-service requirements," "the East Baton Rouge Sheriff requires at least 25 hours per year."[118] Presumably, this is because deputies in the East Baton Rouge Parish receive and respond to calls concerning people with mental illnesses. ROA.865:1-5.

However, this is contradicted by Deputy Birdwell, who claims there is no annual training required concerning police interaction with mentally ill subjects.[119] Moreover, among the 54 pages of training records provided for 2014-2019, only a single entry reflects any in-service training on mental health issues - a two hour course on "Mental Health Awareness" taken by Deputy Budd on April 4, 2019 (three years *after* the incident in this case).[120]

Plaintiffs' police practices expert, Lloyd Grafton, also opined that the Parish's officer training was inadequate. According to Mr. Grafton, if the deputies had received any training for dealing with the mentally ill –it was not reflected in their actions in this incident.[121] POST certification training in Louisiana follows the International Association of Chiefs of Police policy, which follows the Memphis Model on dealing with the mentally ill, which was authored in 1997.[122] Based on these principles, Birdwell was overly aggressive with Mr. Stevenson from the time

[118] ROA.911.
[119] ROA.722:1-12.
[120] ROA.948.
[121] ROA.393:22-25.
[122] ROA. 333-4, 402:5-13.

he first approached. Birdwell never asked if Stevenson was okay,[123] and very soon after, Birdwell broke the driver side window and attempted to forcibly extract Mr. Stevenson from the car.[124] This is inconsistent with well-known de-escalation techniques, on which all deputies should be trained.[125]

C. Procedural History

Plaintiffs-Appellants filed this excessive force suit after five East Baton Rouge Parish Sheriff's Deputies fired 21 rounds into a vehicle, killing Travis Stevenson ("Mr. Stevenson"). Plaintiffs brought claims against the individual deputies under 42 U.S.C. § 1983 for excessive force and against Sheriff Gautreaux in his official capacity, for failure to train his deputies.[126]

On September 13, 2019, Defendants filed a Motion for Summary Judgment, arguing that the force used was reasonable and that the individual deputies were entitled to qualified immunity.[127] Defendant Sheriff Gautreaux argued that his deputies are appropriately trained, that there was no evidence showing that he was deliberately indifferent or disregarded an obvious consequence of any failure to

[123] ROA.404:5-19, 405:12-16.
[124] ROA 406:2-15.
[125] ROA.333-334, 409:20-410:11, 413:15-24.
[126] ROA.24-26.
[127] ROA.535.

train, and that he was entitled to summary judgment on Appellants' municipal liability claim based on failure to train.[128]

On June 17, 2020, the district court granted Defendants' Motion for Summary Judgment in all respects. The court determined that "no reasonable jury could conclude that the defendant Deputies did not reasonably believe that Mr. Stevenson posed an immediate threat to Lt. Birdwell." ROA.1234. The court further concluded that there was "no genuine dispute of fact regarding whether a reasonable officer could have thought Lt. Birdwell was not in danger." Id. Based on these conclusions, the court granted qualified immunity to each of the defendant deputies.

The court also granted summary judgment on Plaintiffs' failure to train official capacity claim against the Sheriff. ROA.1235-1244. The court decided that "no reasonable jury could conclude that the Sheriff utterly failed to train the deputies in how to deal with mentally unstable individuals." ROA.1244.

On July 15, 2020, Plaintiffs timely flied their Notice of Appeal.

[128] Plaintiffs do not pursue a theory of liability against Sheriff Gautreax in his individual capacity, and therefore do not address the argument that he is entitled to qualified immunity.

SUMMARY OF THE ARGUMENT

The district court erred when it granted summary judgment despite the overwhelming factual inconsistencies in this case that should be resolved by a jury. Not only do the deputies' versions of events contradict one another, but they are also contradicted by the physical evidence. Taking the facts in a light most favorable to the Appellants, as the district court was required to do, there was no objectively reasonable basis for the deputies to believe that Mr. Stevenson posed any immediate threat of death or serious bodily injury to anyone on scene when they fired.

The district court also erred when it granted qualified immunity to the individual deputy defendants. As a preliminary matter, disputed issues of fact preclude granting qualified immunity at the summary judgment stage. Moreover, based on the version of events most favorable to the Appellants and drawing all reasonable inferences therefrom, it was clearly established in February of 2018 that it is unreasonable to fire 21 rounds into a vehicle – killing the driver at the scene:

- when the vehicle is boxed-in and has nowhere to go;
- when the driver does not appear to be attempting to flee;
- when the driver has not threatened or attempted to harm any of the deputies;
- when the driver is outnumbered by the on-scene deputies six-to-one;

- when all deputies on scene are out of the vehicle's path and none are about to be run over by the vehicle;
- when the vehicle is in reverse and not moving toward any of the deputies at the time of the shots;
- when there is adequate space for all deputies on scene to distance themselves or move out of the vehicle's path; and
- when it is known to the deputies that the driver is mentally ill and has threatened to commit suicide.

The district court further erred when it granted summary judgment as to Appellants' failure to train claim, because the Appellees received sufficient notice during discovery of the basis for Appellants' claim and because there is ample evidence in the record for the trier of fact to conclude that the deputies' inadequate training as to proper law enforcement interaction with mentally ill persons was a causal factor in Mr. Stevenson's untimely and avoidable death.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the granting of a motion for summary judgment de novo.[129]

II. DISPUTED ISSUES OF FACT PRECLUDE QUALIFIED IMMUNITY AT SUMMARY JUDGMENT.

Summary judgment requires that the movant "show that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[130] A factual dispute is material when it has the chance to affect the outcome of the suit under the governing law.[131] When viewing the whole record in the light most favorable to the nonmoving party, summary judgment is inappropriate unless no reasonable jury could find for the nonmovant.[132]

Determining the reasonableness of a use of fore "requires careful attention to the facts and circumstances of each particular case.[133] This determination involves "slosh[ing] our way through the factbound morass of 'reasonableness.'"[134] As such, "'reasonableness under the Fourth Amendment should frequently remain a question for the jury'" because "'we rely on the consensus required by a jury

---

[129] *Newman v. Guedry*, 703 F.3d 757, 761 (5th Cir. 2012).
[130] Fed. R. Civ. Proc. 56(a).
[131] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
[132] *Newman*, 703 F.3d at 761; *Kerstetter v. Pacific Scientific Co.*, 210 F.3d 431, 435 (5th Cir. 2000).
[133] *Graham v. Connor*, 490 U.S. 386, 396 (1989).
[134] *Scott v. Harris*, 550 U.S. 372, 383 (2007).

decision to help ensure that the ultimate legal judgment of "reasonableness" is itself reasonable and widely shared.'"[135]

Moreover, in cases such as this, where the deputies are the only witnesses alive to testify as to the factual events, summary judgment should be granted sparingly. Courts should give particular weight to internal inconsistencies in the deputies' statements, as well as inconsistencies between the deputies' versions of events and the physical evidence.[136] Qualified immunity is simply unavailable on summary judgment when there are disputed issues of material fact.[137]

A. This Case Involves Disputed Issues of Fact.

Here, the district court either failed to consider the factual inconsistencies created by the conflicting affidavits, depositions, and physical evidence in this case, or improperly resolved the factual disputes in favor of the Appellees – the moving party. Either cause results in the improper and premature outcome of summary judgment granted for Appellees.

The deputies' versions of events contradict themselves. As detailed above in Appellants' statement of facts, some of the deputies claim that Birdwell was standing directly in the path of Mr. Stevenson's vehicle, which, Appellees argue

---

[135] *Lytle v. Bexar County, Tex.*, 560 F.3d 404, 411 (5th Cir. 2009) (citing *Abraham v. Raso*, 183 F.3d 279, 290 (3d Cir. 1999)).
[136] *See Bazan v. Hidalgo*, 246 F.3d 481 (5th Cir) (citing *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 151 (2000); *Plakas v. Drinski*, 19 F.3d 1143, 1147 (7th Cir.) (emphasis added); *Cole v. Carson*, 935 F.3d. 444, 456 (5th Cir).
[137] *Johnson v. Jones*, 515 U.S. 304, 313 (1995).

justified firing 21 rounds and killing Mr. Stevenson.[138] Other deputies claim that they could see Birdwell, who was standing near the parked SUV off to the side of Mr. Stevenson's vehicle or in the 4.6 foot space between the SUV and the apartment during the entire incident. The evidence also indicates that Mr. Stevenson drove straight forward and backward and never turned his wheels,[139] and a reasonable inference therefrom is that Birdwell was never in the path of or about to be run over by Mr. Stevenson's vehicle. Moreover, Birdwell himself never fired; he stated that he never feared that Stevenson would run him over or hurt him, and he believed that Mr. Stevenson was going to submit to being taken into custody.[140] Furthermore, Deputy Henning, who fired only one shot *before* Deputies Budd, Brossard, and Montgomery collectively fired 21 shots, testified that he only fired once because he knew that after he fired, Birdwell was not in danger and had not been run over.[141]

Birdwell claims that Budd stepped in front of him before Budd shot at Mr. Stevenson,[142] and Appellees argue that the shooting was justified on the grounds that Mr. Stevenson was about to drive forward in the deputies' direction.

---

[138] ROA.589-591.
[139] ROA.690, 882:5-883:14, 1017-18\Attachment 3\Terrence 1300_(10)_1305.jpg, 1017-18\Attachment 3\Terrence 1300_(121)_1305.jpg, 1017-18\Attachment 3\Terrence 1300_(122)_1305.jpg.
[140] ROA.688:18-24.
[141] ROA.805:5-22.
[142] ROA.690:6-14.

However, the physical and forensic evidence, including the trajectory rods in the car, and the findings on autopsy, show that none of the gunshots were fired from directly in front of the vehicle, and that all shots were fired from either the front driver's side, the driver's side, or the rear driver's side of Mr. Stevenson's car.[143]

Appellees argue that the use of deadly force was justified because the deputies subjectively believed that Deputy Birdwell might be struck by Mr. Stevenson's car.[144] However, the evidence also indicates that Mr. Stevenson's vehicle was not moving forward toward Birdwell when deputies Budd, Montgomery, and Broussard fired, and that rather, Mr. Stevenson's car was still in reverse. According to the physical evidence documented after the shooting, Mr. Stevenson's car never moved from where it struck Birdwell's patrol unit and the gear shift was found in the reverse position.[145]

There are sufficient factual disputes such that a rational jury could discredit the Deputies' version of events and find that there was no objectively reasonable basis for the deputies to believe that the use of deadly force against Mr. Stevenson was necessary in order to protect Birdwell from being run over. The district court

---

[143] Photos of the trajectory rods are at the file path ROA.1017-18\Attachment 3\18745-16 OIS (EBRSO) Follow-up 3465 Harding Blvd_(14)_ 1460.jpg, _(47)_1460.jpg, _(48)_1460.jpg, _(49_1460.jpg, _(54)_1460.jpg, _(57)_1460.jpg, _(59)_1460.jpg, _(72)_1460.jpg. The relevant pages of the autopsy report are at ROA.1017-18\Attachment 3\Attachment 3 – BRPD Crime Scene Reports.pdf.50-51.

[144] ROA.589-591.

[145] ROA.1017-18\Attachment 3\1300 Terrence_(8)_1305, ROA.1017-18\Case Report.13.

erred when it failed to consider the objective evidence on summary judgment, draw all reasonable inferences from the evidence in a light most favorable to Appellants, and deny the motion for summary judgment based on the existence of disputed issues of material fact.

B. A Jury Resolving the Disputed Facts in Mr. Stevenson's Favor Could Conclude that the Deputies' Conduct was Unreasonable Under Clearly Established Law.

Firing 21 rounds at Mr. Stevenson when the deputies knew that he was mentally ill, had not threatened or attempted to harm any of the deputies, and when none of the officers were about to be run over by Mr. Stevenson's car, was objectively unreasonable under the circumstances and violated Mr. Stevenson's Fourth Amendment rights.

Initially, the seriousness of the crime at issue – that Mr. Stevenson was suspected of misdemeanor battery and that he might commit suicide-- does not justify the excessive use of force in this case. The call that was broadcast to the deputies stated that Mr. Stevenson was wanted for domestic abuse (in which no one was seriously injured) - Deputy Budd did not believe that the situation was that serious[146] and Birdwell characterized the offenses as misdemeanors.[147] The deputies also received information that Mr. Stevenson was suicidal and had

[146] ROA.1017-18\Attachment 13\Sgt. Budd Interview\VIDEO_TS\VTS_01_1.vob.06:05-06:10(min).
[147] ROA.673:17-22.

threatened to kill himself by jumping off a bridge.[148] Birdwell then found Mr. Stevenson legally parked in his car, seated in the driver's seat on his phone.[149] It was Birdwell who then decided to pound on Mr. Stevenson's window with his gun drawn, yell at him to open the door, and use his knife to shatter the driver's side window when a startled Mr. Stevenson started the car.[150] As the Supreme Court has explained in *Tennessee v. Garner*, it is unreasonable for an officer to "seize an unarmed, nondangerous suspect by shooting him dead."[151]

Nor did the circumstances encountered by the deputies, once Mr. Stevenson started his car and began driving back and forth in a straight line, justify firing their weapons at Mr. Stevenson 21 times. Some of the deputies saw Birdwell positioned in the 4.6 foot gap between the parked SUV and the apartment building off to the side of Mr. Stevenson' path, and claim that he remained there during the incident. A reasonable jury could have concluded that Birdwell was never in the path of or about to be run over by Mr. Stevenson's car. Indeed, Birdwell himself never fired and never perceived that Mr. Stevenson posed a threat. And Henning, who fired the first shot, stopped firing because he observed that Birdwell was not in any danger.

---

[148] ROA.758:8-16, ROA.761:8-20.
[149] ROA.656-57.
[150] ROA.657:2-5, 658-59, ROA.1017-18\Attachment 10 - Lt. Birdwell Interview\VIDEO_TS\VTS_01_1.vtb.7:40-7:53(min).
[151] *Tennessee v. Garner*, 471 U.S. 1, 11 (1694).

In *Lytle v. Bexar*,[152] a police officer fired at a vehicle that was backing up toward him after the vehicle had crashed as the result of a high-speed chase.[153] There, this court held that "[t]aking the facts in the light most favorable to the plaintiff . . . [the officer] could have had sufficient time to perceive that any threat to him had passed by the time he fired" and concluded that the reasonableness of the shooting needed to go to a jury.[154]

As in *Bexar*, a jury should decide whether the deputies in this case had sufficient time to assess any existing threat to Birdwell before they fired. Henning testified that he could see Birdwell when he fired and that Birdwell was not in the path of Mr. Stevenson's car.[155] And as stated above, Henning testified that he was the first to shoot, but did not fire additional shots because he could see that Birdwell was not in danger. Birdwell never fired and believed that Mr. Stevenson was going to submit to being taken into custody. When Budd fired, Birdwell was behind him and out of the path of Mr. Stevenson's car. And, Montgomery and Broussard watched Mr. Stevenson drive forward and backward, indicating ample opportunity for the deputies to assess the existence of any threat. In *Bexar*, this court found that three to ten seconds could have been enough time to make an

[152] 560 F.3d 404 (5th Cir. 2009).
[153] 560 F.3d at 408.
[154] 560 F.3d at 414.
[155] ROA.798:3-20.

accurate assessment.[156] The amount of time for a car to reverse and drive forward "two to three times" is at least longer than three seconds, and whether or not the officers had the opportunity under the circumstances of this case to appreciate that Birdwell was not in danger is a question best suited for the jury.

A clearly established right is one that is sufficiently clear that reasonable officers would have understood that what they are doing violates that right.[157] "The central concept is that of 'fair warning': The law can be clearly established despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights."[158] The source of clearly established law may come either from controlling authority, or from a consensus of persuasive authority indicating that the conduct is unconstitutional.[159]

At the time of the incident, on February 23, 2016, the law placed Defendants Broussard, Henning, Budd, and Montgomery on notice that their conduct was objectively unreasonable under the circumstances. This court and others have

---

[156] 560 F.3d at 414.

[157] *Darden v. City of Fort Worth, Texas*, 880 F.3d 722, 727 (5th Cir.), cert. denied sub nom; *City of Fort Worth, Tex. v. Darden*, 139 S. Ct. 69 (2018); *see also Taylor v. Riojas*, No. 19-1261, 2020 WL 6385693, at *2 (U.S. Nov. 2, 2020) (reversing summary judgment where the evidence in the light most favorable to the plaintiff indicated a reasonable officer would have known his conduct was unconstitutional).

[158] *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004) (internal quotations and citation omitted).

[159] *Delaughter v. Woodall*, 909 F.3d 130, 139 (5th Cir. 2018).

established that it is unconstitutional to use deadly force against a driver of a vehicle for purportedly posing a threat to officers, when the driver has indicated no intent to hit an officer, and is not driving toward him.

1. Clearly Established Law in this Circuit Placed the Deputies on Notice that it was Unreasonable to Shoot Mr. Stevenson under these Circumstances.

As a general matter, deadly force is inappropriate unless "the fleeing suspect posed such a threat that the use of deadly force was justifiable."[160] This has long been clearly established.[161] Specifically in the context of alleged vehicular threats, this Court has held that shooting a suspect to death is not justified where, as here, he has not actually driven toward officers. In *Edmond v. City of New Orleans,*[162] for example, officers got out of their vehicle after the plaintiff's car was blocked in place. The officers fired at the plaintiff's vehicle, claiming that the driver drove directly at one of the officers and struck an officer.[163] The driver survived the shooting to testify that he did not recall striking the officer and that he did not drive directly at the officer before he was shot. The Court denied summary judgment given the material dispute of fact as to whether the Plaintiff indeed was driving toward the officer and placed him at risk.[164]

---

[160] *Lytle v. Bexar Cty., Tex.*, 560 F.3d 404, 415 (5th Cir. 2009); *see also Trevino v. Trujillo*, 756 F. App'x 355, 358–59 (5th Cir. 2018).
[161] *Id.* at 417.
[162] 20 F.3d 1170, 1994 WL 14478 (5th Cir. 1994).
[163] 20 F.3d 1170, 1994 WL 14478, *1.
[164] *Id.* at *2.

Whether or not Mr. Stevenson actually drove at any of the deputies, posed a risk to any of the deputies, or intended to harm any of the deputies is similarly disputed here. Mr. Stevenson did not aim his vehicle at Birdwell. Birdwell never fired, claims to have approached Mr. Stevenson at the driver's side of the car several times as Mr. Stevenson drove backward and forward, and did not perceive Mr. Stevenson as a deadly threat. There is no evidence that Mr. Stevenson intended to hit Officer Birdwell with his vehicle. Mr. Stevenson never threatened any of the deputies and the scene photos show that he never turned his wheel toward any of the deputies. Rather, he drove straight backward and forward. Mr. Stevenson's odd behavior was explainable given his mental illness, and a rational jury could conclude that a reasonable officer would have understood this, particularly had they been properly trained.

Moreover, prior to killing Mr. Stevenson in his car, the deputies had knowledge that Mr. Stevenson wished to commit suicide. Defendant Budd spoke directly with Mr. Stevenson five times, Birdwell overheard some of these conversations, and Henning, Broussard, and Montgomery received this information by radio. Mr. Stevenson was also shouting "kill me" during the encounter. A reasonable jury could conclude that while Mr. Stevenson appeared to be thinking of taking his own life, there was no indication he intended to harm any of the deputies.

This Court has also held that an officer lacks an objectively reasonable basis for believing that his own safety, or the safety of others, is at risk when firing into a vehicle that is moving away.[165] In *Lytle*, this Court denied qualified immunity on summary judgment[166] where officers responded to a report from a woman that her ex-boyfriend made violent threats towards her and that he was driving a stolen vehicle.[167] Officers located and followed the vehicle for a quarter-to-half mile. After a vehicle collision between the subject and a third party, an officer pulled behind the subject vehicle and fired twice into the vehicle. The pursued vehicle took off again, eventually crashed, and the driver was apprehended. The officer's two shots resulted in the death of a woman in the backseat. The slayed woman's estate brought suit, and this Court held that a jury could find the officer's shooting unreasonable because the officer shot at the back of a vehicle that was not moving toward him. This Court held that it was unreasonable for the officer to shoot at the vehicle as it was moving away because "force that is reasonable at one moment can become unreasonable in the next if the justification for use of force has ceased."[168]

---

[165] *See Lytle v. Bexar County*, 560 F.3d 404, 413 (5th Cir. 2009).
[166] *Id*. at 418.
[167] *Id*. at 407.
[168] *Id*. (*citing Abraham v. Raso*, 183 F.3d 279, 294 (3rd Cir. 1999)); *Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir.1993).

The facts of the current case are analogous to the situation in *Lytle*, and thus the deputies were on notice that their conduct was unreasonable and violated clearly established law. Taking the disputed facts in Appellants' favor, all of the deputies in this case, including Birdwell, were positioned outside the path of Stevenson's car at the time of the shots. And, as the physical evidence indicates, Mr. Stevenson's car was not moving forward at the time that Budd, Broussard, and Montgomery fired – Mr. Stevenon's car was in reverse and had just backed into Birdwell's patrol unit. Like the situation in *Lytle*, while the circumstances at a later moment might have been different, the deputies' force was unreasonable at the moment they fired when the car was in reverse and no one was about to be struck by Mr. Stevenson. The district court erred in granting qualified immunity under these circumstances.

In *Lytle* this Court also noted the unreasonableness of the officers' conduct given that the shots were fired in a residential area and could have struck an unintended target.[169] The shooting in this case is far more egregious, given that the deputies fired 21 rounds at Mr. Stevenson's car, which was in close proximity to other parked vehicles, an apartment complex, other single family homes, and because the shooting occurred in the evening when most people are expected to be home.

---

[169] *Id.* at 413.

The district court incorrectly compared this case to *Malbrough v. City of Rayne*,[170] an unpublished case which is not precedent. In *Malbrough*, a deputy was in front of a vehicle screaming at the plaintiff, was struck by the plaintiff's vehicle, and was on the ground after apparently being hit by the vehicle. The court concluded that it was reasonable for nearby officers to conclude that the downed officer was being dragged under the vehicle and continued to be in danger.[171] The facts of this case are completely different. According to the disputed facts in a light most favorable to Appellants, Birdwell was never in the path of Mr. Stevenson's vehicle, was never about to be struck by the vehicle, was never actually struck by the vehicle, the deputies could see that Birdwell was not in danger, Birdwell never fell to the ground, and the vehicle was not moving in Birdwell's direction about to harm him at the time of the shots. Nothing about this case is analogous to *Malbrough*.

The district court similarly erred in analogizing this case to *Fraire v. City of Arlington*,[172] for the same reason. In *Fraire*, an officer was in mortal danger of being run over by an accelerating pickup truck, and waited to fire until the truck was dangerously close; had the truck not veered away after the driver had been

[170] 814 F. App'x 798 (5th Cir. 2020).
[171] *Id.* at 800–01, 804.
[172] 957 F.2d 1268, (5th Cir. 1992).

shot, the officer might have been killed.[173] Again here, however, the deputies faced no such danger. None of the deputies were in the path of Mr. Stevenson's vehicle, Mr. Stevenson never veered or turned toward any of the deputies and only moved straight forward and back, the deputies had room to move out of the path if necessary, and the car was in reverse, with a disabled tire, and was not moving toward any of the deputies at the time of the shots.[174]

In sum, there is clearly established precedent in this Court that placed Defendant deputies on notice that their conduct was unreasonable and violated Mr. Stevenson's Fourth amendment right to be free from excessive and deadly force, and the district court erred in finding otherwise.

2. Sufficient Persuasive Authority Clearly Established that it was Unreasonable to Shoot Mr. Stevenson Under These Circumstances.

Authority from sister circuits further underscores that shooting a man to death over twenty times when he had not driven toward an officer was

[173] 957 F.2d 1268, at 1277.

[174] The district court also pointed to *Malbrough* and *Fraire* for the proposition that an excessive force claim cannot rise from officer errors that create the need to use deadly force. ROA.1231. This is irrelevant. Officer Birdwell's conduct in approaching Mr. Stevenson and failing to employ any of the de-escalation techniques that are widely prescribed to law enforcement during encounters with mentally ill persons helps explain Mr. Stevenson's conduct in response. A jury could conclude that a reasonable (and properly trained) officer would have interpreted Mr. Stevenson's response as the conduct of a mentally ill man in need of medical intervention, rather than motivated by a criminal desire to kill a police officer.

unconstitutional, and clearly so. There is a consensus of authority from sister circuits that precludes qualified immunity.[175]

In the Sixth Circuit, for example, in *Kirby v. Duva*, police officers intended to arrest a man who they were told was paranoid and violent, on drugs, and who kept weapons.[176] The officers stopped the driver, who was sandwiched between police cars. While one officer justified shooting the driver on the grounds that the officer was directly in the car's path and that he feared being run over,[177] conflicting eyewitness testimony suggested that the officer was by the passenger side of the car and that the car was not moving when the driver was shot.[178] Like the officer's position to the vehicle in *Kirby*, the disputed facts in a light most favorable to Appellants show that Birdwell was standing off to the side and out of the path of Mr. Stevenson's vehicle when the other deputies shot and killed Mr. Stevenson. Also, like the non-moving vehicle in *Kirby*, the physical evidence documented after the shooting indicates that Mr. Stevenson's vehicle was not moving when the deputies shot and killed him, and in fact, was still in reverse and was not about to move in their direction.

[175] *Delaughter v. Woodall*, 909 F.3d 130, 139 (5th Cir. 2018).
[176] 530 F.3d 475, 477 (6th Cir. 2008).
[177] *Id.* at 478.
[178] *Id.* at 479.

Other Sixth Circuit cases reach similar outcomes. In *Smith v. Cupp*,[179] an officer arrested a man for harassing his estranged wife with repetitive phone calls. The man climbed from the back to the front of the police car in which he was being held, and drove away. The officer shot and killed the arrestee, alleging self-defense and claiming that the arrestee was driving towards him. However, some evidence indicated that the arrestee posed no immediate threat to the officer and, viewing the facts favorably to the arrestee's estate, the court denied qualified immunity.[180] In *Godawa v. Byrd*,[181] an officer shot and killed a driver after the driver's vehicle made contact with the officer. The officer shot through the rear passenger side window as the vehicle was driving away.[182] The Sixth Circuit held that the officer was not entitled to qualified immunity and reversed summary judgment because the officer did not have a reason to fear being struck by the car as it was moving away from him.[183]

Other Circuits hold similarly. In *Cowan ex rel Estate of Cooper v. Breen*,[184] for example, an officer shot twice at a vehicle that he claimed was coming toward him. However, it was disputed whether the officer was standing to the side of the

[179] 430 F.3d 766 (6th Cir. 2005).
[180] *Id*. at 773, 777.
[181] 798 F.3d 457 (6th Cir. 2015).
[182] *Id*. at 461, 462.
[183] *Id*. at 466, 468.
[184] 352 F.3d 756 (2nd Cir. 2003).

vehicle, and the Second Circuit concluded that this was a material dispute of fact precluding summary judgment.[185]

In *Abraham v. Raso*,[186] an officer shot and killed a driver in a mall parking lot as the driver was trying to escape.[187] The officer claimed the driver tried to hit him with the car, but other evidence suggested that the officer shot from the driver's side of the vehicle.[188] The Third Circuit likewise found a material dispute of fact, precluding qualified immunity and summary judgment.

In *Waterman v. Batton*,[189] officers shot into a vehicle as it passed them as part of a reckless car chase.[190] The officers claimed the driver was accelerating in their general direction to run them over, but the Fourth Circuit held that shots to the vehicle would be unreasonable when the officers were no longer in imminent harm.[191]

In *McCaslin v. Wilkins*,[192] the court affirmed the denial of summary judgment where an intoxicated decedent led police on high-speed chase exceeding speeds of 100 miles per hour, swerved across the centerline, resisted officers' attempts at capture, collided with a squad car which had attempted to box him in,

---

[185] *Id*. at 759, 762-3.
[186] 183 F.3d 279 (3rd Cir. 1999).
[187] *Id*. at 282.
[188] *Id.* at 282, 284, 294.
[189] 393 F.3d 471 (4th Cir. 2005).
[190] *Id*. at 482.
[191] *Id.* at 482.
[192] 183 F.3d 775 (8th Cir. 1999).

slid down an embankment into a ditch, and drove back up the hill towards officers, at which point an officer fatally shot him. The Eighth Circuit concluded that a genuine issue of material fact existed as to what transpired after the decedent's truck left the road and went over the embankment and at the time of the shots.

Likewise, in *Vaughan v. Cox*,[193] an officer shot three times at the driver's side of a pursued truck during a highway speed chase out of a purported fear that the truck would crash into his police cruiser.[194] The Eleventh Circuit held a reasonable jury could find that the officer's use of deadly force was unconstitutional because there was no immediate threat of serious harm to the officer or others.[195]

III. THE DISTRICT COURT ERRED WHEN IT GRANTED SUMMARY JUDGEMENT TO SHERRIFF GAUTREAUX ON PLAINTIFF'S MUNICIPAL LIABILITY CLAIM FOR FAILURE TO TRAIN.

As outlined above, there is sufficient evidence in the record on which a reasonable jury could rely in finding that Sheriff Gautreaux failed to train his deputies in the East Baton Rouge Parish Office to properly respond to the circumstances that they regularly encounter, such as interactions with persons suffering from mental illness. The district court applied the correct standard, as it is well-established that to prevail on a claim for municipal liability based on failure

[193] 343 F.3d 1323 (11th Cir. 2003).
[194] *Id*. at 1327.
[195] *Id*. at 1330.

to train, "Plaintiffs 'must show that (1) the municipality's training policy or procedure was inadequate; (2) the inadequate training policy was a 'moving force' in causing violation of the plaintiff's rights; and (3) the municipality was deliberately indifferent in adopting its training policy."[196] The district court erred because it failed to apply the standard to the disputed evidence in the record taken in a light most favorable to Appellants, and because it improperly dismissed Appellants' claim on procedural grounds.

First, the record is replete with disputed facts that, construed in a light most favorable to Appellants, warrant a jury's consideration of Appellants' municipal liability claim for failure to train. Despite Appellees' claims that East Baton Rouge Parish deputies are adequately trained on police interactions with the mentally ill, none of the deputies' in-service training records indicate that they attended any course on mental illness during a five-year period from 2014-2019 – save a *single two-hour training session taken by one deputy three years after this incident*. Deputy Birdwell testified that the Parish Office has no required annual training for interacting with mentally ill persons, and Deputy Montgomery testified that the Parish Office has no official policy on police encounters with the mentally ill. Contrary to the district court's conclusions (ROA.1243), this record suggests

[196] *Valle v. City of Houston*, 613 F.3d 536, 544 (5th Cir. 2010); *Sanders-Burns v. City of Plano*, 594 F.3d 366, 381 (5th Cir. 2010); *Snow v. City of El Paso*, 501 F. Supp. 2d 826, 833 n. 5 (W.D. Tex. 2006) (citations omitted).

that there is more than a single incident of the Sheriff's failure to train. Rather, the record demonstrates that this failure has impacted multiple officers in the East Baton Rouge Parish Office over the period of at least five years.

As explained by Appellants' expert Lloyd Grafton, the deputies' conduct during the incident further underscores the inadequacy of their training. Contrary to the training adopted by the International Association of Chiefs of Police and the Memphis Model procedures, none of the deputies in this case asked Mr. Stevenson if he was okay, approached him slowly, refrained from using raised voices, communicated clearly and one at a time, reassured Mr. Stevenson that they were there to help, gave Mr. Stevenson the space and opportunity to process what was happening, or gave Mr. Stevenson the space and opportunity to calm down. What the deputies did, by immediately ordering him out of the car, breaking the driver's side window to forcibly extract him from the car, shouting commands at him simultaneously, and shooting 21 rounds of bullets at him, is inconsistent with the proper approach that a reasonable officer would take when aiding a subject who is experiencing mental issues and is threatening suicide.

There is also sufficient evidence in the record to prove that the failure to adequately train the deputies was the moving force behind the use of deadly force against Mr. Stevenson. Both Deputies Birdwell and Montgomery testified that they are not trained to change their approach, tactics, or strategies when dealing

with subjects who are mentally ill. A reasonable jury could conclude that had they been trained on the Memphis Model, or required to undergo annual training on mental health consistent with the IACP or Louisiana State P.O.S.T. requirements, they would have approached Mr. Stevenson differently, given him distance and space, reinforced that they were there to help, spoken to him calmly, and the incident would have unfolded differently. Since they knew Mr. Stevenson's identity, knew the make and model of his vehicle, knew where he lived, and had his phone pinged, a reasonable jury could also conclude that proper training would have resulted in less aggressive actions by the deputies toward Mr. Stevenson and the use of alternative methods to take Mr. Stevenson into custody that did not involve shooting 21 rounds into his vehicle as he moved his car forward and backwards with little avenue for escape. A reasonable jury could logically conclude that, but for the Sheriff's failure to properly train the deputies in this case, Mr. Stevenson would not have lost his life.[197]

The record also contains evidence on which a reasonable jury could find deliberate indifference. Deputy Montgomery testified that the East Baton Rouge Office gets calls of this nature "all the time," wherein callers report, for instance, that "oh, such and such is here and he's bipolar and has lost his mind" and "things

[197] *See Burge v. Parish of St. Tammany*, 198 F. 3d 452 (5th Cir. 1999); *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976).

like that." In other words, responding to calls concerning mentally ill persons are the sort of circumstances that the deputies regularly encounter. And, it is a well-known fact that mental illness is a public health crisis.[198] For this reason, the International Chiefs of Police have followed the "Memphis Model" since the policy was first published in 1997. Given the prevalence of mental illness in the state, and the high rate at which police officers use deadly force against mentally ill individuals, it is highly predictable that the East Baton Rouge Sheriff's Department would encounter a substantial amount of mentally ill individuals in crisis. The need for training on how to handle such situations is so "obvious," and the inadequacy of this lack of training so "likely to result in the violation of constitutional rights," that a jury could reasonably find that Sheriff Gautreaux was deliberately indifferent to the need for such training.[199] As the Supreme Court noted in *Board of Commissioners v. Brown*,[200] "a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers'

[198] In its 2013 Annual Report, the East Baton Rouge Coroner's Office acknowledged, "We agree with the community that we have a mental health crisis." Available at: http://ebrcoroner.com/media/1795/EBRPCO-Annual-Report-2013.pdf, p.2.
[199] *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 390 (1989).
[200] 520 U.S. 397, 409 (1997).

decision not to train the officer reflected "deliberate indifference" to the obvious consequence of the policymakers' choice – namely a violation of a specific constitutional or statutory right."[201]

Second, the district court erred when it dismissed Appellants' municipal liability claim on the grounds that Appellees had insufficient notice of the claim in operative complaint. ROA.1242. A court should not dismiss a claim with prejudice without giving a plaintiff leave to amend their complaint, unless the defects in the claim are incurable or a defendant provides evidence that amending would unduly delay the action or was pursued in bad faith.[202] Here, the parties conducted discovery and Appellants timely disclosed an expert, Mr. Grafton, who opined, in part, that the deputies' conduct was the result of inadequate training on police interaction with mentally-ill persons. The Appellees were given the opportunity to and did depose Mr. Grafton, and even filed a motion to exclude his testimony (which the parties fully briefed, but on which the district court did not rule).[203] Given that any defect in the complaint could certainly be cured through leave to amend, would cause no delay or prejudice to the Appellees, since Mr. Grafton has already been deposed, and since there is no evidence that an

[201] *Id.*; *Benavides v. County of Wilson*, 955 F.2d 968, 972 (5th Cir. 1992).
[202] *See Great Plains Trust Co. v. Morgan Stanley Witter & Co.*, 313 F.3d 305, 329-30 (5th Cir. 2002).
[203] ROA.14.

amendment would be pursued in bad faith, it was error for the district court to dismiss the failure to train claim on these procedural grounds.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed in its entirety, and the case remanded for trial.

/s Paul L. Hoffman

Paul L. Hoffman
Melanie T. Partow
UNIVERSITY OF CALIFORNIA, IRVINE
CIVIL RIGHTS LITIGATION CLINIC[204]
Attorneys for Plaintiffs-Appellants
Chiquita Spears, et al.

/s Nora Ahmed

Nora Ahmed
ACLU of Louisiana
Attorneys for Plaintiffs-Appellants
Chiquita Spears, et al.

[204] The following certified law students participated in the preparation of this brief: Kristie Kang, Bianca Leichitz, Daniel Obatake, Sarah Shahatto, Alexandra Subaitis, Hedyeh Tirgardoon,

CERTIFICATE OF SERVICE

This is to certify that the foregoing instrument has been served via the Court's ECF filing system in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure, on November 10, 2020, on all registered counsel of record, and has been transmitted to the Clerk of the Court.

/s Paul Hoffman

Paul Hoffman

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 32(A)(7)(B) because it contains 11,310 words, excluding those items listed in 32(f).

This brief also complies with the typeface requirements of FED. R. APP. P. 32(A)(5) and the type requirements of FED. R. APP. P. 32(A)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with a 14-point font named Times New Roman.

/s Paul Hoffman

Paul Hoffman
Attorney for Plaintiffs-Appellants
Chiquita Spears, et al.