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United States Court of Appeals
Tenth Circuit

September 1, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CHARLESETTA REDD, individually and as personal representative of the estate of Brian Simms, Jr., deceased,

Plaintiff - Appellant,

v.

CITY OF OKLAHOMA CITY, a municipality ex rel., City of OKC Police Department; PAUL GALYON; WILLIAM CITTY, Chief of Oklahoma City Police, in his official and individual capacity,

Defendants - Appellees,

and

BIG DOG HOLDING COMPANY, LLC, d/b/a Oklahoma City Public Farmers Market; 365 LIVE ENTERTAINMENT, LLC, d/b/a 365 Live Entertainment; EVENT SECURITY, LLC,

Defendants.

No. 20-6145
(D.C. No. 5:15-CV-00263-C)
(W.D. Oklahoma)

ORDER AND JUDGMENT*

Before **BACHARACH**, **EBEL**, and **McHUGH**, Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

Paul Galyon is an Oklahoma City police officer who moonlighted as a private security guard for a concert held at the Oklahoma City Farmers Public Market, along with another officer named Antonio Escobar. Off duty, but wearing their police uniforms, Officers Galyon and Escobar approached a car parked in the venue parking lot. Brian Simms, Jr., was in the driver's seat, possibly asleep. Officers Galyon and Escobar shined their flashlights into the car as they neared, and Officer Galyon asked Mr. Simms if he was well. Mr. Simms had a firearm tucked into his waistband or on his lap. According to the officers, upon being startled by their approach, Mr. Simms made a sudden movement as if to draw the pistol in his lap. Officer Galyon repeatedly shouted, "don't do it," but the officers both reported that Mr. Simms continued to reach for his weapon. Officer Galyon shot Mr. Simms nine times, killing him.

Mr. Simms's mother, Charlesetta Murray (then Charlesetta Redd), sued Officer Galyon, the Chief of Police William Citty, and the City of Oklahoma City ("OKC"), among others. She alleged, as relevant here, an excessive force claim against Officer Galyon, a failure to train and discipline claim against OKC, a failure to supervise claim against Chief Citty, and negligence claims against all three of these defendants. The district court held Ms. Murray's tort claims alleged intentional acts rather than negligence, so it dismissed them as barred by the statute of limitations applicable to intentional torts. The district court granted Officer Galyon qualified immunity on his motion for summary judgment, and then granted Chief Citty and OKC's motions for

summary judgment. Ms. Murray now appeals. The district court properly dismissed Ms. Murray's state law claims and correctly determined that Officer Galyon did not violate Mr. Simms's Fourth Amendment rights. We therefore affirm.

I. BACKGROUND

A. Factual History[1]

On the night of July 11, 2013, Officers Galyon and Escobar were off duty from their jobs as police officers for the Oklahoma City Police Department and working for Event Security, LLC, as security guards at a concert. They were wearing their police uniforms, including their OKC-assigned weapons. The Police Department authorized its officers to work "this job and others like it." App. Vol. 6 at 1303. The business operating the concert venue, Big Dog Holding Co., LLC, hired Event Security to provide security services. In turn, Event Security provided a number of unarmed security personnel and two armed personnel—Officers Galyon and Escobar.

While conducting a routine patrol of the parking lot, Officers Galyon and Escobar noticed an Oldsmobile Cutlass parked "cockeyed" and "straddling a parking space." *Id.* at 1443. Although it was nighttime, the parking lot was relatively well lit. Officer Galyon

[1] "In reviewing a motion for summary judgment, we review the facts and all reasonable inferences those facts support in the light most favorable to the nonmoving party." *Doe v. Univ. of Denver*, 952 F.3d 1182, 1189 (10th Cir. 2020) (quotation marks omitted). Because the parties purport to dispute certain facts, this factual recitation recounts the record evidence, which primarily comes from Officers Galyon's and Escobar's accounts. We determine whether there is a genuine, material dispute as to these facts in the discussion section as necessary.

approached the vehicle from the passenger side front and noticed Mr. Simms in the driver's seat. When he was roughly twenty feet from the vehicle, Officer Galyon could tell Mr. Simms was a Black male, was sitting upright, and had his eyes closed.

Officers Galyon's and Escobar's accounts of the encounter differ in some respects. Officer Galyon claimed that, from five or six feet away, he observed Mr. Simms's hands by his side and that Mr. Simms "looked like he was asleep." *Id.* at 1444. But Officer Escobar indicated Mr. Simms's hands were "up in the vicinity of the steering wheel." *Id.* at 1463. Shining a flashlight into the car, Officer Galyon asked Mr. Simms: "Hey, man, are you okay or are you all right" or "[s]omething to that effect." *Id.* at 1445. Officer Escobar was also shining a flashlight into the car. While speaking, Officer Galyon noticed a pistol in Mr. Simms's waistband. Officer Escobar testified the firearm was in Mr. Simms's lap, but not necessarily in his waistband.

According to Officer Galyon, Mr. Simms immediately opened his eyes, looked at Officer Galyon, and put his hand on the butt of the pistol. Officer Galyon stated he perceived Mr. Simms was beginning to draw the pistol. Officer Galyon readied his own firearm at the same time, which obstructed his view of Mr. Simms's firearm, but he saw Mr. Simms's shoulder, elbow, and head continue to move in a manner consistent with drawing the firearm.

Officer Escobar never saw Mr. Simms grab the pistol, but he saw Mr. Simms bring his hands down toward it. He testified that Mr. Simms "moved his hands slowly towards the weapon" but then made "a sudden, a faster movement towards the direction of the weapon" which caused the entire car to move. *Id.* at 1353. Officer Escobar moved

away from the vehicle when he saw Mr. Simms reach for the gun, and thus he could not see if Mr. Simms's hand touched the gun.

Officer Galyon began to say "don't do it" repeatedly, but by the third repetition, Officer Galyon had his firearm pointed at Mr. Simms and started firing. Officer Galyon fired nine shots, killing Mr. Simms. Officer Galyon could not see Mr. Simms point his firearm at Officer Galyon, and Mr. Simms never fired. *Id.* at 1448 (Officer Galyon agreeing "that [he] never saw [Mr. Simms] point the gun at [him]"). But both officers reported Mr. Simms was making a sudden movement consistent with drawing the gun.

After the shooting, Officer Galyon contacted on-duty officers and began to secure the scene. In a recorded interview, Officer Galyon stated he secured Mr. Simms's pistol for safety reasons, but could not initially tell its position, including "if the trigger bar was exposed, or if his finger was in there or what." App. Vol. 3 at 623; *see also id.* at 644 ("[H]is left hand was just above his left thigh, about mid-thigh, and the gun was partially under his left thigh with his left hand over it."); *id.* at 656 ("[H]is hand wasn't really gripping" the firearm). At his deposition, Officer Galyon claimed Mr. Simms's finger was partially on the trigger of the pistol and the pistol itself was "flipped upside down pointing towards the passenger side" once the firing ended. App. Vol. 6 at 1449. Officer Galyon removed the pistol from the vehicle's interior and placed it on the vehicle's roof.

B. Procedural History

Ms. Murray filed suit on March 13, 2015. Her operative complaint alleged claims against Big Dog Holding Co.; 365 Live Entertainment, LLC (the company that promoted the concert); Event Security, LLC; OKC; Chief Citty; and Officer Galyon. As relevant

here, Count I alleges Officer Galyon, OKC, and Chief Citty were negligent in failing to protect Mr. Simms from excessive force and wrongful death; Count II alleges Officer Galyon acted with gross negligence in shooting Mr. Simms; Count III alleges, under 42 U.S.C. § 1983, that Officer Galyon violated the Fourth Amendment by approaching Mr. Simms without probable cause and by using excessive force, and also alleges OKC and Chief Citty are liable under § 1983 for Officer's Galyon's Fourth Amendment violations due to their adoption of unconstitutional polices and their failure to train, supervise, discipline, screen, or hire officers properly; and Count IV alleges OKC is liable on the tort claims under a theory of respondeat superior (i.e., Counts I and II).

OKC, Chief Citty, and Officer Galyon filed motions for summary judgment. Ms. Murray filed a motion for partial summary judgment against Officer Galyon only. The district court granted Officer Galyon, OKC, and Chief Citty's respective motions for summary judgment and denied Ms. Murray's motion for partial summary judgment. Ms. Murray appeals this decision.

II. DISCUSSION

Ms. Murray appeals the district court's grant of summary judgment to Officer Galyon, Chief Citty, and OKC. She argues the district court erred in: (1) holding her complaint alleged state law claims for intentional torts that were time-barred; (2) not concluding Officer Galyon committed a Fourth Amendment violation by approaching Mr. Simms without reasonable suspicion; (3) not concluding Officer Galyon committed a Fourth Amendment violation by using excessive force; and (4) rejecting her supervisory

liability claims against OKC and Chief Citty under § 1983 on the same basis. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.[2]

We begin our discussion with a review of the summary judgment standard. We then consider whether that standard has been met with respect to Ms. Murray's tort claims. Like the district court, we view the tort claims as being based on Officer Galyon's intentional shooting of Mr. Simms, and we therefore affirm the district court's dismissal of the claims as barred by application of Oklahoma's one-year limitations period for intentional torts. Turning next to Ms. Murray's § 1983 claims, we conclude Officer Galyon did not violate Mr. Simms's constitutional rights. Under the facts taken in the light most favorable to Ms. Murray, neither Officer Galyon's approach of Mr. Simms without probable cause, nor his ultimate use of deadly force, violated Mr. Simms's Fourth Amendment rights. Thus, we affirm.

A. Standard of Review

We "review [a] district court's order granting . . . summary judgment de novo," applying "the same legal standards the district court applied under Federal Rule of Civil Procedure 56(a)." *Jordan v. Maxim Healthcare Servs., Inc.*, 950 F.3d 724, 730 (10th Cir. 2020) (internal quotation marks omitted). This entails "draw[ing] all reasonable inferences and resolv[ing] all factual disputes in favor of the non-moving party." *Id.* We

[2] This matter was not final when this appeal was originally filed, but subsequent actions have resolved all nonfinal claims and we may now exercise jurisdiction. *Lewis v. B.F. Goodrich Co.*, 850 F.2d 641, 645 (10th Cir. 1988) (en banc) (holding that where "the [non-final] claims were effectively dismissed after the notice of appeal was filed, . . . the notice of appeal, filed prematurely, ripens and saves the appeal.").

"will affirm a grant of 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.'" *Id.* (quoting Fed. R. Civ. P. 56(a)).

"[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (emphases in original). "A fact is material if, under the governing law, it could have an effect on the outcome of the lawsuit. A dispute over a material fact is genuine if a rational jury could find in favor of the nonmoving party on the evidence presented." *Doe v. Univ. of Denver*, 952 F.3d 1182, 1189 (10th Cir. 2020) (quotation marks omitted). If the moving party meets its burden, the nonmoving party "must do more than refer to allegations of counsel contained in a brief to withstand summary judgment. Rather, sufficient evidence (pertinent to the material issue) must be identified by reference to an affidavit, a deposition transcript or a specific exhibit incorporated therein." *Adams v. Am. Guarantee & Liab. Ins. Co.*, 233 F.3d 1242, 1246 (10th Cir. 2000) (quotation marks omitted).

B. State Law Tort Claims

As indicated, Ms. Murray's operative complaint alleged tort claims against Officer Galyon, OKC, and Chief Citty, which she framed as sounding in negligence and gross negligence. The district court held Ms. Murray's state tort allegations were "substantively pleading a cause of action for assault and battery" even though she framed them as sounding in negligence and gross negligence. App. Vol. 7 at 1770. Under

Oklahoma law, most actions for an intentional tort—including assault and battery—have a one-year statute of limitations, while an action for negligence has a two-year statute of limitations. Okla. Stat. tit. 12, § 95. Ms. Murray filed suit more than one year, but less than two years, after the shooting. Accordingly, if the district court properly construed her tort claims as claims for assault and battery, they are time-barred. But if they should have been construed as claims for negligence, the claims would not be time-barred as they were brought within the two-year limitations' period for negligence. Ms. Murray argues the district court was not permitted to reformulate her claims as intentional torts. Officer Galyon contends the district court properly concluded the substance of Ms. Murray's claims sounded in assault and battery. We agree with Officer Galyon.

1. Legal Standards

Federal courts considering state law claims under their supplemental jurisdiction apply the substantive law of the forum state. *Sawyers v. Norton*, 962 F.3d 1270, 1287 n.16 (10th Cir. 2020). "When . . . called upon to interpret state law, [a] federal court must look to rulings of the highest state court, and, if no such rulings exist, must endeavor to predict how that high court would rule." *Amparan v. Lake Powell Car Rental Cos.*, 882 F.3d 943, 947 (10th Cir. 2018) (quotation marks omitted). Attempting to predict how the state's highest court would rule in the absence of an on-point decision requires examining "the decisions of the state's intermediate court of appeals," which should not "be disregarded . . . unless [the federal court] is convinced by persuasive data that the highest court of the state would decide otherwise." *Id.* at 947–48 (internal quotation marks omitted). Other helpful information includes decisions from other states with similar laws

"and the general weight and trend of authority in the relevant area of law." *Id.* at 948 (quotation marks omitted). With these principles in mind, we turn to the Oklahoma law at issue.[3]

"Oklahoma jurisprudence uses the transactional approach" to define a cause of action. *Chandler v. Denton*, 741 P.2d 855, 862–63 (Okla. 1987) (emphasis omitted). Under this approach, "[t]he operative event that underlies a party's claim delineates the parameters of his cause of action," ensuring "that litigants will be able to assert different theories of liability without violating the purposes of the statute of limitations." *Id.* at 863. While litigants are thus free to allege different theories arising from one event, the Supreme Court of Oklahoma has explained that, "[i]n determining the character of the action, we look to the substance of the entire pleading, and not to the mere formal language in which it is expressed." *Ganas v. Tselos*, 11 P.2d 751, 755 (Okla. 1932) (quoting *Ft. Smith & W.R. Co. v. Ford*, 126 P. 745 (Okla. 1912)). Applying this precedent in *Kimberly v. DeWitt*, 606 P.2d 612, 614 (Okla. Civ. App. 1980), the Oklahoma Court of Appeals held that even where a "petition alleges 'gross negligence and violence,'" the plaintiff pleads "a cause of action for assault and battery" if "the substance of the pleading states only a cause of action for assault and battery." *See also Thomas v.*

[3] Ms. Murray argues *Benavidez v. United States* is supportive of her position. 177 F.3d 927 (10th Cir. 1999). *Benavidez*, however, considered "a matter of federal law" and rested upon "[a] review of federal and state court cases." *Id.* at 929. Here, however, we must apply Oklahoma law, *Sawyers v. Norton*, 962 F.3d 1270, 1287 n.16 (10th Cir. 2020), and therefore we cannot rely on *Benavidez*'s determination of federal law over Oklahoma courts' interpretations of Oklahoma law, *see Amparan v. Lake Powell Car Rental Cos.*, 882 F.3d 943, 947 (10th Cir. 2018).

Casford, 363 P.2d 856, 858 (Okla. 1961) ("*Casford*") (holding a plaintiff could not rely on the general tort statute where he "admit[ted] the injuries were the direct and proximate result of an assault and battery").

2. Analysis

The operative complaint alleges Officer Galyon "was negligent in that he failed in his duty to protect the decedent from excessive force under color of law, unlawful assault, and wrongful death . . . [and] in his disregard for" OKC's policies "designed to prevent the use of excessive force." App. Vol. 1 at 38. The gross negligence allegations are that Officer Galyon exhibited gross negligence "in shooting the decedent [repeatedly] at close range and killing him." *Id.* at 40.

These allegations do not state a claim for negligence under Oklahoma law. As the Oklahoma Supreme Court has explained, "[n]egligence excludes the idea of intentional wrong and when 'a person wills to do an injury, he ceases to be negligent.'" *Broom v. Wilson Paving & Excavating, Inc.*, 356 P.3d 617, 629 (Okla. 2015) (quoting *St. Louis & S.F.R. Co. v. Boush*, 174 P. 1036, 1040 (Okla. 1918)). The crux of Ms. Murray's allegations is that Officer Galyon acted with negligence and gross negligence by intentionally shooting Mr. Simms, but, under *Broom*, that cannot be so.

Ms. Murray resists this conclusion by relying on *Chandler v. Denton*, and *Tucker v. City of Oklahoma City*, No. CIV-11-922-D, 2013 WL 5303730 (W.D. Okla. Sep. 20, 2013). But Ms. Murray misunderstands these cases. *Chandler* and *Tucker* are both consistent with the proposition that, under Oklahoma law, a plaintiff may raise as many

theories arising out of the underlying conduct as the conduct supports—but she may *only* raise claims the alleged conduct supports.

In *Chandler*, the Oklahoma Supreme Court reaffirmed the principle "that litigants will be able to assert different theories of liability" arising out of the same operative event "without violating the purposes of the statute of limitations." 741 P.2d at 863. In *Tucker*, the Western District of Oklahoma rejected the argument that Oklahoma law forbids a plaintiff from pursuing a tort theory supported by the factual allegations, even if done to avoid a statute of limitations that would bar another type of tort claim also supported by his factual allegations. *Tucker*, 2013 WL 5303730 at *18. The court distinguished *Casford* and *Kimberly*—two other Oklahoma cases—stating those cases do not require that "a plaintiff must pursue an assault and battery claim exclusively, even where an alternative legal theory is available." *Id.* Rather, the court explained that the allegations in those cases "stated only a claim of assault and battery as to the[] defendants." *Id.* Officer Galyon responds to Ms. Murray's citation to *Tucker* by raising *Molitor v. Mixon*, No. CIV-16-1202-HE, 2016 WL 9050778 (W.D. Okla. Nov. 21, 2016). There—consistent with *Chandler*, *Tucker*, *Casford*, and *Kimberly*—the court held the allegations "all involve[d] intentional conduct," and, "[a]s a result, no claim for negligence [was] stated." *Id.* at *2.

Ms. Murray could bring other tort claims related to the shooting if—and only if—the underlying factual conduct supports them. But here, the allegations and undisputed facts are that Officer Galyon intentionally shot Mr. Simms. Because *Broom* instructs that

under Oklahoma law intentionality is incompatible with negligence, Ms. Murray cannot proceed on a negligence theory.

3. Ms. Murray's Counterarguments

Ms. Murray asserts several counterarguments in reply. None are availing.

First, she contends the court must consider Officer Galyon's actions occurring before and after the decision to fire in its assessment of whether his broader conduct was negligent. The operative complaint, however, is not so broad. It alleges negligence and gross negligence only as to Officer Galyon's shooting of Mr. Simms. App. Vol. 1 at 38–40 (discussing unlawful assault, use of deadly force, and repeated shooting as the basis for these claims). Thus, the gravamen of all her tort claims is the act of shooting itself. *See Lawmaster v. Ward*, 125 F.3d 1341, 1351 n.4 (10th Cir. 1997) (holding this court focuses on the claims in the complaint). Under Oklahoma law, Ms. Murray cannot proceed on the theory that Officer Galyon exhibited negligence or gross negligence via his conduct leading up to the shooting, where the allegations of the complaint are that Officer Galyon committed a tort by intentionally firing at Mr. Simms.

Second, Ms. Murray argues that while Officer Galyon intended to fire the initial shot, he did not intend the result. Reply Br. at 7 ("[Officer] Galyon may have intended the initial act of firing his weapon[,] but that is where his intent stopped." (emphasis omitted)). She then suggests that "intend[ing] an act without intending its consequences" can constitute gross negligence, rather than an intentional tort. *Id.* (emphasis omitted); *see also id.* at 5–6 ("There is one fatal flaw in the arguments of Galyon and the District Court below, to wit: relying upon the premise that an intentional act must always equal only an

intentional tort. . . . [Officer] Galyon's intent to discharge his weapon, aimed at Simms, does not, by itself, equate to an intentional tort." (emphasis omitted)). In support of this argument, she cites the Oklahoma Supreme Court's decision in *Graham v. Keuchel*. 847 P.2d 342, 361–62 (Okla. 1993).

We are not convinced *Graham* supports Ms. Murray's position. There, the Oklahoma Supreme Court held that gross negligence may be equivalent to willful and wanton conduct for purposes of imposing punitive damages, not with respect to liability. *Id.* at 361–62. Even if Ms. Murray were correct that Oklahoma law supported this proposition, however, her argument would nonetheless fail because the facts here cannot be construed as negligence. This court has previously considered whether Officer Galyon acted intentionally, and concluded he did. *Event Security, LLC v. Essex Insurance Co.*, 715 F. App'x 853, 856 (10th Cir. 2017) (unpublished). There, Event Security and Ms. Murray sought a declaration that Essex Insurance Company was required to defend and indemnify Event Security in this suit. *Id.* In our unpublished decision, we explained, "[f]or a civil battery, Oklahoma Uniform Civil Jury Instruction No. 19.6 requires that a defendant intend to make harmful or offensive contact with the plaintiff, and does make that contact. When [Officer] Galyon fired his gun, he intended to shoot [Mr.] Simms." *Id.*

Officer Galyon does not suggest Ms. Murray is precluded by this decision, and it is unpublished, so its value is only persuasive. *See* 10th Cir. R. 32.1(A) ("Unpublished decisions are not precedential, but may be cited for their persuasive value."); *see also* Fed. R. App. P. 32.1. We are persuaded, however, by our prior analysis of the circumstances underlying this case. Nothing in the record or argument here suggests a

different conclusion. Indeed, Ms. Murray presents no evidence to dispute that Officer Galyon pointed his firearm at Mr. Simms and fired repeatedly until he felt the danger had passed. There is no indication that Officer Galyon was indifferent to or disregarded the consequences of his actions. Rather, per his undisputed testimony, Officer Galyon intended to shoot Mr. Simms until Officer Galyon determined Mr. Simms was incapable of returning fire. These allegations could state a claim for assault and battery, but not for negligence or gross negligence. *See Kimberly*, 606 P.2d at 614; *Casford*, 363 P.2d at 858.

Third, Ms. Murray suggests Officer Galyon did not necessarily intend every one of the nine shots he fired. She presents no evidence, however, that Officer Galyon's continued firing was unintentional. Ms. Murray notes the absence of testimony that Officer Galyon planned to fire nine shots, specifically, but the record reveals he intended to keep firing until he determined Mr. Simms was no longer a threat. App. Vol. 5 at 1142 (Officer Galyon stating "I engaged him, the threat stopped and then I stopped firing . . . it was just engage, boom, boom, boom, and then I stopped"); App. Vol. 6 at 1511 (Officer Galyon stating "it was one continuous engagement until I felt the threat was diminished").[4]

[4] We discuss, *infra*, footnote 10, Ms. Murray's contention that Officer Galyon continued firing after any threat had passed. None of the arguments she makes on that front, however, suggest Officer Galyon did not intentionally fire each shot, nor does she present evidence calling into question his subjective belief that each shot was necessary.

Finally, Ms. Murray asserts police officers should be held to a higher standard of care. Reply Br. at 10 (stating "[Officer] Galyon is an experienced and trained professional law enforcement officer whose conduct and behavior is held to a higher standard than an ordinary person"). The level of care required for a negligence or gross negligence action does not alter our analysis because the allegations here support only an intentional tort.

In sum, none of Ms. Murray's counterarguments can overcome that her allegations and the material facts supported by record evidence state only claims for intentional torts.

* * *

The district court thus properly characterized Ms. Murray's state law tort claims as alleging assault and battery under Oklahoma law, and it correctly noted the applicable statute of limitations for such claims is one year. We therefore affirm the district court's dismissal of these claims—which were brought more than one year after the shooting occurred—as time barred.

C. § 1983 Claims Against Officer Galyon

Ms. Murray brings a claim against Officer Galyon pursuant to 42 U.S.C. § 1983, arguing he violated Mr. Simms's Fourth Amendment rights in two distinct ways: (1) by approaching the car and beginning a seizure without reasonable suspicion and (2) by using excessive force.[5] One question central to resolving both of Ms. Murray's Fourth

[5] "To state a claim under § 1983, a plaintiff must allege that the claimed deprivation was committed by a person acting under color of state law." *Haines v. Fisher*, 82 F.3d 1503, 1508 (10th Cir. 1996). This can be a difficult question when it comes to acts of off-duty police officers. *See id.* But we need not consider it here; Officer Galyon

Amendment theories is if there is a genuine issue of material fact as to whether Officer Galyon reasonably perceived that Mr. Simms had begun to draw his firearm. We therefore address that question first, concluding that Officer Galyon's perception was indeed reasonable. With that conclusion in mind, we proceed to analyze Ms. Murray's Fourth Amendment claim and determine Officer Galyon did not violate Mr. Simms's Fourth Amendment rights.

1. Reasonable Perception

Key to analyzing Ms. Murray's Fourth Amendment claims is the question whether Officer Galyon drew and shot his weapon based upon the reasonable perception that Mr. Simms was drawing his pistol. Officer Galyon need not have been correct that Mr. Simms was drawing the pistol; the question for Fourth Amendment purposes is whether his "assessment [was] objectively reasonable." *Bond v. City of Tahlequah*, 981 F.3d 808, 822 (10th Cir. 2020) (quotation marks omitted), *petition for cert. filed* (U.S. June 1, 2021) (No. 20-1668). For the reasons we now explain, we conclude it was.

"[T]he court may not simply accept what may be a self-serving account by the police officer." *Pauly v. White*, 874 F.3d 1197, 1218 (10th Cir. 2017) (quoting *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)). "[S]ince the victim of deadly force is unable to testify, courts should be cautious on summary judgment to ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the

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conceded he was acting under color of state law, App., Vol. VI at 1484 n.1 ("Defendant Galyon does not dispute that he was acting under color of law at all times during his encounter with . . . Brian Simms.").

person shot dead—is unable to testify." *Id.* (quoting *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999)). Thus, this court carefully scrutinizes "the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider[s] whether this evidence could convince a rational factfinder that the officer acted unreasonably." *Estate of Smart ex rel. Smart v. City of Wichita*, 951 F.3d 1161, 1170 (10th Cir. 2020) (quotation marks omitted).

Viewing the evidence in the light most favorable to Ms. Murray as the nonmoving party, no rational jury could find Officer Galyon did not reasonably perceive Mr. Simms was drawing his firearm. Although there are some discrepancies between Officer Galyon's and Officer Escobar's testimony, they are consistent on the key point: Mr. Simms was reaching for his firearm. No record evidence, direct or circumstantial, suggests otherwise.

Ms. Murray resists this conclusion by suggesting, only in her supplemental brief, that self-serving testimony cannot support a grant of summary judgment. She therefore asks this court to ignore Officer Galyon's deposition testimony. But Ms. Murray points us to no evidence that would suggest Mr. Simms did not reach for the firearm. Moreover, the record contains more than Officer Galyon's testimony. Officer Escobar, too, testified that Mr. Simms appeared to be going for his pistol. App. Vol. 4 at 1018 (Officer Escobar stating he did not "recall [Mr. Simms] touching the gun" but agreeing that "his hands were coming down toward the gun"); *id.* at 1021 ("I didn't see him touch the gun, no."); App. Vol. VI at 1353 ("[H]e moved his hands slowly towards the weapon").

At oral argument, Ms. Murray's counsel directed us to *Estate of Smart* in furtherance of her argument that we should disregard Officer Galyon's testimony. Again, however, a careful reading of this opinion does not support Ms. Murray's request that we disregard Officer Galyon's testimony. It is true that in *Estate of Smart* we noted, because the victim of deadly force is unable to testify, "we must look to the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably." 951 F.3d at 1170 (internal quotation marks omitted). But there, we weighed conflicting record evidence, including "the plaintiffs' forensic evidence, the multiple eyewitnesses [favorable to the plaintiff] (particularly [one witness] who was standing only a few feet from [the decedent]), and the testimony from [the decedent's] longtime friend . . . that [the decedent] never owned or carried a gun" against the officers' testimony. *Id.*

There is no evidence here that contradicts the officers' testimony on the essential point that Mr. Simms was making a rapid movement as though to draw a firearm on Officer Galyon. On summary judgment, a party must produce evidence, not "mere speculation, conjecture, or surmise." *Pioneer Centres Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1334 (10th Cir. 2017) (quotation marks omitted). The factfinder must be able to infer facts, not engage in "speculation and conjecture that renders [the factfinder's] findings a guess or mere possibility." *Id.* (quotation marks omitted) (alteration in original). Were there circumstantial evidence favoring Ms. Murray, our precedent instructs that we would be required to scrutinize it

closely. *See, e.g.*, *Est. of Smart*, 951 F.3d at 1170; *Pauly*, 874 F.3d at 1218. But where, as here, there is not, we will not assume the jury could simply speculate that the officers might be lying.

The material facts supported by record evidence would require a factfinder to find Officer Galyon reasonably perceived Mr. Simms was drawing his firearm.

2. Unreasonable Approach Theory

Ms. Murray argues Officer Galyon violated Mr. Simms's Fourth Amendment rights by "approaching [his] vehicle in an investigatory manner *without reasonable suspicion*." Appellant Br. at 26 (emphasis in original). We cannot agree. Officer Galyon's approach was a consensual encounter that did not require any suspicion of criminal activity under the Fourth Amendment.

"[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Such interactions "are referred to as consensual encounters which do not implicate the Fourth Amendment." *United States v. Hernandez*, 847 F.3d 1257, 1263 (10th Cir. 2017). What makes an encounter "a consensual encounter is that, notwithstanding the officer's questions . . . , 'a reasonable person would feel free to disregard the police and go about his business.'" *Mglej v. Gardner*, 974 F.3d 1151, 1163 (10th Cir. 2020) (quoting *Bostick*, 501 U.S. at 434), *cert. denied* No. 20-1082, 2021 WL 1520808 (U.S. Apr. 19, 2021). The Supreme Court has held this standard is satisfied where there "was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of

weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice." *United States v. Drayton*, 536 U.S. 194, 204 (2002).

We recently considered a Fourth Amendment challenge to a police encounter in *United States v. Tafuna*, 5 F.4th 1197 (10th Cir. 2021). As we explained there, factors relevant to determining if an encounter is consensual include:

> (1) the location of the encounter, particularly whether it occurred in an open place within the view of people other than officers or a small, enclosed space without other members of the public nearby; (2) the number of officers involved; (3) whether an officer touched the defendant or physically restrained the defendant's movements; (4) the officer's attire; (5) whether the officer displayed or brandished a weapon; (6) whether the officer used aggressive language or tone of voice that indicated compliance with a request might be compelled; (7) whether and for how long the officer retained the defendant's personal effects, such as identification; and (8) whether the officer advised the defendant that he had the right to terminate the encounter.

Id. at 1201.

In *Tafuna*, an officer drove a marked police vehicle and parked it near the defendant's car, angled to face the driver's side of the car, but not obstructing its path. *Id.* The officer shone a bright light from his takedown lights—without turning on his emergency lights—to illuminate the vehicle. *Id.* But the encounter was in an open parking lot and the officer issued no commands. *Id*. at 1202. The officer then "exited his vehicle, approached the parked car on foot, and asked the car's occupants for their names and birth dates." *Id.* at 1202. Although he was in a police uniform—with a visible, holstered, firearm—and did not tell the defendant of his right to terminate the encounter, we held the encounter was consensual. *Id.* at 1202–03. Factors weighing toward this conclusion included that the officer (a) did not prevent the defendant's car from leaving

by blocking it, (b) was the only one on the scene and was not threatening, (c) did not touch any of the occupants of the vehicle, (d) did not "use[] intimidating language, [speak] with an aggressive tone, or issue[] any verbal commands," (e) asked rather than ordered the occupants to state their identifying information, and (f) "did not obtain or retain" the defendant's personal effects. *Id.* at 1203.

Officer Galyon's approach of Mr. Simms's vehicle easily falls under the rubric of a consensual encounter in light of *Tafuna*. Officer Galyon approached Mr. Simms's vehicle in an open parking lot in a nonthreatening manner, accompanied by only one other officer. Neither officer touched Mr. Simms or restrained his movement in their approach. Officer Galyon testified that he used an "[a]uthoritative" but "[n]ot overbearing," rather than a "conversational," tone in his initial utterance. App. Vol. 6 at 1313. And his actual words—"Hey, man, are you okay or are you all right," *id.*—are not threatening or a command. And, as in *Tafuna,* the officers here did not take possession of any of Mr. Simms's personal effects. While both officers wore uniforms and sidearms that may have been visible, were shining lights into the vehicle, and neither told Mr. Simms he was free to leave, their approach on foot was much less authoritative than the approach in *Tafuna* by police car with takedown lights. *Tafuna*, 5 F.4th at 1202. As in that case, a reasonable person under the present facts would feel free to leave. And there was absolutely no reason to expect a violent response to an inquiry as to Mr. Simms's well-being.

To be sure, a seizure began when Officer Galyon drew his firearm and started saying "don't do it" in "[a]s stern and authoritative" a tone as he could. App. Vol. 6 at

1327. As Officer Galyon points out, however, an officer "has a right to take reasonable steps to protect himself . . . regardless of whether probable cause to arrest exists." *Thomas v. Durastanti*, 607 F.3d 655, 668 (10th Cir. 2010) ("*Durastanti*") (alteration in original) (quotation marks omitted). Thus, once Officer Galyon saw, or reasonably believed he saw, Mr. Simms reach for a firearm, no constitutional issue arose in his commencing a seizure.

Officer Galyon did not violate Mr. Simms's Fourth Amendment rights by approaching him to initiate a consensual encounter. Once Officer Galyon reasonably perceived Mr. Simms had reached for his firearm, Officer Galyon's decision to initiate a seizure by drawing his own weapon in an attempt to protect himself did not violate Mr. Simms's Fourth Amendment rights. Accordingly, we affirm the district court's summary judgment in favor of Officer Galyon on this claim.

3. Excessive Force Theory

Ms. Murray next contends Officer Galyon used excessive force in violation of the Fourth Amendment when he shot Mr. Simms. Again, we disagree. To place our analysis in context, we begin by explaining the legal background governing excessive force claims. Next, we apply the relevant legal factors to the facts of this case to determine whether the force was excessive. Because, as we have previously explained, the record evidence compels the conclusion that Officer Galyon reasonably perceived Mr. Simms was drawing a firearm, Officer Galyon's decision to shoot Mr. Simms did not violate the Fourth Amendment. We also conclude that Officer Galyon did not recklessly or deliberately create the need for deadly force.

a. Legal Framework

"Excessive force claims can be maintained under the Fourth, Fifth, Eighth, or Fourteenth Amendment, depending on where the plaintiff finds himself in the criminal justice system at the time of the challenged use of force." *McCowan v. Morales*, 945 F.3d 1276, 1282–83 (10th Cir. 2019) (internal quotation marks omitted). "Where, as here, the alleged excessive force occurred prior to arrest, it is the Fourth Amendment that applies." *Bond*, 981 F.3d at 815.

An excessive force claim under the Fourth Amendment requires the plaintiff show an unreasonable seizure. *Durastanti*, 607 F.3d at 663. A seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied." *Scott v. Harris*, 550 U.S. 372, 381 (2007) (quoting *Brower v. County of Inyo*, 489 U.S. 593, 596–97 (1989)). This includes "apprehension by the use of deadly force." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

Reasonableness in the context of the Fourth Amendment requires determining "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989).[6] This analysis requires considering the

[6] Ms. Murray makes several arguments regarding Officer Galyon's underlying motivation. *E.g.*, Appellant Br. at 29 ("[Officer] Galyon gathered up his biases and went looking for an altercation . . . [A]rmed with his presumptions and his service weapon, once [Officer] Galyon decided to approach [the] car, the outcome was inevitable."); *id.* at 42–43 ("[T]he mere presence of a gun caused [Officer] Galyon to develop 'tunnel vision' and immediately sens[e] . . . that he was 'already in a gun battle' or a shootout.'" (quoting App. Vol. 3 at 648–49)). These arguments cannot succeed under *Graham*'s instruction to focus on whether Officer Galyon's actions were objectively reasonable, without regard to

"totality of the circumstances," *Garner*, 471 U.S. at 8–9, bearing in mind that courts "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation," *Graham*, 490 U.S. at 396–97.

Graham outlined three specific factors for consideration: (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." 490 U.S. at 396. These factors "are applied to conduct which is immediately connected to the use of deadly force," so this court also looks at "conduct prior to the seizure." *Bond*, 981 F.3d at 816 (internal quotation marks omitted). Thus even if "an officer uses deadly force in response to a clear threat of such force being employed against him," he may be liable if he "approached the situation in a manner [he] knew or should have known would result in escalation of the danger." *Id.*

b. Analysis

We evaluate each of these factors in turn, with respect to Officer Galyon's use of deadly force. We then consider his conduct leading up to his use of deadly force.

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his underlying motivation. *Graham v. Connor*, 490 U.S. 386, 397 (1989). To the extent Ms. Murray intends to apply these contentions to her argument about Officer Galyon approaching the vehicle, they are nonetheless foreclosed. *United States v. Knights*, 534 U.S. 112, 122 (2001) ("[W]e have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers." (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)).

i. Severity of the crime

Where there is reasonable suspicion of criminal activity, we have indicated the first *Graham* factor turns on whether the suspected crime was a felony or a misdemeanor. *Vette v. Sanders*, 989 F.3d 1154, 1170 (10th Cir. 2021). If a felony, the factor weighs in favor of the officer; if a misdemeanor, it weighs in favor of the plaintiff. *Id.* Here, there was nothing to support a reasonable suspicion of *any* criminal activity, let alone felonious activity.

Officer Galyon disagrees and argues the first *Graham* factor—"the severity of the crime at issue"—favors him because the circumstances gave rise to a reasonable suspicion that an intoxicated individual was in control of a motor vehicle or was engaged in "gang activity." Galyon Br. at 35. Specifically, he contends the poor parking of Mr. Simms's car and the availability of alcohol at the concert supported these suspicions.

But reasonable suspicion requires "something more than an inchoate and unparticularized suspicion or hunch." *United States v. Martinez*, 910 F.3d 1309, 1313 (10th Cir. 2018) (quotation marks omitted). Officer Galyon fails to persuasively explain how the circumstances he describes could support anything more than a mere hunch that criminal activity was afoot. Even if the facts he highlights could support his suspicion of criminal activity, however, this factor would still weigh in favor of Ms. Murray. Physical control of a parked motor vehicle while intoxicated is a misdemeanor for the first offense, Okla. Stat. Ann. tit. 47, § 11-902(C)(1), and the record is devoid of facts from which Officer Galyon could conclude Mr. Simms was a repeat offender. And Officer Galyon's assertions of suspected "gang activity" are supported by nothing but speculation and are

so vague that they cannot support suspicion of felony as opposed to misdemeanor gang activity.

Accordingly, the first *Graham* factor militates toward finding a constitutional violation.[7]

ii. Immediacy of threat

The second *Graham* factor, "whether the suspect poses an immediate threat to the safety of the officers or others," *Graham*, 490 U.S. at 396, "is undoubtedly the 'most important' and fact intensive factor in determining the objective reasonableness of an officer's use of force," *Bond*, 981 F.3d at 820 (quotation marks omitted). "This is particularly true in deadly force cases, because deadly force is justified only if a reasonable officer in the officer's position would have had probable cause to believe that there was a threat of serious physical harm to himself or others." *Bond*, 981 F.3d at 820 (internal quotation marks omitted). In *Estate v. Larsen ex rel. Sturdivan v. Murr*, this court set out a list of non-exclusive factors to consider: "(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect." 511 F.3d 1255, 1260 (10th Cir. 2008).

[7] Officer Galyon states, "if it reasonably appears to the officer that an individual is about to shoot at close range, it becomes insignificant whether the individual was originally suspected of a minor crime or even no crime at all." Galyon Br. at 40. This is true, but under such circumstances, the second *Graham* factor is typically controlling. *See Est. of Valverde ex rel. Padilla v. Dodge*, 967 F.3d 1049, 1061 (10th Cir. 2020).

1) Order and compliance

Ms. Murray argues the first *Estate of Larsen* factor—whether the officers ordered the suspect to drop his weapon and the suspect's compliance with police commands—militated for a finding of excessive force because (1) the phrase "'Don't do it' is ambiguous and could mean any number of things," (2) Mr. Simms was not given an opportunity to comply before being shot, and (3) Officers Galyon and Escobar did not identify themselves as police officers. Appellant Br. at 36. Officer Galyon responds that no warning was necessary and "don't do it" was an adequate warning, regardless.

We are not convinced the command "don't do it" under the present circumstances was ambiguous. At the very least, it is an order to stop doing something. And in the context of a person armed with and apparently drawing a gun, the order was sufficiently clear: do not use your firearm. Officer Galyon therefore gave a command which, in the context of Officer Galyon unholstering his firearm, sufficiently warned Mr. Simms that lack of compliance might be met with deadly force.

Ms. Murray also argues that Mr. Simms did not have the opportunity to comply with the order. Whether or not Officer Galyon gave Mr. Simms a reasonable amount of time to comply must be considered in light of Officer Galyon's reasonable perception that Mr. Simms was drawing a pistol on him. Where Officer Galyon's delay could result in his own death or serious injury, his decision to fire without allowing Mr. Simms further time to comply was reasonable.[8]

[8] We do not discount the possibility that Officer Galyon could have defused the situation by identifying himself when Mr. Simms moved suddenly as though to draw the

Thus the first *Estate of Larsen* factor does not suggest the use of force was unreasonable.

2) Remaining *Estate of Larsen* factors

The remaining *Estate of Larsen* factors are: "(2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect." 511 F.3d at 1260. Each of these factors weighs in Officer Galyon's favor. In *Estate of Valverde ex rel. Padilla v. Dodge*, we held that where a person "was drawing a gun to fire at an officer only a few feet away . . ., [t]he second, third, and fourth [*Estate of Larsen* factors] would obviously be satisfied." 967 F.3d 1049, 1061 (10th Cir. 2020). Officer Galyon relies heavily on *Estate of Valverde* in arguing he fired in justified self-defense.

Ms. Murray counters that the *Estate of Larsen* factors cut in her favor because: (1) the facts do not support that Mr. Simms drew the firearm (so no hostile movements were made with the weapon), (2) the proximity between Officer Galyon and Mr. Simms was offset by the fact that Officer Galyon was outside of the car and the car partially blocked Mr. Simms's line of sight (so the distance did not support the use of deadly

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firearm, thus making clear the commands came from law enforcement. But given the speed with which the events precipitated, Officer Galyon's failure to do so was reasonable. *See Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014) (explaining that in excessive force cases, courts must "allo[w] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation" (alteration in original) (quoting *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)).

force), and (3) Mr. Simms may have moved his arms reflexively upon being awakened (so any such movement did not manifest intention).[9] We are not persuaded.

As to the second *Larsen* factor, both Officer Galyon and Officer Escobar reported hostile motions made by Mr. Simms with the weapon. Specifically, they testified that Mr. Simms made a sudden movement to draw the pistol. App. Vol. 6 at 1447–48 (Officer Galyon's testimony); *id.* at 1349–53 (Officer Escobar's testimony). With respect to the third *Larsen* factor—the distance separating the officers and the suspect—although Officer Galyon was outside the car, he was clearly within range of Mr. Simms's weapon. Officer Galyon was only six feet from Mr. Simms. Thus, even if Officer Galyon controlled the distance and was partially obscured, Mr. Simms could easily have shot him. *Compare Pauly*, 874 F.3d at 1218 (holding pointing a firearm at an officer was not sufficient to meet the second *Larsen* factor where the officer "was fifty feet away and behind both physical cover and the cover of night."). The fourth *Larsen* factor—the

[9] Ms. Murray also argues that even if the initial shots were justified, Officer Galyon continued firing after Mr. Simms was incapacitated. But this argument was not made to the district court regarding Officer Galyon or Chief Citty, nor adequately raised in her opening brief, *see* Appellant Br. at 47–48 (arguing that it was clearly established an officer may not use force against a subdued person, but not explaining how the law applies to the facts in this case). Ms. Murray did make this argument against OKC in the district court. Nonetheless, the inadequacy of her argument in her opening brief results in failure to preserve—twice over with regard to Officer Galyon and Chief Citty. *Strauss v. Angie's List, Inc.*, 951 F.3d 1263, 1266 n.3 (10th Cir. 2020) ("Generally, this court does not consider arguments raised for the first time on appeal."); *Reedy v. Werholtz*, 660 F.3d 1270, 1275 (10th Cir. 2011) ("Issues not adequately briefed will not be considered on appeal."); *Gutierrez v. Cobos*, 841 F.3d 895, 902 (10th Cir. 2016) ("[A] party waives issues and arguments raised for the first time in a reply brief." (quotation marks omitted)).

manifest intentions of the suspect—also weighs in favor of Officer Galyon. Both officers concluded Mr. Simms intended to draw his weapon and to use it against Officer Galyon. Whether Mr. Simms did so reflexively does not change the fact that he could reasonably be perceived to be drawing a firearm on Officer Galyon. Finally, because the record evidence would compel a factfinder to find Officer Galyon reasonably perceived Mr. Simms was drawing a firearm, *Estate of Valverde* teaches that the second, third, and fourth *Estate of Larsen* factors support the use of deadly force.

* * *

In summary, the first *Estate of Larsen* factor does not weigh against the use of deadly force, and the remaining three factors weigh decidedly in its favor. Accordingly, the second *Graham* factor—immediacy of threat—weighs in favor of the use of deadly force being reasonable.

iii. Active resistance or evasion of arrest

The third and final *Graham* factor asks whether the suspect was actively resisting or attempting to evade arrest at the time the officer used force. Officer Galyon and Officer Escobar did not attempt to arrest Mr. Simms, so Mr. Simms could not have been resisting or evading arrest. *Bond*, 981 F.3d at 820.[10] To the extent this factor is relevant at all, it weighs against the use of deadly force.

[10] Officer Galyon relies on *Estate of Valverde* for the proposition that "anyone who appears to be ready to shoot an officer certainly appears to be ready to resist arrest." 967 F.3d at 1061. As with the first *Graham* factor, this supports the proposition that the second *Graham* factor is the most important, and often determinative.

iv. Officer Galyon's prior actions

"[E]ven when an officer uses deadly force in response to a clear threat of such force being employed against him, the *Graham* inquiry does not end there." *Bond*, 981 F.3d at 816. Rather, the court considers "whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995) (footnote omitted). Actions taken by officers which are "immediately connected" to the officers' use of deadly force must therefore be analyzed. *Romero v. Bd. of Cnty. Comm'rs*, 60 F.3d 702, 705 n.5 (10th Cir. 1995) (quotation marks omitted). Thus, in addition to analyzing the three *Graham* factors with respect to Officer Galyon's use of deadly force against Mr. Simms, we also consider whether Officer Galyon's actions preceding the shooting recklessly or deliberately created the need for that force.[11]

This court has held that where "[t]he entire incident" from officers' arrival "to the time of the shooting" was "only ninety seconds[,] . . . [c]learly, the officers' preceding actions were so 'immediately connected' to [the decedent's] threat of force that they should be included in the reasonableness inquiry." *Allen v. Muskogee*, 119 F.3d 837, 841 (10th Cir. 1997). But "[m]ere negligence or conduct attenuated by time or intervening

[11] This inquiry is distinct from the question of whether Officer Galyon improperly approached the car without reasonable suspicion or began an unjustified seizure. An officer may have reasonable suspicion or probable cause sufficient to undertake a search or seizure but nonetheless may do so in a manner that recklessly or deliberately precipitates the use of force.

events is not to be considered." *Est. of Ceballos v. Husk*, 919 F.3d 1204, 1214 (10th Cir. 2019) (quoting the district court opinion approvingly).

This case is far different from those in which we have held an officer recklessly or deliberately created the need for use of deadly force. In *Allen*, police arrived and immediately attempted to seize the decedent from his automobile, despite knowing he was armed. 119 F.3d at 839. There was evidence allowing a jury to conclude they did so in a hostile manner. *Id.* at 841 (describing testimony that an officer "ran 'screaming' up to [the decedent's] car and immediately began shouting"). Similarly, in *Estate of Ceballos* a police officer "shot and killed an emotionally distraught [man] within a minute of arriving on the scene," an action necessitated after the officer "approached [the decedent] quickly, screaming at [him] to drop [a baseball] bat and refusing to give ground as [he] approached the officers." 919 F.3d at 1216. And in *Bond*, an officer advanced toward the decedent, causing him to retreat into a garage; when the three officers then followed, they "block[ed] the only exit from the garage . . . . [The decedent], who[m] the officers knew to be intoxicated, then grab[bed] a hammer," resulting in the officers advancing again and ultimately shooting the decedent. 981 F.3d at 823.

Here, Officer Galyon approached Mr. Simms, who viewed in the light most favorable to Ms. Murray, was asleep in a car. From five or six feet away, Officer Galyon asked Mr. Simms if he was okay. Although his tone was authoritative, no evidence suggests it was hostile. Officer Galyon then reasonably perceived Mr. Simms was attempting to draw a pistol on him. There is simply no evidence that Officer Galyon recklessly or deliberately caused Mr. Simms to do so.

Ms. Murray argues that Officer Galyon was reckless in what he did not do, rather than what he did. She claims that, under the circumstances, Mr. Simms might not have been aware Officer Galyon was a police officer and that Officer Galyon was reckless in failing to identify himself as such. But Officer Galyon approached to five or six feet away from Mr. Simms's vehicle and simply asked if Mr. Simms was alright. Such an innocuous inquiry—one equally appropriate from a concerned civilian—could not have been reasonably anticipated to cause a violent, armed reaction. And, although there is some question as to whether Mr. Simms had an opportunity to observe this fact, Officer Galyon was dressed in a police uniform when he repeatedly ordered Mr. Simms not to go for his gun. There may be cases where an officer's failure to identify as law enforcement is the dividing line between provoking a violent response and not provoking a violent response, such that it would be reckless for the officer to fail to identify himself, but this is not that case. *Compare Durastanti*, 607 F.3d at 667–68 & n.9 (holding a plainclothes officer did not recklessly or deliberately cause the need for deadly force by failing to identify himself where he "saw what reasonably appeared to be notice of police presence" and one suspect appearing to comply with orders from a different officer), *with Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 557, 559–61 (1st Cir. 1989) (upholding a jury verdict on a § 1983 due process claim where four officers in an unmarked car and plainclothes approached another vehicle with guns drawn and without identifying, and fired when the other vehicle drove away). Here, Officer Galyon merely approached a parked car and inquired after the occupant's well-being. It was Mr. Simms's reaction that

necessitated the use of deadly force. There is no evidence from which the jury could find that Officer Galyon recklessly created the need for such force.

* * *

In sum, the first and third *Graham* factors—i.e., the severity of the suspected crime and whether the suspect resisted or evaded arrest—to the extent relevant here, if at all, weigh against Officer Galyon's use of deadly force. But the second factor—the immediacy of the threat to Officer Galyon—weighs strongly in favor of the reasonableness of Officer Galyon's actions. The second factor is the most important *Graham* factor and here easily outweighs the first and the third. We further conclude Officer Galyon did not recklessly precipitate the need to use force. Accordingly, Officer Galyon did not violate Mr. Simms's Fourth Amendment right to be free from excessive force.[12]

[12] Ms. Murray also argues, for the first time on appeal, that Officer Galyon cannot assert qualified immunity because he was off duty and employed by a private company. Ms. Murray failed to preserve this argument by not raising it before the district court. *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127–28 (10th Cir. 2011). We have discretion to consider the issue despite the failure to preserve, *Margheim v. Buljko*, 855 F.3d 1077, 1088 (10th Cir. 2017), but we decline to do so because it is not determinative. Ms. Murray would need to show Officer Galyon's alleged conduct violated Mr. Simms's constitutional rights either to overcome prong one of the qualified immunity analysis, *see Perea v. Baca*, 817 F.3d 1198, 1202 (10th Cir. 2016), or as an element of the cause of action to recover under 42 U.S.C. § 1983. Because she has not done so, her claim fails under either scenario. The question of whether an off-duty police officer may assert qualified immunity therefore remains open in this circuit.

D. § 1983 Claims Against OKC and Chief Citty

Ms. Murray does not dispute that her argument for reversal on the § 1983 claims against OKC and Chief Citty is dependent upon our reversing the claims against Officer Galyon. *See Crowson v. Washington County*, 983 F.3d 1166, 1191 (10th Cir. 2020) ("In most cases, . . . the question of whether a municipality is liable [is] dependent on whether a specific municipal officer violated an individual's constitutional rights."). Because we hold Officer Galyon did not violate Mr. Simms's rights, we affirm the district court's decision with regard to OKC and Chief Citty.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM**.

Entered for the Court

Carolyn B. McHugh
Circuit Judge