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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROSALINDA IBARRA, as the Special Administratrix of the Estate of Jorge Martinez, deceased,

Plaintiff - Appellant,

v.

CHEYENNE LEE; THE BOARD OF COUNTY COMMISSIONERS OF ROGERS COUNTY; SCOTT WALTON, Sheriff of Rogers County in his official capacity,

Defendants - Appellees.

No. 22-5094
(D.C. No. 4:20-CV-00598-TCK-SH)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before **MATHESON**, **EBEL**, and **CARSON**, Circuit Judges.

Deputy Cheyenne Lee set out to serve Jorge Martinez with a protective order, but their brief interaction ended in tragedy when Deputy Lee fatally shot Mr. Martinez.

Rosalinda Ibarra, the Special Administratrix of Mr. Martinez's Estate, sued Deputy Lee and the Board of County Commissioners of Rogers County ("the County")

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

on behalf of her deceased brother. She brought claims under 42 U.S.C. § 1983, alleging Deputy Lee violated Mr. Martinez's Fourth Amendment rights by arresting him without probable cause and by using excessive force. Ms. Ibarra also brought municipal liability claims against the County under § 1983 and state law claims against all defendants.

Deputy Lee and the County each moved for summary judgment, which the district court granted. The court concluded that Deputy Lee did not violate Mr. Martinez's constitutional rights and was therefore entitled to qualified immunity. Having found no predicate constitutional violation, the court also granted summary judgment for the County. The court did not address the state law claims. It entered judgment for Deputy Lee and the County.

Exercising jurisdiction under 28 U.S.C. § 1291, we reverse and remand for further proceedings. Summary judgment is proper only if there is no genuine dispute as to any material fact. Here, the district court failed to consider the facts in the light most favorable to Ms. Ibarra, and there are myriad factual disputes. Viewing the facts properly, the district court should have concluded that a reasonable jury could find Deputy Lee violated the Fourth Amendment by arresting Mr. Martinez without probable cause and by using excessive force. On remand, the district court should consider whether Mr. Martinez's constitutional rights were clearly established and whether the County should be liable. It also should revisit and clarify its position on Ms. Ibarra's state law claims.

* * * *

We proceed as follows. First, we provide the procedural history in district court. Second, we review the law governing summary judgment. Third, we address the scope of the summary judgment record. Fourth, we present the parties' versions of the interactions between Deputy Lee and Mr. Martinez that are reasonably based on the record to show that they genuinely dispute many facts. Fifth, we examine the disputed facts in relation to the Fourth Amendment claims to show that they are material and that the district court erred in granting summary judgment qualified immunity to Deputy Lee. Sixth, we reverse summary judgment for the County because the district court erred in determining there is no underlying constitutional violation. Seventh, we discuss why the district court should revisit the state law claims. We remand to the district court for further proceedings consistent with this opinion.

I. PROCEDURAL HISTORY

On behalf of Mr. Martinez's Estate, Ms. Ibarra sued Deputy Lee and the County, bringing federal civil rights claims under 42 U.S.C. § 1983 and state tort claims.[1] Deputy Lee and the County filed separate motions for summary judgment. Deputy Lee argued he was entitled to qualified immunity because he did not violate Mr. Martinez's constitutional rights and because any such rights were not clearly established. The County argued it was not liable because there was no underlying constitutional violation.

[1] On appeal, the parties address the unlawful arrest, excessive force, and municipal liability claims. Ms. Ibarra also brought § 1983 claims for denial of medical care and for substantive due process. She does not argue the district court improperly granted summary judgment on either claim.

Deputy Lee included a "Statement of Uncontroverted Facts," App., Vol. I at 45–51, which the County "refer[red] to and incorporate[d]," *id.* at 255.[2]

Ms. Ibarra opposed both motions. She contested Deputy Lee's alleged uncontroverted facts, App., Vol. II at 60–65, and provided her own statement of material facts in tension with Deputy Lee's, *id.* at 65–69.

The district court granted summary judgment to both defendants. It concluded that Deputy Lee was entitled to qualified immunity because he "did not violate [Mr.] Martinez's constitutional rights, but instead, was required to make split-second decisions in response to [Mr.] Martinez's violent and assaultive conduct." App., Vol. II at 250.

On the unlawful arrest claim, the court said that "[w]hen a warrantless arrest is the subject of a § 1983 action, the defendant is entitled to qualified immunity if a reasonable officer could have believed that probable cause existed to arrest or detain the plaintiff." *Id.* at 241–42 (quoting *Stearns v. Clarkson*, 615 F.3d 1278, 1283 (10th Cir. 2010)). It concluded Deputy Lee had probable cause to arrest Mr. Martinez for (1) threatening a violent act, (2) obstructing an officer, (3) violating a protective order, (4) assault and battery on a police officer, and (5) resisting a peace officer.

On the excessive force claim, the district court noted that excessive force cases are analyzed under an "'objective reasonableness' standard." *Id.* at 244 (quoting *Graham v.*

[2] Deputy Lee submitted 40 alleged undisputed facts. App., Vol. I at 45–51. The County adopted them and submitted 19 alleged undisputed facts concerning the municipal liability claims. *Id.* at 256–60.

Connor, 490 U.S. 386, 388 (1989)). It determined "the *Graham* factors in the context of the undisputed facts show[] that Deputy Lee" did not use excessive force and "is entitled to qualified immunity." *Id.* at 245.

The district court granted summary judgment to the County "because a municipality cannot be held liable if the actions of its employee do not amount to a constitutional violation." *Id.* at 250.

The district court entered judgment for Defendants. Ms. Ibarra filed a timely notice of appeal.

II. SUMMARY JUDGMENT

"[T]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute is genuine when 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party,' and a fact is material when it 'might affect the outcome of the suit under the governing [substantive] law.'" *Bird v. W. Valley City*, 832 F.3d 1188, 1199 (10th Cir. 2016) (alteration in original) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "In applying this standard, [the court] view[s] the evidence and the reasonable inferences to be drawn from the evidence in the light most favorable to the nonmoving party." *Parker Excavating, Inc. v. Lafarge W., Inc.*, 863 F.3d 1213, 1220 (10th Cir. 2017) (quotations omitted). "We review grants of summary judgment based on qualified immunity de novo," applying the same standard as the district court. *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014).

III. SUMMARY JUDGMENT RECORD

The extensive summary judgment record in this case included depositions, documents, interrogatory answers, declarations, and expert reports. Deputy Lee urged the district court to disregard declarations from Ms. Mitchell and Ms. Martinez, and he and the County jointly moved to exclude Ms. Ibarra's expert reports under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). The district court did not address these issues. Deputy Lee (along with the County) raises them again on appeal. We address them to set the proper scope of the summary judgment record.

A. ***Declarations***

The first issue concerns Ms. Mitchell's and Ms. Martinez's declarations that were submitted with Ms. Ibarra's opposition to Deputy Lee's motion for summary judgment. In his reply, Deputy Lee argued the district court "ha[d] the authority to disregard an affidavit that is drafted to create a sham fact issue." App., Vol. II at 208 n.1 (citing *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986)). The district court did not respond to this argument or discuss the declarations in its summary judgment ruling.

On appeal, Deputy Lee and the County contend the district court agreed these were sham declarations "because it did not rely upon them." Aplee. Br. at 11 n.5; *see also id.* at 23 n.11 (referring to the district court's lack of reliance on Ms. Mitchell's declaration as an "exclusion"). They argue Ms. Ibarra "has shown no abuse of discretion in the District Court's refusal to consider these 'declarations.'" *Id.* at 11 n.5. Ms. Ibarra replies that the court "did not exclude the declaration[s] as a 'sham,' and never even considered [Deputy Lee's] objection. Rather, it inexplicably overlooked the

declaration[s], and thus there is no exercise of discretion to review." Aplt. Reply Br. at 8. We agree with Ms. Ibarra.

The threshold question is whether a declaration conflicts with the declarant's prior sworn testimony. *See Law Co., Inc. v. Mohawk Constr. & Supply Co., Inc.*, 577 F.3d 1164, 1169 (10th Cir. 2009). If there is a conflict, the next question is whether the declaration "is simply an attempt to create a sham fact issue." *Id.* (quotations omitted); *see also Franks*, 796 F.2d at 1237.

Here, the district did not mention the declarations nor Deputy Lee's objection to them. Further, we disagree with Deputy Lee and the County that the district court or this court should disregard the declarations. Deputy Lee and the County fail to show how either Ms. Mitchell's or Ms. Martinez's declarations conflict with their prior statements. The declarations clarify and supplement each declarant's deposition testimony.

In the district court, Deputy Lee alleged only two inconsistencies: whether Deputy Lee had consent to enter the Martinezes' home, App., Vol. II at 208 & n.1, and whether Mr. Martinez's conduct was threatening, *id.* at 214 n.4. On appeal, he also argues Ms. Martinez's declaration and deposition conflict on whether she and her mother deprived Deputy Lee of his radio. Aplee. Br. at 11 & n.5. But his arguments do not warrant disregard of the declarations.[3] We have reviewed the full record and have found

[3] First, on consent to enter the home, Ms. Mitchell testified that when Deputy Lee returned to the door, Ms. Mitchell "had . . . the glass door still a little open, and he walked in." App., Vol. I at 95. She confirmed that she (1) initially "opened the door" and (2) "while holding the door open, stepped to the side and allowed the deputy to enter the house." *Id.* at 104. In her declaration, she stated that "none of [her] actions ever indicated to Deputy Lee that he was allowed to enter the house." App., Vol. II at 135.

no inconsistencies that would call for exclusion of the declarations. Nor have Deputy Lee and the County shown that the declarations are "simply an attempt to create a sham fact issue." *Law Co., Inc.*, 577 F.3d at 1169. The declarations are therefore properly part of the summary judgment record.[4]

She also said that she "never invited Deputy Lee into the house," that "Deputy Lee never asked [her] whether he could come into the house and never told [her] that he was going to enter the house." *Id.* We are not convinced these accounts are inconsistent. But it does not matter if they were because we do not address consent on appeal. As Deputy Lee argues, *see* Aplee. Br. at 21–22, Ms. Ibarra forfeited her argument that Deputy Lee needed both consent to enter the home and probable cause to arrest Mr. Martinez. And she has waived it for not adequately arguing plain error. *See* Aplt. Reply Br. at 23–24.

Second, on whether Mr. Martinez threatened Deputy Lee, Ms. Martinez testified that she "saw and heard [Mr. Martinez] telling the deputy[to] get the F out of the house," but that Mr. Martinez was "just pointing at [Deputy Lee]" when "'moving his hands and arms around while yelling at the deputy.'" App., Vol. I at 81–82. She said Mr. Martinez "g[ot] wild," App., Vol. II at 90, but she said she never saw "[Mr. Martinez] punch [Deputy] Lee," App., Vol. I at 82. This is not inconsistent with her declaration. There, she said Mr. Martinez pointed at Deputy Lee but not "in a threatening manner." App., Vol. II at 96. She stated that she "never saw [Mr. Martinez] ever punch or attempt to punch Deputy Lee." *Id.* at 97. She "also never saw [Mr. Martinez] grab or push, or attempt to grab or push Deputy Lee." *Id.*

Ms. Mitchell similarly testified that Mr. Martinez "shouted out what the F are you doing in my house, also pointing at [Deputy Lee's] face, what the F are you doing in my house, get out of my house." App., Vol. I at 96. She confirmed that Mr. Martinez would be "angry generally and was going to cuss generally, not specifically at the officer." *Id.* at 100–01. Her declaration stated that Mr. Martinez told "Deputy Lee to 'get out of my house,'" that Mr. Martinez never "mov[ed] his hands or arms around in any threatening manner," and "[n]ever verbally threatened to harm or . . . kill [Deputy Lee]." App., Vol. II at 135. We fail to see inconsistency.

Third, on Deputy Lee's radio, Ms. Martinez testified that Deputy Lee asked her for the radio. App., Vol. I at 83. She agreed that she "picked up the radio and took it into the living room[,] in other words, took it away from [Deputy Lee]." *Id.* at 83–84. Her declaration explains she "pick[ed] up the radio with the intention to hand it over to Deputy Lee" but did not after the 911 operator on the phone "yelled at [her] to get away from the officer." App., Vol. II at 97. Ms. Martinez's declaration explains her actions commensurate with her deposition.

[4] Deputy Lee and the County argue Ms. Ibarra omitted relevant documents from the appellate record. Due to this omission, they urge us to summarily affirm. Aplee. Br.

B. ***Expert Reports***

Ms. Ibarra had three expert witnesses: Roger Clark, a "Police Procedure" expert; Jeffrey Noble, a "Police Practices" expert; and Dr. Bennet Omalu, a "Medico-Legal" expert. Suppl. App., Vol. I at 226 (Table of Contents). Each wrote an expert report and was deposed. *Id.* at 41–89 (Clark Deposition), 90–108 (Clark Report), 131–65 (Noble Report), 166–94 (Noble Deposition), 226–40 (Omalu Report), and 241–79 (Omalu Deposition). Deputy Lee and the County moved to exclude their testimony under *Daubert*. *Id.* at 9–40 (Motion to Exclude Clark), 109–30 (Motion to Exclude Noble), 195–225 (Motion to Exclude Dr. Omalu). The parties briefed the *Daubert* motions and the summary judgment motions simultaneously. *See* App., Vol. I at 5–6. Ms. Ibarra also included a declaration from each expert to support her opposition to summary judgment. App., Vol. II at 4, 58, 139–48 (Noble Declaration), 150–57 (Clark Declaration), 162–65 (Omalu Declaration).

In its summary judgment Opinion and Order, the district court cited to Mr. Noble's deposition transcript. *Id.* at 236, 247 n.9, 248 n.10. It otherwise never discussed Ms. Ibarra's experts. After it granted summary judgment, the court denied the Defendants' motions to exclude Ms. Ibarra's experts as moot. *See* App., Vol. I at 7.

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at 17–20. They also provided the documents in a supplemental appendix. *See* 10th Cir. R. 30.2(A)(1) (permitting an "appellee who believes that the appellant's appendix omits items that should be included" to "file a supplemental appendix"). Ms. Ibarra responds that the "omitted exhibits were non-essential." Aplt. Reply Br. at 1; *see also id.* at 1–4. We decline to summarily affirm. *See Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1190–91 (10th Cir. 2018) (summary affirmance for filing a deficient appendix is proper only when the court is "forced to venture a guess as to the merits of an argument or claim").

In light of the foregoing, we conclude that the reports, depositions, and declarations of Ms. Ibarra's three expert witnesses are part of the summary judgment record.[5]

IV. DISPUTED FACTS

The parties agree as follows:

Jorge Martinez and Sara Chapa had two children together. She obtained a protective order that prohibited him from contacting the children, who were then in his care.

A state judge instructed the Rogers County Sheriff's Office to serve the protective order. Deputy Lee was tasked with doing so. He drove to the residence where Mr. Martinez, his mother Isidra Mitchell, and his sister Maria Martinez lived. When Deputy Lee arrived, Ms. Martinez answered the door. Mr. Martinez was sleeping.

From there, the opposing parties embrace starkly different accounts of the events leading to Mr. Martinez's death. Deputy Lee and the County primarily rely upon his deposition testimony. Ms. Ibarra primarily relies upon Ms. Mitchell's and Ms. Martinez's depositions and declarations. We present the parties' versions of the events that can reasonably be derived from the record, and we recount the district court's treatment of the facts.

[5] Neither side has challenged the district court's ruling that the *Daubert* motions were moot. On remand, the Defendants may renew their *Daubert* motions to the extent they are relevant to the issues we have remanded.

A. ***Deputy Lee and the County's Version***

According to Deputy Lee and the County, the judge ordered the Rogers County Sheriff's Office to serve the protective order, ensure the children were safe, and take custody of them. App., Vol. I. at 106–10 (Lee Deposition), 168–70 (Undersheriff Sappington Deposition). When Deputy Lee arrived at the Martinez household to do so, Ms. Mitchell allowed him to enter the house. *Id.* at 114.

When Deputy Lee reached Mr. Martinez's bedroom door, he said, "Hey, Jorge, I've got some papers for you." *Id.* at 115. Mr. Martinez leapt out of bed and immediately "beg[an] his barrage of cursing, yelling, and threatening. . . ." *Id.* at 123. Deputy Lee "tried to calm him down" and "tell him he just needed to take some papers." *Id.* at 116. When Deputy Lee tried to hand him the paperwork, Mr. Martinez "slapped it out of [his] hands" and said "f--- [you] and f--- [your] papers." *Id.* at 122. Mr. Martinez never gave Deputy Lee the opportunity to explain what was in the papers. *Id.* He threatened to "beat [Deputy Lee's]" ass and "kill [his] b---h ass." *Id.* at 124. Mr. Martinez was in "an aggressive fighting stance from the moment he jumped out of the bed," "aggressive[ly] posturing" with his "fists clenched." *Id.* at 120.

Deputy Lee told Mr. Martinez that he was under arrest for making threats and to turn around and put his hands behind his back. *Id.* at 117, 121. To effectuate the arrest, Deputy Lee attempted to grab Mr. Martinez's arm. *Id.* at 120. But Mr. Martinez resisted, pulling away and lunging back into his bedroom. *Id.* at 124. In the bedroom, Mr. Martinez appeared to be reaching for a nightstand where Deputy Lee feared there could be a gun. *Id.* at 124–25.

Deputy Lee then struck Mr. Martinez for the first time, repeatedly telling him he was under arrest and to "turn around" and "place his hands behind his back." *Id.* at 121. Mr. Martinez refused, *id.* at 120–25, and vigorously fought Deputy Lee for several minutes, striking and punching him, *id.* at 128–30. The two fell to the floor where they struggled with each other. *Id.* at 128. The fight took them from room to room. *Id.* Throughout, Mr. Martinez was striking Deputy Lee "anywhere he c[ould] throughout the lower abdomen, groin, chest, [and] head." *Id.* at 130.

Mr. Martinez's family members interfered with the arrest—Ms. Mitchell kept tapping Deputy Lee's back and telling him that he could not arrest Mr. Martinez. *Id.* at 98. And when Deputy Lee's radio became dislodged, Ms. Mitchell and Ms. Martinez both refused to return it to him so that he could call for backup assistance. *Id.* at 83–84 (Martinez Deposition), 104 (Mitchell Deposition), 134–36 (Lee Deposition).

Deputy Lee eventually took Mr. Martinez to the floor and placed a single handcuff on his left wrist, tightening it as a pain compliance technique, but Mr. Martinez did not comply. *Id.* at 129 (Lee Deposition). Deputy Lee was unable to get the other cuff on Mr. Martinez. *Id.* at 129–33.

Mr. Martinez escaped from Deputy Lee's grip and stood up. *Id.* at 137, 142. Mr. Martinez then loomed over Deputy Lee, who remained in a "submissive position" on "his knees." *Id.* at 137. The unfastened handcuff, dangling from Mr. Martinez's wrist, functioned as a weapon. *Id.* at 133, 142. Mr. Martinez began "delivering left- and right-hand closed fist blows to" Deputy Lee's head. *Id.* at 137; *see also id.* at 148. The blows were so hard that Deputy Lee urinated on himself, and everything went "totally black."

Id. at 137; *see also id.* at 148. He thought Mr. Martinez was going to kill him. *Id.* at 137, 148–49. When Deputy Lee unholstered his gun, Mr. Martinez was still standing over him. *Id.* at 141.

Deputy Lee shot Mr. Martinez in the chest. *Id.* at 141, 152–53. The bullet had a slightly downward trajectory and entered the wall at about 17.5 inches from the floor. *Id.* at 220–21, 225 (Report of Deputy Lee's expert, Matthew Noedel).[6] Deputy Lee's forensic expert opined that documented path "best fits" with Deputy Lee's description of the scene, where he was "on hands and knees, backed into the closet with Mr. Martinez upright and leaning into him." *Id.* at 225.

B. ***Ms. Ibarra's Version***

According to Ms. Ibarra, events unfolded differently. Deputy Lee "never told anyone that he was there to serve a protective order or take the children." App, Vol. II at 135 (Mitchell Declaration). Nor did Ms. Mitchell consent to allow Deputy Lee into the Martinezes' home. *Id.* at 134–35. Rather, Ms. Mitchell opened the glass door slightly to converse with Deputy Lee, who told her he needed to retrieve something from his car. App. Vol. I at 94–95 (Mitchell Deposition). Deputy Lee returned holding a piece of paper, "opened the door further . . . and walked into the house." App., Vol. II at 134–35 (Mitchell Declaration); App., Vol. I at 103 (Mitchell Deposition).

Once inside, Deputy Lee walked toward Ms. Mitchell, forcing her to back up until the two of them were in front of Mr. Martinez's bedroom door. App., Vol. II at 134–35

[6] This fact is not contested.

(Mitchell Declaration); App., Vol. I at 103 (Mitchell Deposition). Ms. Mitchell warned Deputy Lee that Mr. Martinez would be angry and cussing. App., Vol. I at 99–100 (Mitchell Deposition). Deputy Lee persisted. Ms. Mitchell knocked and opened the bedroom door. *Id.* at 96. Deputy Lee immediately "yelled out" in an angry and agitated manner and pushed the paper he was holding into Mr. Martinez's bedroom. *Id.* Deputy Lee still had not told Mr. Martinez, or anyone else, that he was there to serve a protective order or explained the papers he was holding. *Id.* at 94–96; App., Vol. II at 135 (Mitchell Declaration).

Mr. Martinez jumped out of bed and told Deputy Lee to "get the F out of the house," while pointing at him, App., Vol. I at 81–82 (Martinez Deposition), 96 (Mitchell Deposition), but "never . . . in a threatening manner," *see* App., Vol. II at 96 (Martinez Declaration). But Mr. Martinez "never verbally or physically threatened Deputy Lee," or "clinch[ed] his fists." *Id.*

Deputy Lee then initiated physical contact. He "pushed [Ms. Mitchell] out of the way" with his left arm while "push[ing]" the papers "into [Mr. Martinez]'s face," "grabb[ing Mr. Martinez's] left wrist and twist[ing] his arm around and pin[ning] him up against the wall." App., Vol. I at 96 (Mitchell Deposition); *see also* App., Vol. II at 96 (Martinez Declaration). "Deputy Lee kept saying to [Mr. Martinez] that he was under arrest but never provided a reason for why he was trying to arrest [Mr. Martinez], even though [Mr. Martinez] repeatedly asked Deputy Lee why he was trying to arrest him, while trying to maneuver away from Deputy Lee." App., Vol. II at 96 (Martinez Declaration). Contrary to Deputy Lee's contention, Mr. Martinez never reached toward

the nightstand in his room. *Id.* Even if he had, there were no firearms or other weapons in the Martinez home. App., Vol. II. at 32 (Rogers County Sheriff Scott Walton Deposition).

Deputy Lee struck Mr. Martinez multiple times and took him to the ground in the hallway. App., Vol. II at 96 (Martinez Declaration), 107–08 (Lee Deposition). Ms. Martinez observed Deputy Lee "punch [Mr. Martinez] several times" but "never saw [Mr. Martinez] ever punch or attempt to punch Deputy Lee . . . [or] grab or push, or attempt to grab or push Deputy Lee." App., Vol. II at 96–97 (Martinez Declaration). Ms. Martinez called 911 to report that Deputy Lee was "beating up [her brother] for no reason." *Id.* Similarly, Ms. Mitchell said Mr. Martinez "never punched Deputy Lee in the face or the head area or anywhere else at any time during the incident." App., Vol. II at 135 (Mitchell Declaration). Mr. Martinez's autopsy provided corroboration. It showed "no injuries" to his right or left hand "consistent with punching or striking someone." App., Vol. II at 199–200 (Oklahoma Chief Medical Examiner's Office Answers to Plaintiff's Interrogatories).

Mr. Martinez pled with his mother to film the incident, so she ran to get her phone from the living room. App., Vol. I at 96–97 (Mitchell Deposition). She heard a thump, and when she ran back to the bedroom, Mr. Martinez was "laying on the floor" not "doing anything," "just looking at [her]." *Id.* at 97. Deputy Lee was on top of him, striking him, and was able to get one handcuff on him. App., Vol. I at 129 (Lee Deposition). "At the time of the shooting, Deputy Lee was on top of [Mr. Martinez] . . . . [Mr. Martinez] was not fighting with Deputy Lee, Mr. Martinez was not resisting, and he

was not endangering the life of Deputy Lee or anyone else." App., Vol. II at 136 (Mitchell Declaration). Deputy Lee never appeared to urinate on himself or appeared to be blacking out. App., Vol. II at 97 (Martinez Declaration), 136 (Mitchell Declaration). And Deputy Lee was still on top of Mr. Martinez when he "grabbed his gun out of his holster" and "shot [Mr. Martinez]." App., Vol. I at 97 (Martinez Declaration).

Ms. Ibarra's medical expert stated the fact of the bullet's "downward" trajectory conflicted with Deputy Lee's testimony that Mr. Martinez was standing over him, which would suggest an "upward" bullet trajectory. App., Vol. II at 164 (Dr. Omalu Declaration). He also reported that Deputy Lee's medical records do not reveal "significant evidence of blunt force trauma [to] the face" and it was "highly unlikely" that Deputy Lee was "repeatedly punched on the head or face by Mr. Martinez." *Id.* at 164–65.

C. ***District Court's Version***

The district court's Opinion and Order adopted, almost verbatim, Deputy Lee's recitation of the facts from his brief in support of his summary judgment motion. *Compare* App., Vol. II at 234–41, *with* App., Vol. I at 45–51.[7]

[7] The district court explained its disregard of Ms. Ibarra's facts:

> Although Plaintiff provided a response to all fifty-nine (59) of Defendants' Unidsputed [sic] Material Facts, many of those responses are contrary to the requirements of Fed.R.Civ.P. 56 and Local Rule 56.l(c). Specifically, Local Rule 56.l(c) provides that "[e]ach fact in dispute shall be numbered, shall refer particularly to those portions of the record upon which the opposing party relies . . . ". In the instant case, not only are there instances in which Plaintiff disputes facts in the

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In deciding a summary judgment motion, courts must "view the evidence and the reasonable inferences to be drawn from the evidence in the light most favorable to the nonmoving party." *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1155 (10th Cir. 2016) (quotations omitted). "In qualified immunity cases, this usually means adopting . . . the plaintiff's version of the facts." *Emmett v. Armstrong*, 973 F.3d 1127, 1130 (10th Cir. 2020) (alteration in original) (quoting *Scott v. Harris*, 550 U.S. 372, 378 (2007)). "[A]t the summary judgment stage the judge's function is not [] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

Here, the district court adopted Deputy Lee and the County's version of the facts without explaining how or why it resolved the conflicting accounts in their favor. As the foregoing shows, the record is laden with factual disputes that are genuine because "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013) (quotations omitted).

> record without any citation to the record, but Plaintiff also makes statements that are not supported by the record cited.

App., Vol. II at 234 n.4. But contrary to this footnote, Ms. Ibarra provided a numbered response to Deputy Lee's statement of facts supported by record citations. *See id.* at 60–69. Also, the district court did not specify what statements she made that lacked support in the record.

V. MATERIAL DISPUTED FACTS

We turn next to address whether the disputed factual issues are material to the outcome of this case and therefore preclude summary judgment on Ms. Ibarra's unlawful arrest and excessive force claims.[8] An issue of fact is material "if under the substantive law it is essential to the proper disposition of the claim." *Becker*, 709 F.3d at 1022 (quotations omitted); *see also Anderson*, 477 U.S. at 248. In this case, we must apply the substantive law of § 1983 qualified immunity and of Fourth Amendment protections against unlawful arrest and excessive force. We conclude that summary judgment should not have been granted due to genuine issues of material fact.

We start with a brief overview of qualified immunity. Section 1983 provides that a person acting under color of state law who "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983. "Individual defendants named in a § 1983 action may raise a defense of qualified immunity . . . ." *Est. of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014) (quotations omitted). "Qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or

[8] Not only did the district court adopt the factual recitation from Deputy Lee's brief in support of his summary judgment motion, it also substantially adopted the qualified immunity analysis. *Compare* App., Vol. I at 52–60, *with* App., Vol. II at 241–50.

constitutional rights." *Wilkins v. City of Tulsa*, 33 F.4th 1265, 1272 (10th Cir. 2022) (quotations omitted).

"When a defendant asserts qualified immunity in a summary judgment motion, the plaintiff must show that (1) a reasonable jury could find facts supporting a violation of a constitutional right and (2) the right was clearly established at the time of the violation." *Id.* "[W]e still view the facts in the light most favorable to the non-moving party and resolve all factual disputes and reasonable inferences in its favor." *Est. of Booker*, 745 F.3d at 411. A defendant is entitled to qualified immunity if the plaintiff fails to satisfy either prong. *See Tolan v. Cotton*, 572 U.S. 650, 656 (2014); *Soza v. Demsich*, 13 F.4th 1094, 1099 (10th Cir. 2021).

A. ***Unlawful Arrest***

Ms. Ibarra claims that Deputy Lee violated Mr. Martinez's Fourth Amendment rights by seizing him without probable cause. She argues the district court erred in holding there is no genuine issue of material fact as to whether Deputy Lee had probable cause to arrest and that he was therefore entitled to qualified immunity. Because material facts are genuinely in dispute, and thus a reasonable jury could have found Deputy Lee arrested Mr. Martinez without probable cause, we agree with Ms. Ibarra.

1. **Legal Background**

Under the Fourth Amendment, a warrantless arrest requires probable cause. *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004); *A.M. v. Holmes*, 830 F.3d 1123, 1140 (10th Cir. 2016) (identifying the "basic federal constitutional right of freedom from arrest without probable cause" (quotations omitted)).

Police officers have probable cause to arrest if "the facts and circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *Adams v. Williams*, 407 U.S. 143, 148 (1972) (alterations and quotations omitted). Courts assess probable cause "from the standpoint of an objectively reasonable police officer" under the totality of the circumstances. *Ornelas v. United States*, 517 U.S. 690, 696 (1996). An individual officer's subjective reason or belief for making the arrest is irrelevant to the Fourth Amendment. *See Apodaca v. City of Albuquerque*, 443 F.3d 1286, 1289 (10th Cir. 2006).

On an unlawful arrest claim, we assess at prong one of qualified immunity whether a reasonable jury could find a reasonable officer lacked probable cause for the arrest.

2. **Analysis**

The district court determined there was no genuine issue of material fact that Deputy Lee had probable cause to arrest Mr. Martinez for five separate crimes: (1) threatening a violent act, (2) obstructing an officer, (3) violating a protective order, (4) assault and battery on a police officer, and (5) resisting a peace officer. Considering the full summary judgment record and viewing the evidence in the light most favorable to Ms. Ibarra, we conclude there are genuine issues of material fact that a jury should resolve.

For each crime, the record contains factual disputes relevant to probable cause.

(1) Threatening a violent act in violation of Okla. Stat. tit. 21, § 1378(B): According to Deputy Lee, Mr. Martinez immediately threatened him, including with death. App., Vol. I at 116. Deputy Lee also described Mr. Martinez as taking "an aggressive fighting stance" when they started speaking. *Id.* at 120. By contrast, Ms. Mitchell and Ms. Martinez both said that Mr. Martinez never threatened Deputy Lee. App., Vol. II at 96, 135. Ms. Martinez also said that Mr. Martinez only stood at the doorway and "point[ed] at Deputy Lee," but never "mov[ed] his hands or arms around in a threatening manner." *Id.* at 96. These disputed facts are material and do not support summary judgment.

(2) Obstructing an officer in violation of Okla. Stat. tit. 21, § 540: Deputy Lee said "[Mr.] Martinez slapped the [protective order] papers out of [Deputy Lee's] hands; started jumping around with his arms in the air; was cursing; threatened [Deputy] Lee; and prevented [Deputy] Lee from serving the papers." Aplee. Br. at 26 (citing App., Vol. I at 122). But Ms. Ibarra points to evidence that Deputy Lee yelled Mr. Martinez's name; that Mr. Martinez responded by telling him to get out of the Martinezes' house; that Deputy Lee slammed Mr. Martinez against the wall, telling him he was under arrest; and that Mr. Martinez did nothing to obstruct Deputy Lee before he was arrested. App., Vol. II at 135, App., Vol. I at 96. Viewing the facts in the light most favorable to Ms. Ibarra, a reasonable jury could find there was no probable cause to arrest Mr. Martinez for obstructing an officer.

(3) Violating a protective order in violation of Okla. Stat. tit. 22, § 60.6(A): A person violates this statute only after a protective order "[h]as been served." *Id.* After service, the statute allows a warrantless arrest only if "[t]he person named in the order has received notice of the order and has had a reasonable time to comply with such order." Okla. Stat. tit. 22, § 60.9(A)(3). The facts are disputed on both of these elements. First, the parties dispute whether Deputy Lee served the protective order. *See* Aplt. Br. at 34, Aplee. Br. at 27. And if Mr. Martinez was not served with the protective order, he also lacked notice of it. Second, even if there was service, the evidence, viewed in in the light most favorable to Ms. Ibarra, shows that Mr. Martinez lacked reasonable time to comply with the protective order. App., Vol. I at 122 (Lee Deposition stating he never explained to Mr. Martinez what was in the papers he held); App., Vol. II at 135 (Mitchell Declaration stating "Deputy Lee never told anyone he was there to serve a protective order). A reasonable jury could find lack of probable cause on this offense.

(4) Assault and battery on a police officer in violation of Okla. Stat. tit. 21, § 649: Again, the parties dispute material facts. Deputy Lee's statements that Mr. Martinez verbally threatened and physically assaulted him conflict with Ms. Martinez's and Ms. Mitchell's statements that Mr. Martinez never threatened Deputy Lee or attempted to punch, grab, or assault him. *Compare* App., Vol. I at

120–40 *with* App., Vol. II at 96, 135. We must resolve disputed facts in favor of Ms. Ibarra. We conclude a reasonable jury could find a lack of probable cause to arrest Mr. Martinez for assault and battery of a police officer.

(5) Resisting a peace officer in violation of Okla. Stat. tit. 21, § 268: Ms. Ibarra points to evidence that the only interaction before Deputy Lee initiated the arrest was Mr. Martinez telling Deputy Lee to leave his house. *See* Aplt. Br. at 35–36; Aplt. Reply Br. at 14. Deputy Lee contends otherwise. *See* Aplee. Br. at 28–29. Once again, taking the facts in the light most favorable to Ms. Ibarra, a reasonable jury could find a lack of probable cause to arrest Mr. Martinez for resisting a peace officer before he was initially seized.[9]

For the foregoing reasons, the district court erred in granting summary judgment on the unlawful arrest claim.

B. ***Excessive Force***

Ms. Ibarra claims Deputy Lee violated Mr. Martinez's Fourth Amendment rights by using excessive force. She argues the district court erred in holding there was no genuine issue of material fact as to whether Deputy Lee used excessive force, including deadly force. Because material facts are in dispute, we agree with Ms. Ibarra.

[9] Deputy Lee and the County also contest whether Deputy Lee had probable cause to arrest Mr. Martinez for resisting arrest at any later point during their interaction. But if Deputy Lee lacked probable cause for the initial seizure, Mr. Martinez may have a triable claim for unlawful arrest even if Deputy Lee later developed probable cause to arrest Mr. Martinez for resisting arrest. Also, Oklahoma courts have allowed a suspect to resist based on the circumstances when an officer lacks probable cause. *See Trent v. States*, 777 P.2d 401, 403 (Okla. Crim. App. 1989); *Graves v. Thomas*, 450 F.3d 1215, 1224 (10th Cir. 2006). We need not address these issues further to resolve this appeal.

1. **Legal Background**

When a plaintiff alleges an officer used excessive force to arrest, "the federal right at issue is the Fourth Amendment right against unreasonable seizures." *Tolan*, 572 U.S. at 656. We review the relevant law on the use of excessive force, including deadly force.

On excessive force claims, courts consider whether the officer's actions were "objectively reasonable," applying the balancing test from *Graham v. Connor*, 490 U.S. 386 (1989). *Graham* delineates "three, non-exclusive factors": "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Fisher v. City of Las Cruces*, 584 F.3d 888, 894 (10th Cir. 2009) (alterations in original) (quoting *Graham*, 490 U.S. at 396).

(1) Severity of the crime: A minor offense supports the use of only minimal force. *See Perea v. Baca*, 817 F.3d 1198, 1203 (10th Cir. 2016). A felony or violent conduct justifies more force. *See Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1170 (10th Cir. 2021); *Est. of Taylor v. Salt Lake City*, 16 F.4th 744, 763–64 (10th Cir. 2021).

(2) Threat to the officer: The second factor is "undoubtedly the most important and fact intensive." *Pauly v. White*, 874 F.3d 1197, 1215–16 (10th Cir. 2017) (quotations omitted). An officer may use increased force when a suspect is armed, repeatedly ignores police commands, or makes hostile motions towards the officer or others. *See Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1318 (10th Cir. 2009). We consider whether the "officers [or others] were in danger at the precise moment they used force." *Vette*, 989 F.3d at 1170 (quotations omitted).

In assessing the threat, we consider the factors identified in *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255 (10th Cir. 2008): "(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon toward[] the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect." *Id.* at 1260.

When deadly force was used, courts consider whether the officer had "probable cause to believe that the suspect pose[d] a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); *see also Thomson*, 584 F.3d at 1313.

(3) Resisting arrest: When a suspect resists arrest, officers "are justified in employing *some* force." *Surat v. Klamser*, 52 F.4th 1261, 1275 (10th Cir. 2022) (alterations and quotations omitted). But an officer's "use of force ha[s] to be proportionate" to the arrestee's flight or resistance. *Id.* When a suspect's resistance is ineffectual and non-threatening, officers are justified in using only "minimal force" to subdue the suspect. *Id.* "[W]e consider whether the [suspect] was fleeing or actively resisting at the precise moment the officer employed the challenged used of force." *Vette*, 989 F.3d at 1171.

2. **Analysis**

a. Severity of the crimes

Mr. Martinez was not suspected of any crime when Deputy Lee arrived at his home. The parties dispute whether Mr. Martinez committed any subsequent crimes. As previously discussed, the summary judgment record does not indisputably show facts supporting probable cause to arrest Mr. Martinez when Deputy Lee began using force. Viewing the facts in the light most favorable to Ms. Ibarra, a reasonable jury could conclude that Mr. Martinez's conduct after Deputy Lee entered his home never "amounted to a crime at all" or was at most a non-violent misdemeanor. *Casey v. City of Federal Heights*, 509 F.3d 1278, 1281 (10th Cir. 2007). The first *Graham* factor thus favors Mr. Martinez.

b. Threat to the officer

The parties point to competing evidence as to whether Mr. Martinez posed a threat to Deputy Lee. Some undisputed facts—Mr. Martinez "maneuvered" out of Deputy

Lee's grip, App., Vol. I at 96, he had only one handcuff on, and the struggle moved from the hallway to the bedroom—show that Mr. Martinez was not passive. But Ms. Ibarra cites evidence showing Mr. Martinez never fought back. App., Vol. II at 135–36. She also notes the size differential between the two: Deputy Lee weighed 220 pounds and was over 6 feet tall, *id.* at 101, while Mr. Martinez weighed 117 pounds and was 5 feet 4 inches tall, App., Vol. I at 240. And as Ms. Martinez testified, Deputy Lee seemed to be beating up Mr. Martinez "for no reason." App., Vol. II at 97. Finally, it is undisputed that the bullet Deputy Lee shot traveled at a downward trajectory before lodging in the wall behind Mr. Martinez. This heavily suggests Deputy Lee was positioned above Mr. Martinez and shot downward at him. Crediting Ms. Ibarra's facts, it is difficult to see how Mr. Martinez posed a threat to Deputy Lee.

We look to the *Larsen* factors for additional guidance. *Larsen,* 511 F.3d at 1260.

1. Order to drop weapon: As to whether, Deputy Lee ordered Mr. Martinez to drop his weapon, the only alleged weapon was the unfastened handcuff. There is no evidence Deputy Lee ordered Mr. Martinez to drop it and no undisputed evidence Mr. Martinez threatened to use it.

2. Hostile motions with weapon: Ms. Ibarra provided evidence that Mr. Martinez never charged, threatened, or struck Deputy Lee or otherwise made no hostile motions with the handcuff. "[I]t [i]s unreasonable for [an] officer to use deadly force against the suspect" "where an officer had reason to believe [the] suspect was only holding a knife, not a gun, and the suspect was not charging the officer" nor making "slicing or stabbing motions toward him." *Tenorio v. Pitzer*, 802 F.3d 1160, 1165–66 (10th Cir. 2015) (quotations omitted).

3. Distance: Deputy Lee and Mr. Martinez were close.

4. Manifest intention: Ms. Ibarra contends Mr. Martinez's intention was to avoid unlawful arrest. *See* Aplt. Br. at 47. Deputy Lee argues Mr. Martinez's intention was to kill him. *See* Aplee. Br. at 34–35. Neither party cites specific facts. Deriving indisputable subjective intent is a tall order on summary

> judgment, *see Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982) ("[Q]uestions of subjective intent so rarely can be decided by summary judgment."), and Deputy Lee has not done so here.

The disputed facts as to whether Mr. Martinez posed a threat to Deputy Lee favor Mr. Martinez.

c. Resisting arrest

The parties dispute whether Mr. Martinez was resisting arrest when Deputy Lee shot him. Ms. Ibarra claims that Mr. Martinez was on the floor, with Deputy Lee crouched over him.[10] Deputy Lee, however, says that he was on his hands and knees while Mr. Martinez was standing over him.

Finally, the Fourth Amendment requires that Deputy Lee's use of force be proportionate to Mr. Martinez's resistance, *see Surat*, 52 F.4th at 1275–76—yet another disputed fact. Deputy Lee claims Mr. Martinez was consistently and violently resisting arrest, up to and including the moment Deputy Lee shot him. Ms. Ibarra claims Mr. Martinez at most maneuvered out of Deputy Lee's grip, asked why he was being arrested, and resisted being handcuffed. Also, Deputy Lee gave no warning he was going to shoot Mr. Martinez. Taking these facts in the light most favorable to Ms. Ibarra, Mr. Martinez's actions were minimal and defensive. This factor can therefore, at most,

[10] Deputy Lee argues Ms. Ibarra's description of Mr. Martinez on the floor with Deputy Lee above him is not credible in light of the physical evidence that the bullet was lodged in the wall not the floor. Aplee. Br. at 13. Ms. Ibarra argues that Mr. Martinez's upper body was propped up, which could be consistent with his lower half laying on the floor. Aplt. Br. at 23. Regardless, it is not our province to weigh the evidence, particularly because the undisputed fact that the bullet had a downward trajectory undercuts Deputy Lee's description of the scene.

provide support for a more modest use of force; it does not support Deputy Lee's use of deadly force.

* * * *

Under the *Graham* factors, a reasonable jury could conclude Deputy Lee used excessive force against Mr. Martinez. Viewed in the light most favorable to Ms. Ibarra, the summary judgment record includes evidence that Mr. Martinez was suspected of no crime, had no weapon, posed no threat to Deputy Lee, and only minimally resisted arrest. The district court erred in granting summary judgment on the excessive force claim.

C. ***Clearly Established Law***

Having concluded that a reasonable jury could find that Deputy Lee violated Mr. Martinez's constitutional rights, we turn to the second prong of the qualified immunity analysis—whether these rights were clearly established at the time of the incident. *Wilkins*, 33 F.4th at 1272.

Because the district court never addressed this issue and because the summary judgment record is rife with disputed facts, we decline to address clearly established law and remand to the district court for its initial consideration.

VI. MUNICIPAL LIABILITY CLAIM AGAINST THE COUNTY

As previously noted, the district court granted summary judgment to the County because it found no underlying constitutional violation. *See Donahue v. Wihongi*, 948 F.3d 1177, 1199 (10th Cir. 2020) (a municipality "may not be held liable where there was no underlying constitutional violation by any of its officers" (quotations omitted)).

But we have determined that a reasonable jury could find that Deputy Lee committed a constitutional violation. We therefore reverse the grant of summary judgment for the County and remand for the district court to revisit the municipal liability claim. *See Rife v. Okla. Dep't of Pub. Safety*, 854 F.3d 637, 654 (10th Cir. 2017) (remanding for district court to evaluate municipal liability claim because a reasonable jury could find constitutional violation); *Becker*, 709 F.3d at 1027 (same).

VII. STATE LAW CLAIMS AGAINST DEPUTY LEE AND THE COUNTY

The district court did not address Ms. Ibarra's state law claims, but it ostensibly granted summary judgment to both Deputy Lee and the County on all claims. The court's Opinion and Order is not clear as to whether the court declined to exercise supplemental jurisdiction over the state law claims, dismissed them on their merits, or simply didn't consider them at all. In light of this confusion, Ms. Ibarra's request to remand, and the County and Deputy Lee's failure to object to remand, we remand the state law claims for further consideration.

VIII. CONCLUSION

We reverse the district court's grant of summary judgment to Deputy Lee and to the County and remand for further proceedings consistent with this opinion.[11]

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

[11] Ms. Ibarra requests we remand with an instruction that a different judge be assigned to this case in "the interests of justice." Aplt. Br. at 52–53 (quoting *Mitchell v. Maynard*, 80 F.3d 1433, 1450 (10th Cir. 1996)). We decline to issue such an instruction.