IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:15-CV-513-BO

ALFRICKA BENNETT, ADMINISTRATRIX FOR THE ESTATE OF S.M.,

Plaintiff,

v.

CITY OF FAYETTEVILLE, CHRISTOPHER HUNT, both individually and in his official capacity as law enforcement officer with the Fayetteville Police Department, and HAROLD MEDLOCK, individually and in his official capacity as a law enforcement officer with the Fayetteville Police Department.

Defendants.

ORDER

This cause comes before the Court on defendants' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff has responded to the motion and defendants have replied. Hearings were held before the undersigned on April 26, 2017, and on July 19, 2017, at Raleigh, North Carolina. In this posture, the motion is ripe for ruling. For the reasons discussed below, defendants' motion for summary judgment is granted.

BACKGROUND

A. Factual background

This case arises out of the death of a minor, S.M., who was shot by City of Fayetteville Police Officer Hunt (Hunt) following what began as a domestic violence call. The incident occurred on Sunday, October 13, 2013, at approximately six o'clock in the evening. Hunt

responded to a home at 201 Bertram Place, which is located on a cul-de-sac in the Loch Lomond neighborhood in Fayetteville, after Algeria McNair (McNair) allegedly assaulted Alexis Smith, the mother of his child, during a visit. McNair's mother, Alfricka Bennett (plaintiff, Ms. Bennett), intervened to try to stop the assault but was unsuccessful. Ms. Bennett gave Smith her cell phone and Smith called her mother and then the police. Smith's mother also called the police and asked that they meet her at the entrance of the subdivision. When Alexis Smith's parents, Tony and Sheila Smith, arrived, a heated exchange occurred between Tony Smith and McNair.

Defendant Hunt was the first officer to arrive at the scene and observed between five and ten people in the cul-de-sac, including Ms. Bennett, McNair, Alexis Smith, and Tony and Sheila Smith. After Hunt was told by Alexis Smith that she had been assaulted by McNair, Hunt placed McNair in handcuffs and began escorting him to his patrol vehicle. The evidence is in conflict as to what caused Hunt to begin chasing Ms. Bennett, but the parties agree that prior to placing handcuffed McNair in his patrol vehicle Hunt did chase Ms. Bennett from the street into the front yard of 200 Bertram Place, where Ms. Bennett either fell or was taken by Hunt to the ground. As Ms. Bennett was on the ground and Hunt was attempting to handcuff her, Ms. Bennett's children S.M. (sixteen years-old), A-a. B. and A-s. B.[1] (thirteen year-old twins), and McNair, who was still in handcuffs, were moving toward their mother. The parties offer different versions of the events which followed.

Plaintiff's evidence

Plaintiff contends that Hunt shot S.M. after S.M. heeded any command made by Hunt to stop advancing and that S.M. did not have a firearm. Plaintiff has proffered the testimony of Alexis

[1] Although the affidavits of plaintiff's twin children have been filed using their full names and their names appear in other filings, as it does not appear certain to the Court that these children have reached the age of majority it will refer to them by initials only.

Smith, Sheila Smith, S.M.'s younger twin siblings, and two later arrivals to the scene, Robert and Marciea Alford. Alexis Smith testified that during the relevant time period she could not see S.M.'s hands, whether he lifted his shirt, or whether or not he had a gun in his waistband. [DE 42-2; Smith, A. Dep. at 72]. Sheila Smith testified that from where she was lying on the ground in the street she did not see S.M. with a gun, that she heard Hunt command S.M. to stop and that S.M. did stop, and that S.M.'s right hand was down when he was shot. [DE 42-1; Smith, S. Dep. at 16-19]. The Alfords both testified that they arrived at the scene after the shooting, that they heard statements from bystanders that S.M. was unarmed when he was shot, and that they did not see a gun in the driveway or on the street. [DE 42-6; 42-7]. The affidavits of S.M.'s younger twin siblings state affirmatively that S.M. did not have a firearm when he was shot by Hunt. A-a. B.'s affidavit states that S.M. was shot first by Hunt in the thigh, that S.M. reached down and grabbed his thigh, and was then shot twice more in the stomach. [DE 42-5; B., A-a. Aff. at 4]; [DE 42-4; B., A-s. Aff.].

Defendants' evidence

Hunt contends that as he was trying to secure Ms. Bennett on the ground, a black male in a hooded sweatshirt, later identified as S.M., advanced toward Hunt at a steady pace, shaking his head left-to-right, saying "not today, this ain't gonna happen today," and tapping his waistband. When S.M. got within about fifteen feet of Hunt, he changed directions as if to approach Hunt from behind. S.M. shifted so that the right side of his body faced Hunt in a defensive position Hunt described as "blading." After S.M. did not respond to at least four loud, clear commands to stop and show his hands, Hunt backed away from S.M. and S.M. continued to approach him. Hunt raised his gun at S.M. without his finger on the trigger, S.M. lifted his shirt, and Hunt saw a gun in S.M.'s waistband. S.M. then began to pull the gun out of his waistband and Hunt fired his

weapon at S.M. S.M. was hit with three bullets and Hunt was about 10 feet away when from S.M. when he fired. [DE 31-1; Hunt, Aff.].

Once S.M. had fallen to the ground, Hunt kicked a gun away from S.M.'s hand through the grass and onto the concrete driveway of 200 Bertram Place. Hunt then handcuffed S.M., returned to Ms. Bennett, and used his radio to call for backup and paramedics. The backup officers arrived and provided aid to S.M. S.M. was transported by the paramedics to a local hospital where he later died. Fayetteville police officers remained at the scene of the shooting until agents of the North Carolina State Bureau of Investigation arrived to take control of the investigation and custody of a black High-point 9 mm handgun that was lying in the driveway of 200 Bertram Place. [DE 31-9; Hardin Aff.]; [DE 31-6; Beldon Aff. and Ex. A]; [DE 31-7; Bohannon Aff.]. Video evidence from Officer Washington's and Officer Lewis' dashboard cameras shows the presence of a black object which appears to be a gun in a driveway on their arrival at the scene just minutes after S.M. was shot. *See* [DE 31-13; Washington Aff. and Ex. A]; [DE 31-4, Lewis Aff. and Ex. A]. Officer Lewis' dashboard camera further reveals an orange evidence cone being placed next to the black object later in the evening. Lewis Aff. Ex. A. at 19:57.

An audio and video recorder inside of Hunt's patrol car captured McNair's spontaneous statements while he was handcuffed and alone inside the vehicle after the shooting. McNair makes a number of statements, including that they would tell the police that the maintenance man left the gun there and that it was neither McNair's nor his brother's gun, that he (McNair) should have told him to keep that gun back, that his brother should have left the gun in the house, and why did his brother bring the gun out. [DE 31-1; Hunt. Aff. Ex. A & C. at approx. 18:18; 18:34; 18:37; 18:40; 18:52]. An autopsy revealed that S.M. was shot three times: once in the right abdomen, once in the right buttock, and once in the right elbow. [DE 31-14].

B. Procedural posture

Ms. Bennett filed this action in Cumberland County Superior Court for wrongful death-negligence and gross negligence by the City of Fayetteville, for negligence and gross negligence by defendant Medlock in his individual and official capacities for failing to establish reasonable policies and negligent hiring and training of defendant Hunt, for negligence and gross negligence against defendant Hunt in his individual and official capacities, for punitive damages, for violation of S.M.'s Fourth and Fourteenth Amendment rights by defendants under 42 U.S.C. § 1983, and for deliberate indifference to civil rights by the City of Fayetteville and defendant Medlock under 42 U.S.C. § 1983. Defendants removed the action to this Court pursuant to its federal question jurisdiction. 28 U.S.C. § 1441. In their motion for summary judgment, defendants argue, among other things, that governmental immunity shields them from liability on plaintiff's tort claims, that plaintiff's official capacity claims should be dismissed as duplicative, that the excessive force claim should be dismissed because the force used was not excessive, that qualified immunity protects the individual defendants from plaintiff's § 1983 claims, and that plaintiff has not established that any constitutional violation arose from a policy or custom or any alleged indifference by the City of Fayetteville.

In opposition to the summary judgment motion, plaintiff contends there is a genuine issue of material fact as to whether S.M. had a weapon or made threatening statements or gestures toward Hunt. Plaintiff also contends that she has forecast evidence that Fayetteville maintained a widespread policy of discrimination against African American males and that the City failed to train and supervise its officers properly. Plaintiff further contends that public officer immunity from tort liability is inapplicable here as plaintiff has sufficiently forecast evidence of willfulness and wantonness.

DISCUSSION

A motion for summary judgment may not be granted unless there are no genuine issues of material fact for trial and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If that burden has been met, the non-moving party must then come forward and establish the specific material facts in dispute to survive summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). In determining whether a genuine issue of material fact exists for trial, a trial court views the evidence and the inferences in the light most favorable to the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). However, "[t]he mere existence of a scintilla of evidence" in support of the nonmoving party's position is not sufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). "A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party. . . . and [a] fact is material if it might affect the outcome of the suit under the governing law." *Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 313 (4th Cir. 2013) (internal quotations and citations omitted). Speculative or conclusory allegations will not suffice. *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002).

The Court turns its attention first to plaintiff's § 1983 claims against Hunt and Medlock. Hunt and Medlock have raised the affirmative defense of qualified immunity to plaintiff's § 1983 claims. Qualified immunity shields government officials from liability so long as they could reasonably believe that their conduct does not violate clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011) (en banc). It protects "all but the plainly incompetent or those who knowingly violate the law."

Malley v. Briggs, 475 U.S. 335, 341 (1986); *see also Reichle v. Howards*, 566 U.S. 658, 132 S. Ct. 2088, 2093 (2012). A court employs a two-step procedure for determining whether qualified immunity applies that "asks first whether a constitutional violation occurred and second whether the right violated was clearly established." *Melgar v. Greene*, 593 F.3d 348, 353 (4th Cir. 2010) (citing *Saucier v. Katz*, 533 U.S. 194 (2001)). A court may exercise its discretion to decide which prong of the analysis to decide first based on the circumstances presented. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Addressing the second prong of the qualified immunity analysis first, it was clearly established at the time of the shooting that the Constitution does not permit the use of deadly force against a person who "poses no immediate threat to the officer and no threat to others". *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); *see also Cooper v. Sheehan*, 735 F.3d 153, 160 (4th Cir. 2013). Thus, at issue here is the first prong – whether Hunt violated S.M.'s right to be free from seizure by excessive force. *Schultz v. Braga*, 455 F.3d 470, 476 (4th Cir. 2006). Whether an officer used excessive force to effect a seizure is analyzed under an objective reasonableness standard, without regard to the officer's subjective intention or motivation. *Id.* at 477. A court does consider, however, the facts and circumstances confronting the officer, and it must focus its attention on the moment the force was employed. *Henry*, 652 F.3d at 531 (citations omitted).

In deciding whether the force used to effect a seizure was objectively reasonable, a court is required to engage in "a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests, against the countervailing government interests at stake," paying close attention to the "severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (U. S. 1989)

(internal quotation and citations omitted). "A police officer may use deadly force when the officer has sound reason to believe that a suspect poses a threat of serious physical harm to the officer or others." *Elliott v. Leavitt*, 99 F.3d 640, 642 (4th Cir. 1996) (citing *Garner*, 471 U.S. 1). "Recognizing that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—[courts] take care to consider the facts from the perspective of a reasonable officer on the scene, and avoid judging the officer's conduct with the 20/20 vision of hindsight." *Clem v. Corbeau*, 284 F.3d 543, 550 (4th Cir. 2002) (internal quotation marks and citations omitted). Whether the officer's conduct was reasonable is a question of law to be decided after determining "the relevant set of facts and draw[ing] all inferences in favor of the nonmoving party to the extent supportable by the record." *Scott*, 550 U.S. at 381 n.8 (emphasis omitted).

Even drawing all inferences in favor of plaintiff, her evidence is insufficient to rebut the objective evidence, including the video evidence and autopsy report. Plaintiff argues that the presence of a firearm is a fabrication and that S.M. was neither resisting nor acting disruptive when he was shot. She has not, however, come forward with any alternate explanation for the presence of what she appears to agree is a firearm in the driveway a few feet away from S.M.'s body as captured by Officer Washington's and Officer Lewis' dashboard cameras. Plaintiff's only unequivocal evidence which supports that S.M. did not have a firearm is comprised of the bare statements of his twin siblings, one of whose version of events is otherwise inconsistent with the autopsy findings. While the twin siblings both state that S.M. did not have a gun, neither provides any detail or specificity regarding how they came to possess such knowledge. For example, neither states that they were with S.M. prior to the encounter nor do they explain their vantage point during the encounter to demonstrate that they could see S.M., his waistband, or his gestures.

While the mere possession of a firearm by a suspect is insufficient to support the use of deadly force, *Cooper*, 735 F.3d at 159, "[t]his Circuit has consistently held that an officer does not have to wait until a gun is pointed at the officer before the officer is entitled to take action." *Anderson*, 247 F.3d at 131. The autopsy findings and the locations of the bullet wounds are consistent with Hunt's description that S.M. was standing with the right-side of his body toward Hunt and that S.M.'s right elbow was bent as he reached into his waistband and was withdrawing a gun when Hunt fired. Plaintiff has offered no contrary evidence that is supported by the record. Accordingly, while the nature of the intrusion into S.M.'s Fourth Amendment interests was grave, the record reveals that S.M. posed an immediate threat to the safety of Hunt and others when he reached for a firearm. As the objective evidence supports both the presence of a gun and Hunt's telling of the position and actions of S.M. in the moments to the shooting, the record supports a finding that the force employed by Hunt was not excessive and that a constitutional violation did not occur. However, even if S.M. did not have a gun, Hunt may still be protected by qualified immunity if Hunt had sound reason to *believe* that S.M. posed a threat. *See Sigman v. Town of Chapel Hill*, 161 F.3d 782, 788 (4th Cir. 1998) (emphasis added).

Plaintiff confirmed in her interview with the police shortly following the shooting that S.M. had his hands down the front of his pants or in his waistband and pulled his hands from his pants just before Hunt shot him. [DE 39-11 at 39-42]. Alexis Smith testified that S.M. failed to heed Hunt's command to "stop" or "back up" just prior to Hunt firing his gun. [DE 42-2; Smith, A. Dep. at 14, 42]. Ms. Smith further testified that emotions were high that evening, *id.* at 33-34, as is apparent from the description of events from every witness. Further, at the time of the shooting Hunt was the sole police officer and there were at least eight people on the scene, one of whom

was already in handcuffs but not secured in a patrol car and another of whom Hunt was attempting to secure.

What the record reveals is a tense and quickly unfolding[2] series of events which began with a domestic violence call. Even viewing the facts and drawing inferences in the light most favorable to plaintiff, while Hunt attempted to gain control of S.M.'s mother S.M. approached Hunt with his hands concealed in his waistband and failed to comply with at least one command to stop or back up. Hunt has proffered that based on his training and experience he believed that S.M.'s gestures and refusal to comply with commands indicated that he was armed and posed threat of serious injury. Hunt has proffered the report of an expert who notes that domestic violence calls are known by law enforcement to be uncertain and often violent in comparison to other service calls and that touching the front of one's shirt and pants is consistent with repositioning a gun concealed in the waistband. [DE 31-2; Thompson Aff. Ex. A].

The Court finds that on the record before it a determination can be made that a reasonable officer in Hunt's position would have believed that S.M. posed a threat of serious physical injury, whether S.M. actually had a gun in his waistband or merely behaved as if he did. Accordingly, the Court holds that no constitutional violation occurred, Hunt is entitled to qualified immunity, and summary judgment in favor of Hunt on plaintiff's excessive force claim is appropriate.

Because no constitutional violation occurred, the City of Fayetteville and Medlock cannot be liable for failure to properly hire, train, or supervise Hunt or for an alleged deliberate indifference to the rights of S.M. as a result therefrom. *See Young v. City of Mount Ranier*, 238 F.3d 567, 579 (4th Cir. 2001) (citing cases holding same). The failure to establish a Fourth

[2] Hunt's dashboard camera footage reveals that roughly sixteen-to-seventeen seconds elapsed between the time Ms. Bennett and S.M. run in front of the camera and away from Hunt to when a bystander can been seen to be visibly upset in response to an event, presumably the shooting. [DE 31-1 Ex. A].

Amendment violation based on excessive force also results in a finding that plaintiff cannot establish any state law tort claims for assault or battery[3] against defendants in their individual capacities. *See Rowland v. Perry*, 41 F.3d 167, 174 (4th Cir. 1994) (parallel state law claims of assault and battery subsumed within excessive force claim); *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 625 (2000) (citation omitted). Finally, as defendants have correctly argued, governmental immunity protects the defendants in their official capacities from plaintiff's state law tort claims, *Anderson By & Through Jerome v. Town of Andrews*, 127 N.C. App. 599, 601 (1997), and public officer immunity under North Carolina law further shields Hunt and Medlock in their individual capacities as plaintiff has argued but not come forward with evidence of malice or corruption. *Smith v. State*, 289 N.C. 303, 331 (1976). Summary judgment is therefore appropriate in defendants' favor on all claims.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment [DE 29] is GRANTED. The clerk is DIRECTED to enter judgment in favor of defendants and to close this case.

SO ORDERED, this 14 day of July, 2017.

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

[3] The Court does not find a claim for assault and battery in plaintiff's complaint but address such claim as plaintiff discusses assault and battery in her opposition to summary judgment.