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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-22-19

BRODIE FAUGHN AND BILLY COLVIN APPELLANTS V. ALFRED KENNEDY AND WAYNE KENNEDY APPELLEES	Opinion Delivered May 3, 2023 APPEAL FROM THE ST. FRANCIS COUNTY CIRCUIT COURT [NO. 62CV-16-180] HONORABLE DANNY GLOVER, JUDGE AFFIRMED

N. MARK KLAPPENBACH, Judge

Appellants Brodie Faughn and Billy Colvin bring this interlocutory appeal of the St. Francis County Circuit Court's denial of their second motion for summary judgment based on qualified immunity. In a previous interlocutory appeal, this court affirmed the circuit court's first denial of summary judgment based on qualified immunity. *See Faughn v. Kennedy*, 2019 Ark. App. 570, 590 S.W.3d 188 ("*Faughn I*"). Because neither the circuit court nor this court may disturb the law of the case established in *Faughn I*, we affirm.

Appellee Alfred Wayne Kennedy and his son, appellee Wayne Kennedy (collectively "the Kennedys"), filed claims against Officers Brodie Faughn and Billy Colvin individually for assault, battery, and violations of the Arkansas Civil Rights Act ("ACRA")—including excessive force—in relation to their January 14, 2016 arrests. Faughn and Colvin filed a

motion for summary judgment based on a qualified-immunity defense, which the circuit court denied. Appellants then filed their first interlocutory appeal.

On December 4, 2019, this court in *Faughn I* affirmed the circuit court's denial of summary judgment as to Alfred Kennedy's claims against both officers and as to Wayne Kennedy's claims against Faughn upon holding that material questions of fact remained regarding whether the force the officers used was reasonable.[1] The opinion in *Faughn I* cited, among other cases, a recent case from the United States District Court for the Western District of Arkansas, *Franklin v. Franklin County, Arkansas*, No. 2:17-CV-2016, 2019 WL 1757533 (W.D. Ark. Apr. 19, 2019), for the proposition that it is clearly established that it is unreasonable to use a taser on a nonfleeing, nonviolent misdemeanant. Shortly after this court issued the opinion in *Faughn I*, the Eighth Circuit reversed the district court's decision in *Franklin* based on the fact that the suspect was not nonviolent but instead "acted violently and uncooperatively immediately before each shock of the tasers." *See Franklin v. Franklin Cnty., Ark.*, 956 F.3d 1060, 1062 (8th Cir. 2020).

On the belief that the Eighth Circuit's decision in *Franklin* materially undermined this court's holding in *Faughn I*, appellants once again filed a motion for summary judgment based on qualified immunity. In opposing the motion, the Kennedys argued, in part, that the detainee's conduct in *Franklin* was much different than their conduct, and as such, *Franklin* did not support appellants' motion. Following a hearing, the circuit court denied

[1]This court reversed the denial of summary judgment as to Wayne's claims against Colvin because Wayne had not alleged that Colvin used any force against him.

appellants' second motion for summary judgment, specifically finding that the law of the case precluded reconsideration of their argument on qualified immunity:

> I think my marching orders from the Court of Appeals are to try this case. I understand your arguments. But the issue was briefed. Motion for Summary Judg[]ment was heard and brief [sic] before Judge Proctor. It was taken up to the Court of Appeals. The Court of Appeals affirmed Judge Proctor and remanded the case for trial. And I, I don't think I'm in a position to reconsider Judge Proctor's ruling or the Court of Appeals' ruling at this point in time. So the case will proceed to trial on August 30th on all the issues. If there is a, a failure of proof we can take that up at Directed Verdict Motion time. But as of right now, I think there is [sic] sufficient factual issues that require a trial. And the Court of Appeals has found that Judge Proctor's analysis was correct. And it may be that there's an appeal later and that's reversed. But as of right now I think that's the law of the case. So Motion for Summary Judgement will be denied. Second motion will be denied.

Generally, the denial of a motion for summary judgment is neither reviewable nor appealable; however, that general rule does not apply where the refusal to grant a summary-judgment motion has the effect of determining that the appellant is not entitled to immunity from suit, as the right of immunity is effectively lost if the case is allowed to proceed to trial. *Sullivan v. Coney*, 2013 Ark. 222, 427 S.W.3d 682.

On appeal, appellants maintain that they are entitled to qualified immunity pursuant to the Eighth Circuit's decision in *Franklin*. They allege that the case involved identical facts to the facts relied on by this court in *Faughn I* and that the denial of qualified immunity is inconsistent with the new precedent in *Franklin*, which clarified the law. Appellants argue that the law-of-the-case doctrine should not preclude this appeal because allowing the decision in *Faughn I* to stand after the Eighth Circuit's opinion in *Franklin* would create inconsistency in the law, undermine efficiency in the judicial process, and result in manifest

injustice. The Kennedys argue that the Eighth Circuit's decision in *Franklin* has no bearing on this court's holding in *Faughn I* and that *Faughn I* established the law of the case.

Whether the law-of-the-case doctrine was properly invoked and to what extent it applies to a case are questions of law that we review de novo. *Morrand Enters., LLC v. Sachs/Haynes 503, LLC*, 2022 Ark. App. 451. The doctrine of law of the case prohibits a court from reconsidering issues of law and fact that have already been decided on appeal. *Green v. George's Farms, Inc.*, 2011 Ark. 70, 378 S.W.3d 715. The doctrine provides that a decision of an appellate court establishes the law of the case for the trial upon remand and for the appellate court itself upon subsequent review. *Id.* The law-of-the-case doctrine also prevents consideration of an argument that could have been raised at the first appeal and is not made until a subsequent appeal. *Id.* The doctrine serves to effectuate efficiency and finality in the judicial process, and its purpose is to maintain consistency and avoid reconsideration of matters once decided during the course of a single, continuing lawsuit. *Id.* However, the law-of-the-case doctrine is conclusive only where the facts on the second appeal are substantially the same as those involved in the prior appeal, and it does not apply if there was a material change in the facts. *Id.*

We agree with the circuit court that the law-of-the-case doctrine bars consideration of appellants' arguments. Appellants' first and second interlocutory appeals are based on precisely the same facts. Even if we were to agree with appellants that the Eighth Circuit's *Franklin* opinion changed the law as it applies to their case, the Arkansas Supreme Court has expressly declined to adopt an exception to the law-of-the-case doctrine based on an

intervening change of controlling law. *Tilley v. Malvern Nat'l Bank*, 2019 Ark. 376, 590 S.W.3d 137. Accordingly, neither the circuit court nor this court may disturb the law of the case established in *Faughn I* by considering or applying the Eighth Circuit's opinion in *Franklin*.

Furthermore, we disagree with appellants' assertion that applying the law-of-the-case doctrine would create inconsistency in the law, undermine efficiency in the judicial process, and result in manifest injustice. This court in *Faughn I* stated in part as follows:

> Relevant to the facts of this case, there exists a sufficient body of caselaw establishing that tasering an individual (an older man in this case) who is already on the ground, who is not actively resisting arrest or fleeing, who has made no verbal threat to an officer's safety, is not suspected of possessing a weapon much less has brandished one, whose offense is a misdemeanor, and who poses little or no threat to the officers' or the public's security (in part because Alfred was outnumbered several officers to one, was near the jail, and was on the ground), and where such use of force was disproportionate to the need constitutes excessive force. *See, e.g.*, *Brown v. City of Golden Valley*, 574 F.3d 491 (8th Cir. 2009). Citing *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009), the Eighth Circuit Court of Appeals recently stated, "[I]t was clearly established that it was unreasonable under the Fourth Amendment to apply a taser to a 'nonviolent, suspected misdemeanant who was not fleeing or resisting arrest, [and] who posed little to no threat to anyone's safety.'" *Johnson v. McCarver*, 942 F.3d 405, 412 (8th Cir. 2019); *see also Franklin v. Franklin Cty., Ark.*, No. 2:17-CV-2016, 2019 WL 1757533 at *9 (W.D. Ark. Apr. 19, 2019), appeal filed, No. 19-1854 (8th Cir. Apr. 25, 2019) ("It is clearly established in the Eighth Circuit that it is excessive force to use a taser on a nonfleeing, nonviolent misdemeanant."); see generally *Smith v. Conway Cty*, 759 F.3d 853 (8th Cir. 2014); *Hickey v. Reeder*, 12 F.3d 754 (8th Cir. 1993) (discussing use of tasers in context of a prison or jail setting).

Faughn, 2019 Ark. App. 570, at 13–14, 590 S.W.3d at 198. In *Franklin*, the Eighth Circuit held that the district court was wrong to rely on the legal principle that it is excessive force to use a taser on a nonfleeing, nonviolent misdemeanant because that legal principle "doesn't

fit the facts of this case" where "the record is plain that Franklin acted violently and uncooperatively immediately before each shock of the tasers." *Franklin*, 956 F.3d 1060, 1062. Accordingly, there was no change in the law that we applied in *Faughn I*. We affirm the circuit court's denial of appellants' second motion for summary judgment.

Affirmed.

BARRETT and BROWN, JJ., agree.

Sara Monaghan, for appellant.

Easley & Houseal, PLLC, by: *B. Michael Easley*, for appellee.