No. _____

In the Supreme Court of the United States

RICARDO SALAZAR-LIMON,
Petitioner,

v.

CITY OF HOUSTON, *et al*.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

David E. Mills
Counsel of Record
THE MILLS LAW OFFICE LLC
1300 West Ninth St., Ste. 636
Cleveland, OH 44113
(216) 929-4747
dm@MillsFederalAppeals.com

Sean M. Palavan
TALABI & ASSOC., P.C.
2909 Hillcroft Ave., Ste. 200
Houston, TX 77057
(713) 266-0529

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

When a police officer shoots an unarmed person in the back and the person testifies that he was merely walking away when shot, may a court grant summary judgment to the officer in a suit for excessive force by concluding that it is an "undisputed fact" that the person reached for his waistband just because the officer said he did?

PARTIES TO THE PROCEEDING

Petitioner Ricardo Salazar-Limon ("Salazar"), along with his wife and their minor children, brought suit in Texas state court against the City of Houston, Officer Chris Thompson, and various Houston Police officials.

The Defendants removed the case to federal court. Salazar dismissed his claims against the police officials other than Officer Thompson. The district court granted summary judgment to Thompson and the City.

Salazar was the appellant in the Fifth Circuit below, and the City and Thompson were the appellees. The Fifth Circuit affirmed the district court's judgment.

Salazar is the Petitioner here, and the City and Thompson are the Respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

PETITION FOR A WRIT OF CERTIORARI

Ricardo Salazar-Limon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 826 F.3d 272 and reproduced at Appendix A. (Pet. App. 1–13.) The opinion of the district court is reported at 97 F. Supp. 3d 898 and reproduced with the final judgment at Appendix B. (*Id.* 14–39.)

JURISDICTION

The court of appeals issued its judgment on June 15, 2016. (Pet. App. 1.) The court denied Petitioner's timely petition for rehearing on July 20, 2016. (*Id.* 40–41.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides that the "right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated . . . ."

The Seventh Amendment to the U.S. Constitution provides that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Section 1983 of Title 42 of the U.S. Code provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

STATEMENT OF THE CASE

Underlying Facts

1. Salazar is unarmed and shot in the back.

The following facts are viewed in the light most favorable to Petitioner Ricardo Salazar-Limon ("Salazar").

In October 2010, Salazar was 25 years old and working in Houston, Texas, supporting his wife and children. He had come to the United States from Mexico in 2001 when he was 16 years old. He had no criminal history—his lone interaction with the police over the years was when he received a traffic ticket.

On October 30, 2010, he had another encounter with police—one that effectively destroyed his life, leaving him paralyzed from the waist down.

It was Friday evening, and Salazar came home from work around 8:00 p.m. after a long day of installing sheetrock and painting at some apartments. His wife and son were home, along with his friend. Salazar and his friend had two or three beers and ate dinner. They then left to hang out with two other friends, and stopped to pick up a 12-pack of Bud Light. They arrived at their friends' house around 10:00 p.m., and

Salazar had one of the beers while they were all talking. Around 11 p.m., they decided to go to another friend's house. They got into Salazar's truck (one friend in the passenger seat and the other two in the back cab seats), brought the beers that remained in the 12-pack, and headed down the interstate.

There wasn't too much traffic on the freeway, and Salazar was driving around 75 miles per hour in the left lane, though the posted speed limit was 65. Salazar was not drinking while driving. He drove past a police car that was sitting off to the right, and the police car immediately pulled out and turned on its lights and sirens as Salazar drove by. As soon as Salazar saw the police car coming up behind him, he pulled off on the right side of the freeway into the emergency lane as far as he could, and stopped the truck.

The officer ran the truck's license-plate number and it came up clean—no indication of anything suspicious. The officer walked to the truck and asked Salazar if the officer could see his license and insurance. Salazar said, "of course." Salazar explained that his insurance information was in the glove compartment, and he asked the officer if he could get it out. The officer said, "of course." During the conversation, the other three men in the truck just sat quietly, waiting for the stop to be completed.

Salazar handed the officer his driver's license, which is from Mexico, and the officer asked "what's this?" Salazar explained that it was his license. Salazar then said, "Excuse me, sir. Can I ask you something?" The officer responded, "No. Quiet. Calm

down." Salazar said, "okay." The officer then walked back to his car.

In the police car, the officer ran Salazar's license through his computer system. The license came up totally clear—no indication of any crimes or problems.

The officer then exited his car, walked toward the front of his car and the back of the truck, and said to Salazar, "Hey, come here," indicating that he should walk over. So Salazar opened his door and walked over to the officer, and they stood between the truck and the police car.

With no explanation, the officer told Salazar he was going to jail and started trying to handcuff him. Salazar pulled his hand back and started walking away. Salazar testified to this at his deposition, in response to questions by the officer's attorney:

> Q. Okay. And what happens?
>
> A. So then I just recall that he says to me, he says that he's going to take me to jail.
>
> Q. Okay.
>
> A. And I — I ask, I say, "Well, why?" And then he just tells me, "Don't ask." He didn't say, like — He didn't say, like, "Calm down" or Quiet."
>
> And then he takes his hand, and he's going to get his handcuffs; and he grabs my hand, and he wanted to do like this (indicating) to me. So then when he was going to lock the handcuffs on me, I pulled my hand.

* * *

Q. Okay. And you pulled back. What happened next?

A. I pulled back my hand, and I give him my back.

Q. Okay. And what happens next?

A. I became frightened when he said that. I turned around, and I began to walk.

Q. Okay. Showing with lines, indicate where you were walking.

A. (Complying.)

Q. At any point before you started work—walking, did you and Officer Thompson get involved in a struggle?

A. No.

Q. So the only movement between the two of you is you pulling away from him, turning around.

A. Corre— Correct.

Q. And walking away.

A. Correct.

Q. And on your — your map here, it appears that you began walking along the passenger side of your truck.

A. Correct. Because on this side, there were cars coming.

(Pet. App. 43–47.)

Salazar then described how he continued merely walking along the side of the truck when Officer Thompson suddenly shot him in the back:

Q. Okay. All right. What happens when you start walking by the side of your truck?

A. Okay. I start walking. I start — I start, and I'm — when I'm passing the passenger-side window —

Q. Would that be where [your friend] is sitting?

A. That's correct.

Q. Okay.

A. I just hear the policeman says — he says — in English, he says, "Stop" — He said, "Stop right there." And when he says that, so I just hear boom.

Q. Did you turn around?

A. When I hear — When I hear, boom, I began to feel hot in my back, wet. And so I turn around, and I see him; and then I fall.

* * *

Q. When he told you to stop, did you stop?

A. No. Because immediately, he says, "Stop," and then he fires.

(*Id.* 48–50.)

Salazar couldn't move: "I feel that I'm not able to move my legs." (*Id.* 50.) "I was trying to get up, but I wasn't able to move at all." (*Id.* 51.) He also stated: "I just recall that I wanted to try to stand up, and I was kind of like suffocating." (*Id.*) Salazar could hear the officer talking, but doesn't know what he was saying because, Salazar said, "I was dying." (*Id.* 52.)

Salazar survived, but the bullet entered his back and severed his spine, leaving him paralyzed from the waist down. He is a wheelchair-bound paraplegic.

In sum, Salazar was unarmed, had no criminal history, was pulled over for speeding, told without any explanation that he was going to jail, threatened with handcuffs, and then shot in the back by a police officer while merely walking away.

2. Thompson tells a different story and claims Salazar reached for his waistband.

The officer who shot Salazar is Respondent Christopher Thompson of the Houston Police Department. He has a different story about what occurred. Crucially, unlike Salazar's description of being shot while merely walking, Thompson claims that Salazar reached for his waistband—even though Salazar had nothing in his waistband.

At 5:28 a.m. that morning, a few hours after shooting Salazar in the back, Thompson completed a typed statement describing his version of the encounter

as follows. He pulled Salazar's truck over for speeding, clocking it at 83 miles per hour. He spoke to the driver and noticed a strong odor of alcoholic beverages. He saw that there were three other male passengers. He asked Salazar to come out between the police car and the truck. When he was talking with Salazar and tried to put handcuffs on him, he said Salazar "turned around and pushed me as if trying to push me into traffic."[1] He pushed Salazar back and they struggled toward the guard rail that was about 20 feet over the road below. He claimed that he felt as if "Salazar was trying to pull me over the guard rail." Thompson tried to hold Salazar, but he broke away and "began walking" along the passenger side of the truck. Thompson pointed his gun at Salazar and "began yelling at him to show his hands." Salazar kept walking and was yelling something in Spanish.

At this point in Thompson's statement, he claimed that he saw Salazar move "both of his hands" toward his waistband, leading Thompson to shoot: "He then took both of his hands and moved them to the front of his waistband. I fired one shot and continued to yell for him to show his hands. I was in fear for my life at that point because I believed he was reaching for a weapon."

---

[1] Based on Thompson's version of the events, Salazar was later charged with two misdemeanors: driving while intoxicated and resisting arrest. The charging instrument alleged that Salazar had pushed Officer Thompson with his hand. Salazar ultimately pled *nolo contendere* to both charges; his punishment was limited to paying a fine.

But Thompson then stated he "finally" could see Salazar's hands after he shot him in the back: "He then collapsed and finally put his hands where I could see them."

3. Thompson gives a second statement, adding that Salazar turned toward him before he shot.

A few months later, on January 25, 2011, Officer Thompson gave another statement. This statement was similar to his first one, but it added that while Salazar was walking away, "he started to turn his body but still did not show his hands." Further, Officer Thompson stated, "[a]s he was turning and still not exposing his hands, I discharged my duty weapon."

District Court

Salazar then brought this § 1983 suit against Thompson and the City of Houston, alleging violations of the Fourth and Fourteenth Amendments. Salazar contended that (1) Thompson used excessive force in shooting Salazar in the back while he was unarmed, and (2) the City was liable for failing to properly train and supervise Thompson. The district court had jurisdiction under 28 U.S.C. § 1331 (federal question).

Discovery ensued, and Salazar testified at his deposition on August 15, 2013. Salazar provided the facts noted above regarding his full encounter with Thompson, explaining that Thompson shot him in the back as he was simply walking away. There was no shoving, no aggressive action toward Thompson, no reaching for a waistband (and nothing to reach for), and no turning toward Thompson before Thompson shot Salazar.

Thompson then testified at his deposition two weeks later. Thompson testified to a very different set of facts, similar to his post-shooting statements noted above. Again, Thompson stated that while Salazar was walking away, Salazar made a motion toward his "waistband area." Moreover, Thompson claimed, Salazar turned to his left and looked at Thompson. In light of these alleged motions toward the "waistband" and the "turning," Thompson testified that he shot Salazar in the back. Thompson further testified to his view that he believed Salazar was an "imminent threat" when he was walking and remained an imminent threat after he was shot and even after he was put into the ambulance paralyzed. Thompson also admitted that he had no scrapes or bruises after his encounter with Salazar.

The district court granted summary judgment for Thompson and the City. In the first paragraph of the opinion, the district court stated as fact that as Salazar was walking away, he "turned toward the officer, reaching toward his waistband" before he was shot. (Pet. App. 14.) The district court asserted that there was "no summary judgment evidence contradicting Thompson's testimony." (*Id.* 34.) Concluding that there were no disputed material facts, the district court granted summary judgment to Thompson and to the City.

Fifth Circuit

The Fifth Circuit affirmed, having jurisdiction under 28 U.S.C. § 1291 (final decisions of district courts). The court recited the familiar summary-judgment standard, noting that the court is supposed to "view the facts in the light most favorable to the non-

moving party and draw all reasonable inferences in its favor." (*Id.* at 2.) Yet the court stated that the "undisputed facts" included that Salazar was "suddenly *reaching toward his waistband*" as he walked away. (*Id*. at 11 (court's emphasis).) Despite Salazar's testimony describing being shot while merely walking away, the court stated that Salazar "did not deny" reaching for his waistband. The court affirmed, and it later denied Salazar's petition for rehearing. (*Id.* at 40.)

Thus, unless this Court intervenes, no jury will ever decide the truth of what occurred that night. And, under the precedent of the decision below, the same will be true of all forthcoming cases where an unarmed person is shot by an officer and testifies to actions presenting no threat whatsoever, so long as the officer claims the person "reached for a waistband."

Salazar now petitions for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The decision below violates the summary-judgment standard, is an outlier among all circuits in the Nation, and sets a dangerous precedent that will undermine the public's perception of the right to have facts decided by a jury, especially when police shoot an unarmed person. Certiorari should be granted.

I. The decision below is contrary to precedent of this Court and every other court of appeals.

A. The legal framework.

Section 1983 enables a person to bring a suit for violation of clearly established constitutional rights, including excessive force in violation of the Fourth Amendment. Whether police use of force is reasonable turns on the circumstances of the 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 v. Connor*, 490 U.S. 386, 396 (1989). Police may not use deadly force on a person who poses no immediate threat to the officer and no threat to others. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

Individual defendants in § 1983 suits are entitled to raise the defense of qualified immunity. To overcome the defense, the plaintiff must establish that (1) the defendant violated a constitutional right, and (2) the right was clearly established. *Tolan v. Cotton*, 134 S. Ct. 1861, 1865–66 (2014); *Ortiz v. Jordan*, 562 U.S. 180, 183 (2011).

When, as here, qualified immunity is raised at the summary-judgment stage, the familiar summary-judgment standard applies: "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [the nonmovant's] favor." *Tolan*, 134 S. Ct. at 1863 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

B. As Judge Kozinski has stated, it is not a justifiable inference that a person reached for a waistband with nothing in it.

Judge Kozinski of the Ninth Circuit recently explained the proper analysis in this situation, i.e., where a person is shot by police, the police claim "waistband," there was nothing in the waistband, and the record is otherwise silent on the alleged movement toward the waistband. *Cruz v. City of Anaheim*, 765 F.3d 1076 (9th Cir. 2014).

In *Cruz*, a confidential informant told police that Cruz was a gang member, sold drugs, was carrying a gun in his waistband, and made clear that he was not going back to prison. *Id.* at 1077–78. Officers pulled over Cruz's car, he tried to drive away, and officers surrounded him with weapons drawn. *Id.* at 1078. Cruz opened his door and police shouted at him to get on the ground. Four officers stated that he ignored them and reached for his waistband. The officers opened fire and killed him. He had no weapon on him, but a loaded gun was found on the passenger seat. Cruz's family brought suit, and the district court granted summary judgment to the officers, concluding that the plaintiffs "hadn't presented anything to contest the officers' version of events." *Id*.

In a unanimous opinion, the Ninth Circuit reversed. Writing for the court, Judge Kozinski explained that everything turned on the waistband: "Given Cruz's dangerous and erratic behavior up to that point, the police would doubtless be justified in responding to such a threatening gesture by opening fire." "Conversely," Judge Kozinski continued, "if the suspect *doesn't* reach for his waistband or make some similar threatening gesture, it would be clearly unreasonable for the officers to shoot him after he stopped his vehicle and opened the door." *Id.* at 1078–79. At that point, the suspect no longer poses an immediate threat to the police or the public. *Id.* at 1079 (citing *Garner*, 471 U.S. at 9).

Judge Kozinski explained that the district judge relied entirely on the testimony of the four officers who said Cruz indeed reached for his waistband. *Id*. But courts cannot rely solely on "what may be a self-serving account by the police officer." *Id.* (citation omitted). This remains true where the shooting victim was killed and is unable to testify to his or her version of the events. *Id.* The courts must also consider "circumstantial evidence that, if believed, would tend to discredit the police officer's story." *Id.* (citation omitted).

Judge Kozinski then noted that one particular piece of evidence could give a reasonable jury pause regarding the officers' claims of reaching for the waistband: "Most obvious is the fact that Cruz didn't have a gun on him, so why would he have reached for his waistband?" *Id.* Judge Kozinski further stated that it would have been foolish, but not implausible, for Cruz to try to quickly reach for a gun in his waistband

when surrounded by officers if he actually had a gun on him. "**But for him to make such a gesture when *no* gun is there makes no sense whatsoever**." *Id.* (italics in original). "A jury may doubt Cruz did this," he continued. *Id.* Of course a jury could reach the opposite conclusion, he explained, but a jury "could also reasonably conclude that the officers lied." *Id.* at 1079–80.

Further emphasizing that it would make no sense to reach for a waistband that had nothing in it, Judge Kozinski remarked that saying shooting victims "reached for a gun" might be a plausible defense, but saying that such victims "'reached for no gun' sounds more like song-and-dance." *Id.* at 1080.

Judge Kozinski was also careful to emphasize that the court took no position about whether the officers ultimately were telling the truth: "We make no determination about the officers' credibility, because that's not our decision to make. We leave it to the jury." *Id.* The case was therefore remanded to trial.[2]

---

[2] The other circuits recognize that similar factual disputes regarding officers' claimed perception of imminent harm must be resolved by a jury. *See, e.g.*, *Whitfield v. Melendez-Rivera*, 431 F.3d 1, 7–8 (1st Cir. 2005) ("Specifically disputed was whether [the plaintiff] was running away, or whether he had stopped running and had turned toward the officers with a metal object in his hand."); *Aczel v. Labonia*, 92 F. App'x 17, 19 (2d Cir. 2004) (denial of summary judgment proper where officers claimed plaintiff was resisting arrest and possibly grabbing for weapons but plaintiff testified that he offered no resistance); *Lamont v. New Jersey*, 637 F.3d 177, 184 (3d Cir. 2011) (reversing summary judgment for officers who used deadly force on unarmed person who reached for waistband and many bullets struck person in the back); *Cooper v. Sheehan*, 735 F.3d 153, 159 (4th Cir. 2013) (reversing summary

C. Salazar is entitled to have a jury decide whether Thompson's version of the facts is the truth.

Salazar has a right to have a jury decide the facts of his case.

First consider his evidence, and how much more obvious the need for a trial is here than in a case such as *Cruz*. Salazar was pulled over for speeding. He was not aggressive. Thompson ran the truck's plates and Salazar's license, and they both came back clean. Without any explanation, Thompson told Salazar he

---

judgment for officers who shot armed person because there was a dispute whether the person actually threatened them); *Bing v. City of Whitehall*, 456 F.3d 555, 571–72 (6th Cir. 2006) (denying qualified immunity to an officer who shot a person in the back, even though police responded to "shots fired" and knew he had a gun, because he did not pose threat to anyone at that point); *Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir. 1993) (denying qualified immunity where officer shot person in back "without any indication that he had committed a violent felony or was dangerous"); *Capps v. Olson*, 780 F.3d 879, 885 (8th Cir. 2015) ("Whether [plaintiff] was moving towards [the officer when the officer] fired the first shot is a disputed material fact that bears on the reasonableness of the use of force."); *Carr v. Castle*, 337 F.3d 1221, 1227–28 (10th Cir. 2003) (denying qualified immunity to officers who shot an unarmed person who was not advancing on them, even though he previously threw a concrete block at them, noting that "all [11] shots that hit [the person] entered his back side"); *Perez v. Suszczynski*, 809 F.3d 1213, 1216 (11th Cir. 2016) (denial of summary judgment proper where officer shot person in the back and evidence indicated person was not resisting); *Flythe v. Dist. of Columbia*, 791 F.3d 13, 22 (D.C. Cir. 2015) (reversing summary judgment for officer who shot a person whom he claimed attacked him with a knife because a reasonable jury could conclude that person did not actually threaten him).

was going to jail and started handcuffing him. That likely violated Salazar's rights from the start, even under Fifth Circuit law. *See Brown v. Lynch*, 524 F. App'x 69, 75 (5th Cir. 2013) ("[W]e have never allowed the use of handcuffs on reasonable suspicion alone in circumstances like this when a person who is suspected of committing a nonviolent crime on some prior date posed only such a remote threat of either fight or flight."). Realizing he was suddenly being handcuffed and arrested for no apparent reason, Salazar pulled his hand back and simply turned to walk away. While merely walking, Salazar heard the command to stop and then his back almost immediately became hot and wet from the gunshot, and he collapsed.

Then consider how this conflicts with Thompson's version, including the crucial allegation that Salazar was reaching for his waistband. Unlike Cruz (who was killed), Salazar testified about the shooting and specifically explained that he simply walked away from the officer. The fair inference from his description—which must be taken as true—is that he did not reach for his waistband. Any remaining doubt about that is erased by the objective fact that Salazar had nothing in his waistband, as Judge Kozinski emphasized in *Cruz*: "[F]or him to make such a gesture when *no* gun is there makes no sense whatsoever." 765 F.3d at 1079. Contrary to the view of the court below, there is no requirement that Salazar explicitly sound out the words "I did not reach for my waistband" when the evidence viewed in his favor shows that he did not. *See Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29, 35 (1944) ("The very essence of [the jury's] function is to

select from among conflicting inferences and conclusions that which it considers most reasonable.").[3]

And Thompson's claim that Salazar "reached for no gun" (as Judge Kozinski would phrase it) is not the only problem with Thompson's credibility. Thompson's first statement, written hours after the shooting, never mentioned Salazar turning toward him before Thompson fired—Thompson added that in his second statement months later. Thompson also said he could see Salazar's hands before shooting, claiming that Salazar "took both of his hands and moved them to the front of his waistband," but Thompson then stated that after Salazar collapsed he "finally put his hands where I could see them." Thompson further claimed that Salazar struggled with him and literally tried to pull

---

[3] In contrast to cases such as *Cruz*, Salazar's case is particularly egregious because Thompson would have no basis to believe Salazar was armed or dangerous even if Salazar *did* move his hands toward his waistband as Thompson claimed. *See Smith v. Ray*, 781 F.3d 95, 104–05 (4th Cir. 2015) (denying qualified immunity and explaining that "while an officer of course may legitimately be *concerned* that a suspect is holding a weapon any time the officer cannot see the suspect's hands, [the officer] offered no reason for actually *believing* [the suspect] had a weapon other than the fact that [the suspect] refused to submit to him [the suspect's] hands") (court's emphasis); *AKH v. City of Tustin*, No. 14-55184, 2016 U.S. App. LEXIS 16961, at *4 (9th Cir. Sept. 16, 2016) ("The officers had little, if any, reason to believe that [the person] was armed," where person had right hand in his sweater pocket, was mostly facing away from the officer while walking and running, and never displayed a weapon); *Calderin v. Miami-Dade Police Dep't*, 600 F. App'x 691, 695 (11th Cir. 2015) ("[S]peculation about erratic moves [the person] may have made or other weapons he may have had on his person are insufficient to justify the force applied here when [the person] was merely holding the knife.")

Thompson over the guard rail to throw him down to the street 20 feet below—but Thompson later admitted didn't have a single scrape or bruise on him after the encounter. Thompson also claimed that the area was "dimly lit," but photographs and statements of investigators showed the area was illuminated by light poles. Finally, Thompson appears inclined to stretch the definition of "imminent threat," as he testified to his view that Salazar remained an imminent threat even after he was put into the ambulance.

These are the sort of things Thompson would be asked about at trial. A jury would look him and Salazar in the eye as they testify, and decide who is telling the truth. That is all Salazar is asking for—the chance to have a jury decide what really happened that fateful night, and whether he really reached for his waistband. And the law requires a jury, not a court, to do so. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (in deciding a motion for summary judgment, a court "may not make credibility determinations or weigh the evidence").

The court below usurped the jury's role, writing in italics to emphasize that it is an "undisputed fact" that Salazar was "suddenly *reaching toward his waistband*," and relying on that "fact" to grant judgment against Salazar without a trial. (Pet. App. 11 (court's emphasis).) This is a severe misapprehension of the summary-judgment standard and the Seventh Amendment's right to a jury trial. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624–25 (1991) ("In the federal system, the Constitution itself commits the trial of facts in a civil cause to the jury.").

II. This Court will intervene when a lower court applies such a "clear misapprehension of summary judgment standards."

This isn't the first time the Fifth Circuit has veered dangerously far from these basic summary-judgment principles in a case where police shot an unarmed person who police claimed reached for his "waistband." Two years ago, in *Tolan v. Cotton*, this Court summarily reversed the Fifth Circuit in such a case. 134 S. Ct. at 1863.

In *Tolan*, an officer entered the wrong license-plate number for a car, mistakenly believed it was stolen, drew his gun, and ordered the driver (Tolan) to lie down on the front porch of his own house where he lived with his parents. *Id.* at 1863. Tolan's parents came out to explain it was all a mistake, but Tolan stated that the officer slammed his mother against the garage, prompting Tolan to rise to his knees about 20 feet from the officer, telling the officer to take his hands off his mother. *Id.* at 1864. The officer then fired three shots at Tolan, with one bullet entering his chest, causing life-altering injuries. *Id.*

The Fifth Circuit affirmed summary judgment for the officer, relying on the purportedly "undisputed" fact that Tolan was "moving to intervene" and that the officer therefore could reasonably have feared for his life. *Id.* at 1865. The Fifth Circuit also stated that the officer feared that Tolan "was reaching towards his waistband for a weapon." *Tolan v. Cotton*, 713 F.3d 299, 303 (5th Cir. 2013).

This Court unanimously reversed, explaining that the Fifth Circuit "failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case." 134 S. Ct. at 1865. These facts included disputes regarding the officer's claims that the area was "dimly lit," that Tolan's mother was "very agitated," that Tolan was "verbally threatening," and that Tolan was "moving to intervene." *Id.* at 1866–67. This Court explained that it granted review because the "opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents." *Id.* at 1868. As the Court reminded the Fifth Circuit, "genuine disputes are generally resolved by juries in our adversarial system." *Id.*

The Fifth Circuit has again failed to heed this lesson, and another unarmed person has been shot by police without the opportunity for a jury to decide what facts actually occurred. This Court's intervention is again warranted. *Cf. White v. Wheeler*, 136 S. Ct. 456, 462 (2015) (reversing court of appeals on grounds it had been previously reversed on and stating that "this Court again advises the Court of Appeals" of the established legal principles at issue).

III. The precedent set by the lower court is dangerous and raises an important federal question.

The public perception of the right to trial and the judicial system as a whole are at the forefront of national discourse, especially in the context of police shootings. When an unarmed 25 year old with no criminal history ends up paralyzed from a bullet to the spine after being pulled over for speeding, has no

weapon whatsoever (let alone in his waistband), and testifies that he was shot while simply walking away, he is entitled to a trial—even if the officer says he reached for his waistband. The public understands this, and so do the other circuits. Unless this Court grants certiorari, the basic principle that facts are determined by a jury will be undermined, and it will leave the odious perception—accurate or not—that police play by different rules.

This Court is symbolic of our entire judicial system. This case presents the opportunity for the Court to show that in times of visible strain between communities and police, our fundamental principles—including the Seventh Amendment right to have disputed facts decided by a jury—remain unbowed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David E. Mills
Counsel of Record
THE MILLS LAW OFFICE LLC
1300 West Ninth St., Ste. 636
Cleveland, OH 44113
(216) 929-4747
dm@MillsFederalAppeals.com

Sean M. Palavan
TALABI & ASSOC., P.C.
2909 Hillcroft Ave., Ste. 200
Houston, TX 77057
(713) 266-0529

Counsel for Petitioner

October 13, 2016

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-20237

REVISED June 16, 2016
[Filed June 15, 2016]

RICARDO SALAZAR-LIMON, Individually and as Next Friend of EFS,	)
Plaintiff - Appellant	)
v.	)
CITY OF HOUSTON; CHRIS C. THOMPSON,	)
Defendants - Appellees	)

Appeal from the United States District Court
for the Southern District of Texas

Before REAVLEY, JOLLY, and ELROD, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Ricardo Salazar-Limon ("Salazar") appeals the judgment dismissing his 42 U.S.C. § 1983 claims, which alleged that Officer Chris C. Thompson of the

Houston Police Department ("HPD"), in Houston, Texas, applied excessive and unreasonable deadly force during his arrest, causing Salazar to be partially paralyzed. Salazar also asserted a claim, under *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), against the City of Houston based on the same conduct and injuries. The district court granted qualified immunity to Officer Thompson in his individual capacity (finding that Salazar's constitutional rights had not been violated during the arrest) and also denied Salazar's claims under *Monell*. Salazar appealed. We AFFIRM.

I.

In reviewing an appeal from a summary judgment, we "view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." *See Deville v. Marcantel*, 567 F.3d 156, 163–64 (5th Cir. 2009).

On October 29, 2010, around midnight, Salazar was driving on Houston's Southwest Freeway. Three other men were in his truck. Salazar had drunk at least four or five beers in the previous two hours—and had the remainder of the 12–pack with him in the truck.

Officer Thompson observed Salazar's truck weaving between lanes and speeding in excess of the posted limit. In response, Officer Thompson turned on his lights and sirens, and Salazar pulled over on the right shoulder of the elevated overpass, next to a low retaining wall. About two feet separated the freeway wall from the passenger side of Salazar's truck. Officer Thompson parked his patrol car about four feet behind Salazar's truck. Before getting out of the patrol car,

Officer Thompson ran a search on Salazar's license plate to see if the truck was stolen; it was not.

Officer Thompson approached the driver's window of Salazar's truck and asked Salazar for his license and proof of insurance. Lacking a U.S. license, Salazar complied by giving Officer Thompson his Mexican driver's license. Officer Thompson returned to his patrol car and checked the driver's license, which showed Salazar had no open warrants or charges pending against him. Officer Thompson then returned to the driver's window of Salazar's truck, asking Salazar to step out. Salazar complied, walked to the back of his truck, and stood next to Officer Thompson in the space between the back of the truck and the front of the patrol car.

Officer Thompson and Salazar dispute certain details of what happened next, but it is undisputed that: 1) Officer Thompson tried to handcuff Salazar; 2) Salazar resisted; 3) a brief struggle ensued (in which neither party was injured);[1] and 4) after the brief struggle, Salazar pulled away, turned his back to Officer Thompson, and walked away along the retaining wall and the passenger side of his truck.

At this point, Officer Thompson pulled out his handgun and ordered Salazar to stop. Salazar did not

---

[1] Salazar contends in his briefing that he did not "struggle" with Officer Thompson at any point. Salazar alleged in his complaint, however, that he had a "brief struggle" with Officer Thompson after Officer Thompson pulled out his handcuffs. Salazar was convicted on his nolo contendere plea to resisting arrest. The charging instrument alleged that Salazar "push[ed] [Officer Thompson] with his hand."

immediately comply and took "one or two" more steps. Officer Thompson testified he then saw Salazar turn left and reach toward his waistband, which was covered by an untucked shirt that hung below his waist.[2] Further, Officer Thompson testified that he perceived the combination of Salazar's actions to be consistent with a suspect retrieving a weapon from his waistband. Officer Thompson fired a single shot, hitting Salazar in the right lower back.

Upon inspection, Officer Thompson determined that Salazar was not armed. Salazar survived, but the gunshot wound left him partially paralyzed.

Salazar was charged with, and pleaded nolo contendere to, resisting arrest and driving while intoxicated.

In Texas state court, Salazar sued Officer Thompson, the City of Houston, and various HPD officials, alleging constitutional and state-law violations. The defendants timely removed the case. Salazar dismissed his claims against all of the HPD officers, except Officer Thompson. Officer Thompson moved for summary judgment, asserting qualified immunity. The City of Houston moved for summary judgment, asserting Salazar's failure to sufficiently plead *Monell* liability as a matter of law.

Addressing Salazar's Fourth Amendment claims against Officer Thompson, the district court determined that "Salazar [] pointed to no summary

---

[2] Salazar disputes the direction of the turn, or indeed that he was turning at all at the time he was shot. This factual dispute does not preclude summary judgment for the reasons noted infra.

judgment evidence contradicting Thompson's testimony that he shot because, when Salazar reached for his waistband and turned toward him, he believed that Salazar had a gun and would shoot." *Salazar-Limon v. City of Houston*, 97 F. Supp. 3d 898, 909 (S.D. Tex. 2015). The district court thus concluded that Officer Thompson's use of deadly force was not excessive under the circumstances and that Salazar's constitutional rights were not violated, and accordingly granted qualified immunity to Officer Thompson, dismissing the claims against him. *See id*.

Turning to Salazar's *Monell* claims against the City of Houston, the district court granted the City of Houston's summary judgment motion based on the insufficiency of Salazar's claims as a matter of law. Specifically, the district court denied Salazar's *Monell* claims because the "constitutional violation of a municipal official is a prerequisite to municipal liability," and Salazar "ha[d] not raised a factual dispute material to determining whether [his] *constitutional rights* were violated." *Id.* at 910 (emphasis added) (citations omitted). Thus, "[w]ithout an underlying [constitutional] violation," the district court held, "the § 1983 claims against the municipality fail." *Id.*

Salazar appealed to this Court, arguing that the district court erred in granting Officer Thompson and the City of Houston's motions because genuinely disputed material facts precluded summary judgment. Accordingly, Salazar argues that the district court's grant of summary judgment was error and that the

judgment should be reversed and remanded for trial against Officer Thompson and the City of Houston.[3]

II.

We review the district court's grant of summary judgment de novo, also applying the same standards as the district court. *See Newman v. Guedry*, 703 F.3d 757, 761 (5th Cir. 2012). Summary judgment is only appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "On a motion for summary judgment, [we] must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." *Deville v. Marcantel*, 567 F.3d 156, 163–64 (5th Cir. 2009). "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 v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

III.

To establish a claim under § 1983, "a plaintiff must (1) allege a violation of a right secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law."

---

[3] Salazar does not appeal the district court's dismissal of his other federal (conspiracy) and state-law (negligence against Officer Thompson in his official capacity, negligence against the City of Houston, and loss of consortium) claims.

Whitley v. Hanna, 726 F.3d 631, 638 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1935 (2014). Additionally, "[c]laims under § 1983 may be brought against persons in their individual or official capacity, or against a governmental entity." *Goodman v. Harris Cnty.*, 571 F.3d 388, 395 (5th Cir. 2009)).

A municipality and/or its policymakers may be held liable under § 1983 "when execution of a government's policy or custom . . . by those whose edicts or acts may fairly be said to represent official policy, inflicts the [constitutional] injury. . . ." *Monell*, 436 U.S. at 694; *see also Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009) (requiring plaintiffs asserting *Monell*-liability claims to show "(1) an official policy (2) promulgated by the municipal policymaker (3) [that was also] the moving force behind the violation of a constitutional right").

A.

First, we turn to Salazar's claims against Officer Thompson. Salazar contends that the district court erred by resolving disputed issues of material fact, and on that basis, by granting Officer Thompson qualified immunity, holding that Officer Thompson did not use excessive or unreasonable force in Salazar's arrest.

Because Officer Thompson was sued in his individual capacity, he asserted the defense of qualified immunity. *See Goodman*, 571 F.3d at 395; *Salazar-Limon*, 97 F. Supp. 3d at 900. When evaluating a qualified immunity defense, we conduct a "well-known" two-prong inquiry. *Bazan ex rel. Bazan v. Hidalgo Cty.*, 246 F.3d 481, 490 (5th Cir. 2001). "In order to overcome a qualified immunity defense, a plaintiff must allege a

violation of a constitutional right, and then must show that 'the right was clearly established . . . in light of the specific context of the case.'" *Thompson v. Mercer*, 762 F.3d 433, 437 (5th Cir. 2014) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

Thus, "[a]t summary judgment, it is the plaintiff's burden to rebut a claim of qualified immunity once the defendant has properly raised it in good faith." *Cole v. Carson*, 802 F.3d 752, 757 (5th Cir. 2015). And, "[t]his is a *demanding standard*." *Vincent v. City of Sulphur*, 805 F.3d 543, 547 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1517 (2016) (emphasis added). "Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

Moreover, "[t]his burden is not satisfied with 'some metaphysical doubt as to the material facts,' by 'conclusory allegations,' by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (citations omitted). And, although "[w]e resolve factual controversies in favor of the nonmoving party," we do so only "when there is an *actual controversy*, that is, when both parties have submitted evidence of contradictory facts." *Id.* (emphasis added). Accordingly, we do not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts" to survive summary judgment. *Id.* (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990)).

Turning to the constitutional claim here, Salazar contends that Officer Thompson violated his Fourth

Amendment rights by applying excessive force during his arrest.

To establish a claim of excessive force under the Fourth Amendment, Salazar "must demonstrate: '(1) [an] injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Deville*, 567 F.3d at 167 (quoting *Tarver v. City of Edna,* 410 F.3d 745, 751 (5th Cir. 2005)). "Excessive force claims are necessarily fact-intensive." *Id.*

"The '[u]se of deadly force is not unreasonable when an officer would have reason to believe the suspect poses a threat of serious harm to the officer or others.'" *Carnaby v. City of Houston*, 636 F.3d 183, 188 (5th Cir. 2011) (quoting *Mace v. City of Palestine*, 333 F.3d 621, 624 (5th Cir. 2003)). And, this "inquiry is confined to whether the [officer or another person] was in danger *at the moment of the threat* that resulted in the [officer's use of deadly force]." *Rockwell v. Brown*, 664 F.3d 985, 993 (5th Cir. 2011) (citation omitted).

Salazar contends that the district court erred because it resolved disputed issues of material fact in Officer Thompson's favor. Specifically, Salazar asserts that the district court erred by finding that: 1) the highway was dimly lit; 2) Officer Thompson adequately warned Salazar prior to the shooting; 3) Salazar turned sharply towards Thompson; and 4) Salazar reached for his waistband, making threatening movements with his hands.

Of the four issues, only one need be addressed—whether Salazar reached for his waistband

before being shot. Unless Salazar has presented competent summary judgment evidence that he did not reach toward his waistband (for what Officer Thompson perceived to be a weapon), Officer Thompson's decision to shoot was not a use of unreasonable or excessive deadly force.[4]

Here, the record evidence shows that Officer Thompson testified that: 1) he saw Salazar reach for his waistband; 2) his view of Salazar's waistband was obscured (either by Salazar's low-hanging shirt, the angle at which Salazar turned, or some combination of the two); and 3) he perceived Salazar's movements to be consistent with those of an arrestee reaching for a concealed weapon. In the proceedings before the district court, however, Salazar did not deny reaching

---

[4] *See Deville*, 567 F.3d at 167 (we must "consider . . . '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.'") (emphasis added) (citing *Graham*, 490 U.S. at 396); *Carnaby*, 636 F.3d at 188 ("The '[u]se of deadly force is not unreasonable when an officer would have reason to believe the suspect poses a threat of serious harm to the officer or others.'") (citation omitted); *Rockwell*, 664 F.3d at 993 ("The excessive force inquiry is confined to whether the [officer or another person] was in danger *at the moment of the threat* that resulted in the [officer's use of deadly force].") (citation omitted); *Manis v. Lawson*, 585 F.3d 839, 844 (5th Cir. 2009) ("This court has found an officer's use of deadly force to be reasonable when a suspect moves out of the officer's line of sight such that the officer could reasonably believe the suspect was reaching for a weapon.") (citations omitted); *see also Ontiveros v. City of Rosenberg, Tex.*, 564 F.3d 379, 385 (5th Cir. 2009); *Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991); *Young v. City of Killeen, TX*, 775 F.2d 1349, 1352–53 (5th Cir. 1985).

for his waistband;[5] nor has he submitted any other controverting evidence in this regard. To the point, Salazar has not presented *any* competent summary judgment evidence to controvert or challenge Officer Thompson's testimony noted above. And, in the absence of such controverting evidence, we cannot assume that Salazar "could or would prove the necessary facts" to survive summary judgment. *Little*, 37 F.3d at 1075 (citing *Lujan*, 497 U.S. at 888).

Thus, based on our precedent and the undisputed facts, considering the totality of the circumstances—which include Salazar's resistance, intoxication, his disregard for Officer Thompson's orders, the threat he and the other three men in his truck posed while unrestrained, and Salazar's actions leading up to the shooting (including suddenly *reaching towards his waistband*)—it seems clear that it was not unreasonable for an officer in Officer Thompson's position to perceive Salazar's actions to be an *immediate* threat to his safety.[6] And, it follows that it

---

[5] *See Salazar-Limon*, 97 F. Supp. 3d at 906 ("uncontroverted record evidence shows that Salazar . . . reached for his waistband before Thompson fired"); *id.* at 906–07 ("undisputed summary judgment evidence shows that: . . . as [Salazar] walked away from Officer Thompson toward his own truck, he reached toward his waistband").

[6] Furthermore, we note that, in the context of the facts of this case, it is immaterial whether Salazar turned left, right, or at all before being shot. Specifically, we have never required officers to wait until a defendant turns towards them, with weapon in hand, before applying deadly force to ensure their safety. *See, e.g.*, *Manis*, 585 F.3d at 844 ("This court has found an officer's use of deadly force to be reasonable when a suspect moves out of the officer's line of

was not "clearly excessive" or "unreasonable" for Officer Thompson to use deadly force in the manner he did to protect himself in such circumstances.[7]

Accordingly, we agree with the district court that Salazar's constitutional rights were not violated; and, we hold that the district court did not err in granting Officer Thompson qualified immunity.

B.

We next turn to Salazar's claims against the City of Houston. Salazar asserts three theories of municipal liability under *Monell*: 1) unofficial policy, custom or practice for failure to discipline; 2) unofficial policy, custom or practice for failure to train and/or supervise; and 3) ratification.[8]

---

sight such that the officer could reasonably believe the suspect was reaching for a weapon." (collecting cases)); *Mendez v. Poitevent*, No. 15-50790, ___ F.3d ___, 2016 WL 2957851 at * (May 19, 2016) (qualified immunity applies to shooting of fleeing suspect who had physically clashed with officer leaving officer disoriented and with impaired vision); *Colston v. Barnhart*, 130 F.3d 96, 99 (5th Cir. 1997) (qualified immunity applies to shooting without warning after suspect struggled with two officers knocking them to the ground while resisting arrest).

[7] *See* cases cited *supra* note 4.

[8] Salazar also argues that the HPD use of force policy is "facially deficient" because it uses the term "imminent threat," as opposed to "immediate threat." *See Deville*, 567 F.3d at 167 ("whether the suspect poses an immediate threat to the safety of the officers or others") (citing *Graham*, 490 U.S. at 396). In short, this argument is meritless as municipalities are not required to incorporate specific language from our case law, or that of the Supreme Court, in order to satisfy *Monell*.

Because Salazar has not shown a violation of his constitutional rights, however, all of his *Monell* claims against the City of Houston fail as a matter of law. *See Peterson*, 588 F.3d at 847 (requiring plaintiffs asserting *Monell*-liability claims to show "(1) an official policy (2) promulgated by the municipal policymaker (3) [that was also] the moving force behind the *violation of a constitutional right*") (emphasis added).

IV.

In sum, the record evidence, read in the light most favorable to Salazar, does not show that his Fourth Amendment rights were violated. Thus, the district court's judgment is, in all respects

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 12-3392

[Filed March 31, 2015]

RICARDO SALAZAR-LIMON, *et al*.)
)
Plaintiffs,)
)
VS.)
)
CITY OF HOUSTON *et al.*,)
)
Defendants.)

MEMORANDUM AND OPINION

A Houston Police Department officer shot a man after he was pulled over late at night on a busy freeway for suspected drunk driving. When the officer tried to handcuff the man, the man resisted. After a brief struggle — the details of which are disputed — the man walked away from the officer and headed back to his truck. The officer pulled out his weapon and twice ordered the man to stop and raise his hands, but the man did not obey. Instead, the man turned toward the officer, reaching toward his waistband. The officer fired once, hitting the man in the lower right back. The man

is partially paralyzed as a result. This civil-rights action against the officer and the City of Houston, alleging constitutional violations and state-law tort claims, followed.[1]

The officer and the City of Houston have moved for summary judgment. (Docket Entry No. 31). They argue that qualified immunity precludes finding the officer liable and that limits on municipal liability preclude finding the City liable. The defendants also argue that they cannot be held liable on the state-law causes of action. The plaintiffs responded, the defendants replied, and counsel presented argument. (Docket Entry Nos. 38, 44). Based on the record; the motion, response, and reply; counsels' arguments; and the applicable law, the court grants the motion for summary judgment and enters final judgment by separate order.

The reasons for this ruling are explained below.

I. Background

Around midnight on October 29, 2010, Ricardo Salazar-Limon was driving his truck on Houston's Southwest Freeway. Three other men were in the truck. (Docket Entry No. 38, Ex. B, Salazar Depo. at pp. 13–15). Salazar had consumed four or five beers in the previous two hours and had the rest of the 12-pack with him in the truck.

HPD Officer Chris Thompson was operating a LIDAR speed gun on the Southwest Freeway that

---

[1] The plaintiffs initially sued supervisory officers as well, but they have been dismissed.

night. Thompson recorded Salazar's speed as over the limit and saw that he was weaving between lanes. (Docket Entry No. 31, Ex. A, Thompson Depo. at pp. 89–90). Thompson turned on his lights and sirens and followed Salazar's truck. A minute later, Salazar pulled over and stopped on the right shoulder of an elevated overpass, next to a low retaining wall. (*Id.* at p. 96; Salazar Depo. at p. 19). About two feet separated the freeway wall from the passenger side of Salazar's truck. (Salazar Depo. at p. 27). Thompson parked his patrol car about four feet behind the truck. (*Id.* at p. 25; Thompson Depo. at p. 97). Before getting out of the patrol car, Thompson ran a search on Salazar's license plates to see if the truck was stolen; it was not. (Thompson Depo. at pp. 97–98).

Thompson walked over to the driver's window of the truck and asked Salazar for his license and proof of insurance. (*Id.* at p. 98; Salazar Depo. at pp. 19–20). Salazar gave Thompson his Mexican driver's license. (Thompson Depo at p. 99; Salazar Depo. at p. 20). When Salazar tried to ask a question, Thompson told him to be quiet and "calm down." (Salazar Depo. at p. 21). Thompson returned to his patrol car and checked the driver's license. (*Id.* at p. 22; Thompson Depo. at p. 99). The check showed that there were no open warrants or charges pending against Salazar.

Thompson returned to the driver's window and asked Salazar to get out of his truck. (*Id.* at p. 23, Thompson Depo. at p. 101). Salazar stepped out of the truck and stood next to Thompson, between the truck and the patrol car. (Salazar Depo. at p. 23; Thompson Depo. at p. 101). Thompson pulled out handcuffs and told Salazar that he was detained on suspicion of drunk

driving. (Thompson Depo. at pp. 104, 106–07). Salazar asserts that Thompson pulled out handcuffs and said that he was arresting Salazar and would take him to jail. (Docket Entry No. 38 at pp. 4, 6; Salazar Depo. at p. 25) Thompson tried to handcuff Salazar's right hand, but Salazar pulled away. (Salazar Depo. at p. 24). A brief struggle followed. (Docket Entry No. 13 at ¶ 23). The parties dispute the extent of that struggle. Thompson testified that Salazar pushed him toward the lanes of oncoming traffic, then, continuing to resist, pushed him against the low retaining wall at the edge of the elevated overpass. (Thompson Depo. at pp. 177–78). Thompson was afraid that Salazar would push him over the freeway wall onto the road below. (*Id.* at p. 178).

Salazar testified that he did not struggle with Thompson at any point. (Salazar Depo. at pp. 26–27). But Salazar alleged in his complaint that he did have a "brief struggle" with Thompson after the handcuffs came out. (Docket Entry No. 13 at ¶ 23). Salazar also later pleaded *nolo contendere* to a charge of resisting arrest. The charging instrument alleged that Salazar resisted arrest by pushing Thompson. (Docket Entry No. 44, Ex. I, Charging Instrument, Cause No. 1716652; Ex. J, *Nolo Contendere* Plea to Cause No. 1716652).

Although the parties dispute the details of the struggle, they do not dispute that Thompson attempted to detain and handcuff Salazar and that Salazar resisted. Neither party was injured during that struggle. (Docket Entry No. 38, Ex. 17). The parties also agree that after the brief struggle, Salazar pulled away, turned his back to Thompson, and walked along

the freeway retaining wall back toward the passenger door of his truck. (Salazar Depo. at pp. 26, 40; Thompson Depo. at p. 113). Thompson pulled out his weapon when Salazar walked away and ordered him to stop. (Thompson Depo. at pp. 113–115). When Salazar kept walking, Thompson repeated the order to stop and added an order for Salazar to raise his hands. (*Id.*). Salazar did not comply. Instead, he walked forward another few steps. (Salazar Depo. at pp. 28–29).

Salazar was wearing an untucked shirt that hung below his waist. (*Id.* at p. 36–37). Thompson testified that he saw Salazar turn to his left and reach toward his waist. (Thompson Depo. at pp. 115–18). Thompson testified that Salazar's motion was consistent with a suspect retrieving a weapon from his waistband. (*Id.*). Less than a minute after the first order to stop, Thompson fired a single shot, hitting Salazar in the right lower back. (Salazar Depo. at pp. 29, 31). Salazar testified that he turned and saw Thompson after the shooting. (*Id.* at pp. 27–29). Salazar was not armed.

The medical evidence showed that the bullet entered Salazar's right side and lodged in his spine, suggesting that Salazar was turning to the right when he was shot. (Docket Entry No. 38, Ex. 8, Allen Depo. at pp. 72–74; Ex. 13, Salazar Ben Taub Records at 33). The gunshot wound left Salazar partially paralyzed.

Salazar was charged with, and pleaded *nolo contendere* to, resisting arresting and driving while intoxicated. (Docket Entry No. 44, Exs. I, J, K, L). In October 2012, Salazar and his wife filed this suit in state court individually and on behalf of their children. They sued Thompson, the City of Houston, and various Houston Police Department officials, alleging

constitutional and state-law violations. (Docket Entry Nos. 1, 13). The defendants timely removed. (Docket Entry No. 1). The plaintiffs have dismissed their claims against the Houston Police Department officials. The claims against Thompson and the City of Houston remain. (*See* Docket Entry No. 46).

The defendants' grounds for seeking summary judgment, and the plaintiffs' responses, are analyzed below.

II. The Legal Standard for Summary Judgment

Summary judgment is appropriate if no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). "The movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine [dispute] of material fact." *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–25 (1986)).

If the burden of proof at trial lies with the nonmoving party, the movant may satisfy its initial burden "by 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. Although the party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, it does not need to negate the elements of the nonmovant's case. *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Texas*, 560 F.3d 316,

326 (5th Cir. 2009) (internal quotation marks omitted). "'If the moving party fails to meet [its] initial burden, the motion [for summary judgment] must be denied, regardless of the nonmovant's response.'" *United States v. $92,203.00 in U.S. Currency*, 537 F.3d 504, 507 (5th Cir. 2008) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (per curiam)).

When the moving party has met its Rule 56(a) burden, the nonmoving party cannot survive a summary judgment motion by resting on the mere allegations of its pleadings. The nonmovant must identify specific evidence in the record and explain how that evidence supports that party's claim. *Baranowski v. Hart*, 486 F.3d 112, 119 (5th Cir. 2007). "This burden will not be satisfied by 'some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence.'" *Boudreaux*, 402 F.3d at 540 (quoting *Little*, 37 F.3d at 1075). In deciding a summary judgment motion, the court draws all reasonable inferences in the light most favorable to the nonmoving party. *Connors v. Graves*, 538 F.3d 373, 376 (5th Cir. 2008).

III. The Claims Against Thompson in his Individual Capacity

A. The Legal Standard for Qualified Immunity

Section 1983 provides a cause of action against an individual who, acting under color of state law, has deprived a person of a federally protected statutory or constitutional right. Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which

a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "In reviewing a motion for summary judgment based on qualified immunity, [courts] undertake a two-step analysis." *Luna v. Mullenix*, 773 F.3d 712, 718 (5th Cir. 2014). "First, [courts] ask whether the facts, taken in the light most favorable to the plaintiffs, show the officer's conduct violated a federal constitutional or statutory right." *Id.* (citing *Tolan v. Cotton*, 134 S. Ct. 1861, 1865 (2014)). "Second, [courts] ask 'whether the defendant's actions violated clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* (quoting *Flores v. City of Palacios*, 381 F.3d 391, 395 (5th Cir. 2004)). "A court has discretion to decide which prong to consider first." *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013) (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)). "Claims of qualified immunity must be evaluated in the light of what the officer knew at the time he acted, not on facts discovered subsequently." *Luna*, 773 F.3d at 718. But "[a]s the Supreme Court has recently reaffirmed, 'in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Id.* (quoting *Tolan*, 134 S. Ct. at 1863).

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Lytle v. Bexar County*, 560 F.3d 404, 410 (5th Cir. 2009) (quotations omitted).

As the en banc Fifth Circuit recently held:

> When considering a defendant's entitlement to qualified immunity, we must ask whether the law so clearly and unambiguously prohibited his conduct that "every 'reasonable official would understand that what he is doing violates [the law].'" To answer that question in the affirmative, we must be able to point to controlling authority — or a "robust 'consensus of persuasive authority'" — that defines the contours of the right in question with a high degree of particularity.

Morgan v. Swanson, 659 F.3d 359, 371–72 (5th Cir. 2011) (en banc) (quoting *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2083, 2084 (2011) (alteration in original, internal footnotes omitted)).

"Qualified immunity balances two important interests — the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). The doctrine of qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244 (2012) (internal quotation marks omitted). "[W]hile the Supreme Court has stated that 'courts should define the 'clearly established' right at issue on the basis of the 'specific context of the case,' it has also recently reminded [courts] that [they] 'must take care not to

define a case's 'context' in a manner that imports genuinely disputed factual propositions.'" *Luna*, 773 F.3d at 724–25 (quoting *Tolan*, 134 S. Ct. at 1866). A plaintiff has the burden of overcoming the qualified immunity defense. *Bennett v. City of Grand Prairie*, 883 F.2d 400, 408 (5th Cir. 1989).

B. The Fourth Amendment Claims

Salazar admits that Thompson had probable cause to stop him and to handcuff and arrest him for driving while intoxicated. (Docket Entry No. 38 at p. 6; Salazar Depo. at pp. 35, 40; Howse Depo. at pp. 74–76). The issue is whether Thompson used excessive force when he shot Salazar, that is, whether, considering all the circumstances, it was objectively reasonable for Thompson to shoot.

To establish a claim of excessive force under the Fourth Amendment, a plaintiff demonstrate: "(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Poole v. City of Shreveport*, 691 F.3d 624, 628 (5th Cir. 2012) (citing *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382 (5th Cir. 2009)) The reasonableness inquiry "requires analyzing the totality of the circumstances." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014).

"[W]hether the force used is 'excessive' or 'unreasonable' depends on 'the facts and circumstances of each particular case.'" *See Tolan*, 134 S. Ct. at 1863 ((quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). "Factors to consider include 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is

actively resisting arrest or attempting to evade arrest by flight.'" *Id.* (quoting *Graham*, 490 U.S. at 396). As the Supreme Court stated in *Graham*, "all claims that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham*, 490 U.S. at 395. The determination of "reasonableness" under the Fourth Amendment is "not capable of precise definition or mechanical application . . . [but] requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396 (internal quotation omitted). The Court explained that "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." *Id.* at 397.

Excessive-force determinations do not involve "easy-to-apply legal test[s]." *Scott v. Harris*, 550 U.S. 372, 383–84 (2007). It is clear that a court may not apply hindsight to second-guess an officer's conduct. *Hill v. Carroll Cnty., Miss.*, 587 F.3d 230, 234 (5th Cir. 2009) (citing *Graham*, 490 U.S. at 396–97). A court must consider only the information available to the officer at the time. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Connor*, 490 U.S. at 396. A court must also recognize that officers often must make split-second decisions in stressful situations. *Id.*

An officer's use of force is presumed to be reasonable when the officer "has reason to believe that the suspect poses a threat of serious harm to the officer or to others." *Ontiveros*, 564 F.3d at 382 (citing *Mace v. City of Palestine*, 33 F.3d 621, 623 (5th Cir. 2003)); *accord Davis v. Romer*, No. 13-11242, 2015 WL 409862 (5th Cir. Feb. 2, 2015). "The excessive force inquiry is confined to whether the [officer or another person] was in danger *at the moment of the threat* that resulted in the [officer's use of deadly force]." *Rockwell v. Brown*, 664 F.3d 985, 993 (5th Cir. 2011) (quoting *Bazan v. Hidalgo County*, 246 F.3d 481, 493 (5th Cir. 2001) (emphasis in original)). The Fifth Circuit's opinion in *Lytle*, 560 F.3d at 413, provides some clarity. The suspect there had led the officer on a car chase that threatened innocent bystanders. The officer reasonably believed that the suspect was armed, was driving a stolen vehicle, and had committed the felony offense of fleeing from a police officer. When the shooting occurred, the chase had ended and the suspect was driving away from the officer and was "three or four houses down the block." *Id.* at 409. There were no bystanders in the vehicle's path, and neither the vehicle nor its occupants posed a threat to the officer or others. *Id.* at 413. Because there were disputed facts material to determining whether the officer had "sufficient time to perceive that any threat to him had passed by the time he fired" while the suspect was driving away, the Fifth Circuit held that it did not have jurisdiction to consider the district court's denial of summary judgment to the officer on the basis of qualified immunity.

The summary judgment evidence here shows that Salazar had been drinking when Thompson pulled him

over for speeding and weaving across traffic lanes. Salazar later pleaded guilty to a charge of driving while intoxicated that night. (Docket Entry No. 44, Exs. K, L). Thompson had checked Salazar's driver's license and license plates and knew that there were no open warrants or charges against him. (Thompson Depo. at pp. 97–98). But Thompson had not checked Salazar or his truck for weapons. Nor had Thompson checked the other three men in Salazar's truck for outstanding warrants, charges, or weapons. (*Id.* at p. 114; Salazar Depo. at p. 32).

When Thompson detained Salazar for drunk driving and tried to handcuff him, Salazar pulled his arm away. (Thompson Depo. at pp. 97, 113; Salazar Depo. at p. 26). Some form of struggle ensued, although the details are disputed. Based on the allegations in Salazar's amended complaint and his plea of *nolo contendere* to the State charge of resisting arrest, it is undisputed that there was a brief struggle, during which Salazar pushed Thompson. (Docket Entry No. 38, Exs. I, J; Docket Entry No. 13 at ¶ 23; Thompson Depo. at pp. 177–78).

After that brief struggle, it is undisputed that Salazar broke away from Thompson and walked toward his truck. (Thompson Depo. at p. 113). Thompson pulled out his weapon and ordered Salazar to stop. Thompson repeated that order, adding a command for Salazar to raise his hands. (*Id.* at pp. 113–15). Salazar, who was still only feet away from Thompson, did not stop or raise his hands. (Salazar Depo. at pp. 27–29). Instead, he continued walking another few steps away from Thompson. (*Id.*).

It was dark, other than the usual freeway overpass lights. (Docket Entry No. 38, Ex. 14). Salazar was wearing a long shirt that covered his waistband. (Salazar Depo. at pp. 36–37). Thompson testified that Salazar stopped walking and starting turning back toward Thompson, reaching toward his waistband. (Thompson Depo. at pp. 115–16). Salazar offered no controverting evidence. Thompson, as well as Salazar's expert witness, testified that police officers know that the waistband is a common place to hide a weapon. (*Id.*; Howse Depo. at p. 115). Thompson testified that the motion Salazar made was consistent with drawing a weapon. (Thompson Depo. at pp. 117–18). Thompson did not see any weapon.

Thompson fired a single shot, hitting Salazar in the lower right part of his back. (*Id.* at pp. 114–15; Salazar Depo. at pp. 27–29). The medical evidence and the testimony of Timothy Allen, a lieutenant in Internal Affairs at the Houston Police Department, showed that, based on the entry wound, Salazar was turning to the right and toward Thompson when he was shot. (Docket Entry No. 38, Ex. 8, Allen Depo. at pp. 72–73; Ex. 13, Salazar Ben Taub Records at p. 33)

Salazar argues that there was no reasonable basis to use deadly force because any threat he posed had ended by the time Thompson fired his gun. But uncontroverted record evidence shows that Salazar had disregarded repeated orders, walked away, then turned back toward Thomson and reached for his waistband before Thompson fired. That evidence distinguishes this case from those in which courts found that there was enough time between the suspect's threatening conduct and the officer's decision to shoot for the officer

to see that the justification for using deadly force had ended. *Cf. Lytle*, 560 F.3d at 413; *Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005) ("We therefore hold that force justified at the beginning of an encounter is not justified *even seconds later* if the justification for the initial force has been eliminated."). Thompson's use of force was not justified by the earlier struggle with Salazar, the extent of which is disputed. At the summary judgment stage, the court is required to resolve these disputes in Salazar's favor and assume that the struggle was limited. Neither party argues that such a limited struggle would authorize the use of deadly force. Even if it could, that brief struggle had ended and Salazar had begun to walk away from the officer before the shooting.

Thompson's use of deadly force was justified, however, by the officer's reasonable belief that Salazar was reaching for a weapon and turning to shoot him. The undisputed summary judgment evidence shows that: Thompson had not checked Salazar for weapons; Salazar appeared intoxicated; Salazar did not obey repeated orders to stop and an order to show his hands; and that, as he walked away from Officer Thompson toward his own truck, he reached toward his waistband and began to turn back toward the officer.[2] The summary judgment evidence also showed that it was

---

[2] Salazar argues that a reasonable jury might not credit Thompson's testimony that Salazar turned to his left as he reached for his waistband because medical evidence showed that Salazar turned to the right. But it is undisputed that Salazar was turning back toward Thompson when he was shot. This factual dispute does not preclude summary judgment.

dark,[3] that Salazar wore a shirt covering his waist area, and that Thompson did not have a direct view of the front of Salazar's body.

Before firing at Salazar, Thompson had twice ordered Salazar to stop and once ordered him to show his hands. Thompson did not expressly warn Salazar that he would shoot if Salazar did not obey Thompson's orders. But Thompson's conduct and words clearly communicated that "escalation of the situation would result in the use of the firearm." *Loch v. City of Litchfield*, 689 F.3d 961 (8th Cir. 2012) (quoting *Estate of Morgan v. Cook*, 686 F.3d 494, 498 (8th Cir. 2012)); *see Graham*, 490 U.S. at 396–97 (stating that officers should, when possible, warn suspects before using deadly force).

Thompson's belief that Salazar was armed turned out to be wrong, but it was objectively reasonable. The undisputed facts show the type of "tense, uncertain, and rapidly evolving" situation requiring "split-second judgments" that courts are hesitant to second-guess with the benefit of hindsight. *Graham*, 490 U.S. at 396–97. A reasonable officer in the circumstances Thompson faced could have believed, based on the facts that Salazar struggled with Thompson to resist detention and handcuffing, walked away from Thompson toward his truck, refused to obey repeated

---

[3] Salazar argues that there is a factual dispute as to whether the lighting was so dim that Thompson could not have seen Salazar's hands. (Docket Entry No. 38 at p. 11). This dispute does not preclude summary judgment. It is undisputed that, due to the angle of Salazar's body and Salazar's long shirt, Thompson did not have a clear view of Salazar's waistband or what Salazar reached for.

commands to stop, and then turned toward the officer, moving his hand toward his waistband, that Salazar posed an immediate threat to Thompson's safety.

Salazar argues that because Thompson did not actually see a weapon in Salazar's hand or waistband, the use of force was not justified. Keith Howse, Salazar's designated expert witness and the former Director of Public Safety and Assistant Chief of Police for the Baylor Health Care System in Dallas, testified in his deposition that Thompson should have waited until he actually saw Salazar with a gun before shooting. (Docket Entry No. 44, Ex. C, Howse Depo. at pp. 118–19). Howse also testified that Thompson should have used nondeadly force, such as a baton or a taser. (Docket Entry No. 44, Ex. C-1, Howse Report at pp. 8, 32–34).[4] Neither the record nor the case law supports these arguments.

As noted, the record shows that when Thompson saw Salazar turn toward him, he was reaching toward his waistband, which was covered by a long shirt. An officer in that circumstance, given Salazar's drunkenness and resistance to the officer's efforts to detain or arrest and handcuff him, his disregard for the officer's orders to stop, and his turn toward the officer while moving his hand toward his waistband, would reasonably have feared that the suspect was armed and would shoot. Salazar had been walking away from Thompson, making the use of a baton difficult. Given

---

[4] Howse also testified Thompson would have been justified in using deadly force if, during the struggle, Salazar had pushed him toward oncoming cars or against the low freeway retaining wall. (Howse Depo. at pp. 99–101; Howse Report at p. 6).

the time it would take to draw and charge a taser, Thompson did not act unreasonably when he believed that Salazar was pulling out a gun.

The Fifth Circuit has repeatedly "upheld the use of deadly force where a suspect moved out of the officer's line of sight and could have reasonably been interpreted as reaching for a weapon." *Ontiveros*, 564 F.3d at 385 (citing *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991)); *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985); *cf. Newman v. Guedry*, 703 F.3d 757 (5th Cir. 2012) (finding that the officers used excessive force by using a taser and a nightstick on the suspect and noting that the suspect was pulled over for a "mere traffic violation," did not resist arrest, did not reach for his waistband, and "was never given any commands that he disobeyed"). These cases undermine Salazar's argument that Thompson acted unreasonably by shooting before he saw Salazar holding a weapon.

In *Ontiveros*, 564 F.3d at 379, the police had received a call warning them that the plaintiff, Ontiveros, had fought with two men, threatened to kill them, and then showed up at their house with a gun. The police went to Ontiveros's home and found him behind a blocked door. An officer told him several times to raise his hands. Ontiveros then reached into a boot on the floor. *Id.* at 381. The officer fired two shots, killing Ontiveros. *Id.* The Fifth Circuit found that a reasonable officer could have believed Ontiveros was reaching for a weapon and interpreted the movement as an immediate threat to the officer's safety. *Id.* at p. 384. The court concluded that the officer who shot Ontiveros did not violate his constitutional rights.

In *Young*, 775 F.2d at 1349, the officer stopped a suspect after seeing him in a drug sale. The suspect did not follow the officer's instructions to get out of his car. Instead, the suspect reached down to the floor of his car. The officer, believing that the suspect was reaching for a weapon, shot and killed him. The Fifth Circuit held that the facts showed no constitutional violation because the officer "fired his gun in self-defense when he thought his own life was threatened." *Id.* at 1352.

In *Reese*, 926 F.2d at 494, the undisputed summary judgment evidence showed that the officer had stopped a vehicle with four occupants and repeatedly ordered them to raise their hands and keep them in the air. One of the occupants lowered his hands and reached for something on the car's floor. The officer testified that he believed the man was reaching for a gun. The officer shot and killed the man. It turned out that the man was unarmed. His mother, who sued officers alleging unconstitutionally excessive force, did not controvert the evidence that he disobeyed repeated orders to keep his hands in the air and instead had reached for something on the floor of the car. The Fifth Circuit held that the officer's use of deadly force in that situation was justified and did not violate the decedent's constitutional rights.[5]

---

[5] Other circuits have reached similar results. *See Lamont v. New Jersey*, 637 F.3d 117 (3d Cir. 2011) (a suspected car thief had concealed his hand in his waistband and appeared to be clutching a weapon; after police ordered him to stop and raise his hands, the suspect pulled his hand out of his waistband as if he were drawing a gun); *Anderson v. Russell*, 247 F.3d 125 (4th Cir. 2001) (the officer, warned that a mall patron was armed, stopped a suspect who was drinking while walking around the mall; the suspect

Salazar relies on a number of cases in which the Fifth Circuit held that summary judgment in an officer's favor was improper despite the officer's testimony that he believed that the suspect was reaching for a weapon. These cases are distinguishable. In those cases, the officer's testimony that the suspect appeared to reach for a weapon was contradicted by competent summary judgment testimony from the suspect or from other witnesses. *See, e.g.*, *Baker v. Putnal*, 75 F.3d 190, 198 (5th Cir. 1996) ("Whether Putnal ordered Baker, Jr., to 'freeze' or to drop the pistol before Baker, Jr., turned toward him and whether Baker, Jr., was even holding the pistol or pointing it at Putnal are certainly issues of fact material to whether Putnal's actions were excessive and objectively reasonable."); *Sanchez*, 376 Fed. App'x

---

raised his hands at the officer's order but then lowered one hand to reach into his back pocket, where it turned out he had a radio, not a gun, but the the officer's use of force was not objectively unreasonable); *Pollard v. City of Columbus, Ohio*, No. 13-4142, — F.3d —, 2015 WL 925887 (6th Cir. March 5, 2015) (police officers in a car chase with a suspect they reasonably but erroneously believed to have a concealed-carry gun permit stopped the man and ordered him to show his hands; when he instead reached to the floor of the car, extended his arms, clasped his empty hands in a shooting posture, and pointed at the officers, the police were justified in shooting); *Loch*, 689 F.3d at 961 (the officer was told that the suspect had a weapon and did not see him discard it during the encounter or hear others yell that the suspect was unarmed; the officer did see the suspect disobey the officer's orders to drop to the ground and instead move his hand to his side, justifying the shooting); *Carr v. Tatangelo*, 338 F.3d at 1259 (11th Cir. 2003) (the suspect was hiding in the bushes outside of a crime scene and throwing rocks at the officers; the officers heard a sound similar to the chambering of a bullet, and one officer testified that he saw a gun barrel in the bushes, justifying the police shooting).

at 452 (although the officer testified that the suspect "was digging in his waistband and pointing his hands under his shirt as though aiming a weapon," an eyewitness testified that the suspect had his hands at his side).

In this case, Salazar has pointed to no summary judgment evidence contradicting Thompson's testimony that he shot because, when Salazar reached for his waistband and turned toward him, he believed that Salazar had a gun and would shoot. The fact disputes that emerge from the record — the extent of the struggle before Salazar walked away from Thompson and whether Salazar turned right or left toward Thompson while reaching for his waistband — are not material to determining whether the force was excessive and do not preclude summary judgment. Because Thompson reasonably believed that Salazar posed an immediate threat, his use of deadly force was not excessive.

Thompson's use of deadly force did not violate Salazar's clearly established constitutional rights. Salazar has identified no case holding that the use of deadly force violates clearly established rights when an officer reasonably believes that the subject is armed and poses an immediate threat. The clearly established law at the time of the shooting held that an officer's reasonable belief that a suspect poses an immediate threat, even if that belief turns out to be incorrect, justifies the use of deadly force. *See Ontiveros*, 564 F.3d at 379; *Reese*, 926 F.2d at 494; *Loch*, 689 F.3d at 961. Summary judgment is granted on the § 1983 claims against Thompson in his individual capacity.

C. The Conspiracy Claim

The amended complaint alleges that Thompson conspired with other Houston Police Department officers to deprive Salazar of his civil rights. The claims against officers other than Thompson have been dismissed. The officers were all employees of the City of Houston. It is well established that employees of the same legal entity cannot conspire among themselves. *See Swilley v. City of Houston*, 457 Fed. App'x 400, 404 (5th Cir. 2012) ("The City of Houston is a single legal entity and, as a matter of law, its employees cannot conspire among themselves." (citing *Benningfield v. City of Houston*, 157 F.3d 369, 378 (5th Cir. 1998)). Summary judgment is granted dismissing the conspiracy claims.

III. The State-Law Claims Against Thompson in his Official Capacity

The plaintiffs allege that Thompson, sued in his official capacity, was negligent or grossly negligent when he shot Salazar, an unarmed citizen. (Docket Entry No. 13, p. 24). A suit against a government employee in his official capacity is a suit against the government entity. *University of Tex. Med. Branch. at Galveston v. Hohmnan*, 6 S.W.3d 767, 777 (Tex. App. — Houston [1st Dist.] 1999, pet. dismissed w.o.j.). Under § 101.106(a) of the Texas Civil Practice & Remedies Code, if a suit is filed against a government employee based on conduct within the scope of his or her employment and the plaintiff could have brought the claims against the government entity, the employee may move to dismiss the claims.

The plaintiffs sued Thompson in his official capacity based on what he did acting as a police officer for the City of Houston. The plaintiffs could, and did, assert the same negligence and gross-negligence claims against the City. (Docket Entry No. 13 at p. 24). The state-law tort claims against Thompson are dismissed.

IV. The Claims Against the City of Houston

A. Municipal Liability Under 42 U.S.C. § 1983

Municipal liability requires proof of an underlying claim of a violation of rights and three additional elements: "a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." *Cox v. City of Dallas*, 430 F.3d 734, 748 (5th Cir. 2005). The constitutional violation of a municipal official is a prerequisite to municipal liability. "Proper analysis requires that two issues be separated when a § 1983 claim is asserted against a municipality: (1) whether [the] plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 119–20 (1992).

The summary judgment evidence shows that Thompson had an objectively reasonable basis for the force he used. The plaintiffs have not raised a factual dispute material to determining whether Salazar's constitutional rights were violated. Without an underlying violation, the § 1983 claims against the municipality fail.

B. The Negligence Claims

The Texas Tort Claims Act waives the immunity of governmental entities when the plaintiff's injuries "have been proximately caused by the operation or use of a motor-driven vehicle or motor-driven equipment or by a condition or use of tangible real or personal property." *Holland v. City of Houston*, 41 F. Supp. 2d 678, 710–11 (S.D. Tex. 1999). Tangible property is property that is capable of being handled, touched, or seen. *Id.*

The plaintiffs allege that the City negligently trained and supervised Thompson, including by implementing the policies and procedures that led to the shooting. These claims do not involve motor-driven vehicles or tangible property. The City's immunity is not waived for these claims. *Id.* at 712.

To the extent the plaintiffs claim that the City is liable for Thompson's negligent use of a firearm, that is an intentional tort claim, not a negligence claim. *See id.* (holding that a TTCA claim based on an officer's allegedly negligent use of his service weapon was a claim for intentional tort, not negligence). The TTCA does not waive the City's sovereign immunity for intentional torts. TEX. CIV. PRAC. & REM. CODE. § 101.057. The City of Houston is entitled to summary judgment on this claim.

V. The Loss of Consortium Claims

Salazar, suing on behalf of his wife and children, asserts state and federal law rights to recover for the loss of consortium and loss of familial society, companionship, and association. The summary judgment record reveals no basis for recovery on either

the federal or state-law claims. These claims are dismissed.

VI. Conclusion

The defendants' motion for summary judgment, (Docket Entry No. 31), is granted. Final judgment is entered by separate order.

SIGNED on March 31, 2015, at Houston, Texas.

/s/Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 12-3392

[Filed March 31, 2015]

RICARDO SALAZAR-LIMON, *et al.*	)
	)
Plaintiffs,	)
	)
VS.	)
	)
CITY OF HOUSTON *et al.*,	)
	)
Defendants.	)
	)

FINAL JUDGMENT

For the reasons stated in the court's Memorandum and Order of even date, this action is dismissed with prejudice.

SIGNED on March 31, 2015, at Houston, Texas.

/s/Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-20237

[Filed July 20, 2016]

RICARDO SALAZAR-LIMON, Individually and as Next Friend of EFS,	)
Plaintiff - Appellant	)
v.	)
CITY OF HOUSTON; CHRIS C. THOMPSON,	)
Defendants - Appellees	)

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

Before REAVLEY, JOLLY, and ELROD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED

ENTERED FOR THE COURT:

/s/E. Grady Jolly
UNITED STATES CIRCUIT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:12-03392
(Jury Trial Demanded)
Judge Lee H. Rosenthal

[Dated August 15, 2013]

RICARDO SALAZAR-LIMON, Individually and as Next Friend of EDGAR FRANCISCO SALAZAR AND SUSANA RENTERIA, Individually and as Next Friend of MARK BRAYAN SALGADO Plaintiffs,	)
v.	)
CHRIS C. THOMPSON, D.W. READY, J.G. HERRERA, T. VASHAW, J.B. SWEATT and C. BIGGER, Individually and in their Official Capacities, CITY OF HOUSTON, HOUSTON POLICE DEPARTMENT and JOHN DOES #1-5 Defendants.	)

ORAL DEPOSITION OF
RICARDO SALAZAR-LIMON

August 15, 2013

ORAL DEPOSITION OF RICARDO SALAZAR-LIMON, produced as a witness at the instance of the Defendants, and duly sworn, was taken in the above-styled and numbered cause on August 15, 2013, from 10:13 a.m. to 11:19 a.m., before TAMI A. ADAMS, CSR in and for the State of Texas, reported by machine shorthand, at the offices of Talabi & Associates, P.C., 6420 Richmond Avenue, Suite 600, Houston, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record herein.

* * *

[p.23]

was walking back towards you. Towards the truck?

A. No.

Q. No. Okay. What happened next?

A. So he gets down off of his car. So then he stands over here toward by the hood of his car is. And he says to me, "Hey, come here" (indicating).

Q. So he signals for you to come?

A. Yeah.

Q. And he said, "Come here."

A. Yeah.

Q. In English.

A. Yes.

Q. And what happens next?

A. So then I open my door, and I walk towards him.

Q. Were cars still going by at this time?

A. Yes.

Q. All right. So what happens once you start walking towards him?

A. So then we stop here. We're standing in-between the middle of the truck and his car.

Q. Okay. And what happens?

A. So then I just recall that he says to me, he says that he's going to take me to jail.

Q. Okay.

A. And I -- I ask, I say, "Well, why?" And then he

[p.24]

just tells me, "Don't ask." He didn't say, like -- He didn't say, like, "Calm down" or "Quiet."

And then he takes his hand, and he's going to get his handcuffs; and he grabs my hand, and he wanted to do like this (indicating) to me. So then when he was going to lock the handcuffs on me, I pulled my hand.

Q. Okay. Let's stop there. Let's stop there.

So he tells you that he's going to take you to jail.

A. Uh-huh.

Q. Were you facing his car or facing your truck?

A. I was facing my side, at him. I was kind of like looking at him.

Q. Okay. Where was he standing?

A. Right here, in-between the car and the truck. We were both there.

Q. I'm handing you a piece of paper, and we'll use this as an exhibit. Can you drive -- Drive -- draw --

THE INTERPRETER: Listen.

Q. (BY MS. NORRIS) Okay. I'd like for you to draw the expressway and the -- the emergency lane and where you remember your truck and his car being.

A. (Complying.)

Q. Okay. Okay. Can you mark your truck with the letter A?

[p.25]

A. (Complying.)

Q. And the police car as B?

A. (Complying.)

Q. Okay. How much space, if you had to guess, is between your truck and the police car?

A. About four -- three or four feet.

Q. And can you mark where you were standing, with a square?

A. (Complying.)

Q. Okay. And where Officer Thompson was standing, with a circle.

A. (Complying.)

Q. Okay. So you said that --

Are you facing him when he tells you he's going to take you to jail?

A. Yes.

Q. Did he tell you to turn around?

A. No.

Q. Okay. Did he say, "Put your hands behind your back"?

A. No.

Q. Okay. So the only thing he said to you, before he grabbed his handcuffs, is that he's going to take you to jail.

A. Yes.

[p.26]

Q. Okay. So tell me what happens when he goes to handcuff you.

A. So I just pull back my hand.

Q. Which hand did he grab first?

A. I believe, the right.

Q. Okay. And you pulled back. What happened next?

A. I pulled back my hand, and I give him my back.

Q. Okay. And what happens next?

A. I became frightened when he said that. I turned around, and I began to walk.

Q. Okay. Showing with lines, indicate where you were walking.

A. (Complying.)

Q. At any point before you started work-- walking, did you and Officer Thompson get involved in a struggle?

A. No.

Q. So the only movement between the two of you is you pulling away from him, turning around.

A. Corre-- Correct.

Q. And walking away.

A. Correct.

Q. And on your -- your map here, it appears that you began walking along the passenger side of your truck.

A. Correct. Because on this side, there were cars coming.

[p.27]

Q. Okay. Now, at any point did Officer Thompson try to handcuff you again?

A. No.

Q. At any point, was any of your struggle close to the retaining wall?

A. Yes. It was right here in the middle of the two cars.

Q. Okay. So did -- at any point, did you end up over here by the edge of the freeway?

A. No, never.

Q. Okay. How much space was between the wall for the freeway and your passenger side of the truck?

A. I'm not certain, but about two feet. I'm not certain.

Q. Okay. All right. What happens when you start walking by the side of your truck?

A. Okay. I start walking. I start -- I start, and I'm -- when I'm passing the passenger-side window --

Q. Would that be where Rogelio is sitting?

A. That's correct.

Q. Okay.

A. I just hear the policeman says -- he says -- in English, he says, "Stop" -- He said, "Stop right there." And when he says that, so I just hear boom.

Q. Did you turn around?

[p.28]

A. When I hear -- When I hear, boom, I began to feel hot in my back, wet. And so I turn around, and I see him; and then I fall.

Q. Where -- Where was he standing when you turned around?

A. When I turned around, I just recall that I was holding onto myself, and I would see him; and I recall that he was about -- right near my truck already. Like, right here on the corner of the bed of the truck.

Q. Okay. So he was at the end of the truck, between the passenger side and the wall.

A. Yeah.

Q. Okay. So he wasn't behind the truck. He was --

A. No. He was right beside it. Right there. In the back area, between the side.

Q. Okay. And you were standing by the front passenger-side window, next to Rogelio.

A. No. No. I was already -- When he tells me to stop, I was right about here (indicating). When he says that to me, I was able to take one more step or two; and then that's when -- when I felt the heat, and I fall. And I fell down at the front of my truck. It's a front, but on the side, like.

Q. In front of the passenger-side tire or next to?

A. In-between the tire and the hood.

[p.29]

Q. Okay. Can you mark a --

A. Right on the corner.

Q. -- mark a X with a circle?

A. (Complying.)

THE INTERPRETER: There you go. That's good. That's good.

Q. (BY MS. NORRIS) Did you say anything to him from the time he told you he was going to take you to jail and when you were shot?

A. No.

Q. Did you say anything to anybody else?

A. No.

Q. No. So you were quiet the whole time.

A. (Nodding head.) Yes.

Q. When he told you to stop, did you stop?

A. No. Because immediately, he says, "Stop," and then he fires.

Q. Okay. So how long after you hear him say, "Stop right there," do you feel the -- the sensation in your back?

A. When he says, "Stop," I walked maybe one step or two more steps; and then four, five seconds could have gone by. I'm not certain. Like -- And -- And so then he fires at me, and I fall.

Q. Okay. After you fall, what happens?

[p.30]

A. So I fall, and I'm facing up, and I feel that I'm not able to move my legs. And I try to get up. I'm wanting to grab onto the bumper on my truck, on the corner;

and I was trying to get up, but I wasn't able to move at all.

And so then when I was trying to get up, I recall that he just arrives; and he kept aiming at me (indicating).

Q. When he -- When you're -- When you're trying to get up and he arrives, where is he standing?

A. Like, in-between the window right here in the truck where Rogelio was at.

Q. And where you were.

A. On the ground, down below.

Q. Okay. Can you mark with -- Let's see -- a square and a circle a-- around --

THE INTERPRETER: (Indicating.)

MS. NORRIS: Yes.

Q. (BY MS. NORRIS) -- where he was?

A. (Complying.)

Q. Okay. And what was he doing at that point?

A. I just recall that I wanted to try to stand up, and I was kind of like suffocating.

THE INTERPRETER: Interpreter speaks: Drowning.

[p.31]

A. And so then when all that was happening, I was, like -- I was, like, reliving my life; like if only -- I was thinking that I was going to be going away.

Q. (BY MS. NORRIS) What was -- What was he doing?

A. He was just standing. I recall that -- I would just hear that he was calling -- He was talking. I don't know if he was calling the ambulance. I don't know.

Q. Okay. You didn't -- You didn't -- So when you heard him talking to somebody, he was standing next to where Rogelio was.

A. I didn't know after that. By then, I was -- I was kind of, like, in my own world, like -- I was, like, leaving. I was dying.

Q. Did you hear him say anything to Rogelio, Ivan, or José?

A. No.

Q. Do -- How long had -- How much time had passed from the time you stopped, from [sic] the time you were shot?

A. I don't know.

Q. Was it 30 minutes?

A. No.

Q. Less than 10 --

A. It all happened -- Everything happened fast.

Q. Did you say anything while you were laying on

* * *