IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ESTATE OF JAMES SIZER, SR., by and through his heirs Dorothy Sizer, Caroline Wolff, and James Sizer, Jr., DOROTHY SIZER, CAROLINE WOLFF, and JAMES SIZER JR.,
Plaintiffs,

-vs-

OFFICER MARTHA CAMERON, OFFICER SALVATORE REALE, and the CITY OF AUSTIN,
Defendants.

CAUSE NO.:
A-15-CA-01143-SS

ORDER

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Plaintiffs' Motion for New Trial [#77] and Defendants' Response [#78] in opposition. Having reviewed the documents, the governing law, and the file as a whole, the Court now enters the following opinion and order.

Background[1]

In their motion for new trial, Plaintiffs ask this Court to reconsider its order granting Defendants' motion for summary judgment. The Court granted Defendants' motion after carefully considering the events giving rise to this lawsuit which transpired on March 6, 2015. *See* Order of June 1, 2017 [#73]. Around 2:30 p.m. on March 6, 2015, James Sizer, Sr. made three calls to 311 and 911 to request police assistance at his residence in Austin, Texas. During these calls, Sizer advised the dispatcher his son was dangerous; if his son came on his property,

[1] The facts recounted here are drawn from the summary judgment record, which includes, among other things, the certified transcripts of the 311 and 911 phone calls made on March 6, 2015, dash cam footage from the officers' patrol cars, and Corporal Reale's and Officer Cameron's depositions and affidavits.

Sizer would "point any gun" at him; and Sizer was "fully armed and ready for anything." Between Sizer's first and second calls, a nearby neighbor called 911 to report he heard three gunshots fired. Sizer admitted during his third call that he had fired three rounds of ammunition "just so somebody would hear it." Officer Cameron and Corporal Reale were the first two officers to arrive on the scene. They both testified they knew they were responding to a report of "shots fired" where the suspect had threatened to shoot his son, and Officer Cameron expressly stated she knew Sizer warned the dispatcher he was "armed and ready for anything." The officers further testified they believed Sizer's son "may [have] be[en] shot and in need of life-saving medical attention."

When Corporal Reale arrived on the scene, he saw Sizer standing barefoot in his driveway, wearing pants and an untucked shirt. Corporal Reale testified he only had a visual of Sizer's front and left side and feared he may still be armed. Officer Cameron, who arrived on the scene seconds after Corporal Reale, testified she also lacked a complete visual of Sizer because she could only see the right side of his body. As she approached, Officer Cameron informed Corporal Reale she was holstering her service weapon and switching to her taser.

Corporal Reale issued eleven verbal commands for Sizer to get on the ground but Sizer failed to comply. At one point, Sizer explained he could not get on the ground because he was physically disabled. Given Sizer's continued non-compliance with his orders to get on the ground, Corporal Reale instructed Officer Cameron to "go lethal and I'll go hands on." Rather than "go lethal," however, Officer Cameron continued to train her taser on Sizer. Officer Cameron testified she chose to maintain non-lethal cover because she was concerned that if the takedown went bad she "would have had to shoot the subject." Moreover, Officer Cameron

explained she perceived the risk of Corporal Reale going "hands on" with Sizer as too high, because Sizer had just fired a weapon and the officer had not yet confirmed he was unarmed.

With her taser trained on Sizer, Officer Cameron gave Sizer two commands to get on the ground. When Sizer failed to comply with these orders, Officer Cameron yelled, "taser, taser, taser," before tasing Sizer once in the back for approximately five seconds. Sizer fell backward and hit his head. The officers then called EMS. While they waited for EMS to arrive, the officers conducted a protective sweep of Sizer and his residence. They learned Sizer was unarmed and no one was discovered inside his residence.

Sizer was arrested for discharging a firearm in a municipality and transported to St. David's North Austin Medical Center, where a CT scan revealed he suffered "a left frontal subdural hematoma." The following day, Sizer was discharged to APD "in improved and stable condition" with instructions to "follow up with his primary care physician or other physician in the next week." APD transported Sizer to the Travis County Jail, where he remained until March 9, 2015. Four days later, on March 13, 2015, Dorothy Sizer, Sizer's wife, came home to find Sizer on their bathroom floor, deceased. The medical examiner concluded Sizer died "as a result of complications of blunt force head trauma" with a "contributing factor" of "acute and chronic ethanol abuse."

Plaintiffs, the heirs and surviving family members of Sizer, filed this action on December 10, 2015, alleging Section 1983 claims for excessive force against Officer Cameron and Corporal Reale and municipal liability claims against the City of Austin for, among other things, failing to discipline, supervise, and train its officers and failing to implement adequate policies governing the use of tasers. After a lengthy discovery period, Defendants moved for summary judgment, which the Court granted on June 1, 2017. In that order, the Court found Plaintiffs had

failed to establish the officers' actions violated Sizer's constitutional rights and therefore dismissed Plaintiffs' claims against both the officers and the City.

On June 23, 2017, Plaintiffs filed a motion seeking reconsideration of the Court's order granting Defendants' motion for summary judgment. The parties fully briefed Plaintiffs' reconsideration motion, and it is now ripe for consideration.

Analysis

I. Legal Standard

Though Plaintiffs style their motion as a motion for new trial, the Court construes it as a Rule 59(e) motion for reconsideration of the Court's order granting Defendants' motion for summary judgment. *See* FED. R. CIV. P. 59(e) (giving each party twenty-eight days after entry of a judgment to file a motion asking the court to alter or amend that judgment). "Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). "[S]uch a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment," but instead is intended to allow a court to correct manifest errors of law or fact, to correct inadvertent clerical errors, or to present newly-discovered evidence. *Id.* Indeed, the "remedy is so extraordinary that the standard under Rule 59(e) 'favors denial of motions to alter or amend a judgment.'" *Sanders v. Bell Helicopter Textron, Inc.*, No. 4:04-cv-254-Y, 2005 WL 6090228, at *1 (N.D. Tex. Oct. 25, 2005). Although the decision to grant a motion to reconsider is within the discretion of the district court, the decision should be made in light of two "important judicial imperatives": (1) the need to bring litigation to an end, and (2) the need to render just decisions on the basis of all the facts. *Id.*

II. Application

In their motion for reconsideration, Plaintiffs ask the Court to reconsider the following findings in its summary judgment order: (1) George Kirkham's expert report was unsworn; (2) Officer Cameron possessed an objective and reasonable belief that Sizer posed an immediate threat to the officers' safety; and (3) Officer Cameron received annual taser training. Because the Court finds Plaintiff's arguments are insufficient to warrant reconsideration of its previous order, Plaintiffs' motion is DENIED.

First, Plaintiffs argue the Court's finding that Kirkham's report was unsworn was "completely incorrect" and "an indication that Plaintiffs' motions" were not fully reviewed or considered in rendering the Court's judgment. Plaintiffs direct the Court's attention to Kirkham's affidavit attached as Exhibit 15 to Plaintiffs' response to Defendants' summary judgment motion. Resp. Mot. Summ. J. [#63-7] Ex. 15 (Kirkham Decl.). In this affidavit, Kirkham testified, "all the matters stated in each of my two expert reports . . . are true, accurate and correct[,]" and stated "Exhibit A" to his affidavit "contains copies of [his] reports." *Id.* ¶ 2. Although Kirkham testifies to the accuracy of the reports attached to his affidavit, there is no "Exhibit A" attached to Kirkham's affidavit, nor are his reports otherwise attached to the affidavit.

Even assuming Kirkham's report was properly authenticated by this affidavit, however, the Court's error in concluding otherwise does not warrant reconsideration of the Court's ultimate finding that Defendants are entitled to summary judgment. Under Fifth Circuit precedent, a court need not rely on the plaintiff's description of the facts, or an expert's interpretation of these facts for that matter, where the record discredits that description. *Carnaby v. City of Hous.*, 636 F.3d 183, 187 (5th Cir. 2011). Instead, the court should consider "the facts

in the light depicted by the videotape." *Id.* As this Court previously concluded, "[a] thorough review of the officers' videos and the undisputed evidence regarding the information the officers possessed compel this Court's conclusion that Plaintiffs failed to establish a constitutional violation." Order of June 1, 2017 [#73] at 11 n.6. Kirkham's report, even if considered proper summary judgment evidence, does not create a fact issue as to whether Officer Cameron used excessive force against Sizer.

Second, Plaintiffs dispute the Court's finding that Officer Cameron possessed an objective and reasonable belief that Sizer posed an immediate threat to the officers' safety. According to Plaintiffs, Officer Cameron could not have reasonably feared for the officers' safety, and therefore justified her use of force, because Sizer was only passively resisting the officers. In support of their argument, Plaintiffs cite the Austin Police Department (APD)'s definition of "passive resistance," which states "[a] passively resistant suspect fails to follow commands and, although not threatening, may be verbally questioning or disagreeing." Mot. Recons. [#73] at 5. But the Court's finding that Sizer exhibited "passive resistance" is based on binding Fifth Circuit precedent, not APD's definition of the phrase.[2] According to the Fifth Circuit, an individual exhibits passive resistance when she merely refuses to comply with an officer's orders. *See Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009). To the extent Plaintiffs construe *Deville* as holding a passively resisting individual can never be threatening, the Court does not read *Deville* so narrowly. Plaintiffs' misplaced reliance on APD policy aside, they have failed to point to any authority holding it is unreasonable for an officer to feel

[2] Moreover, the Court notes that APD's policy expressly contemplates a situation where the suspect is not necessarily exhibiting physical resistance but where it would still "be unsafe for officers to approach within contact range of the subject." Pls.' Mot. Summ. J. [#35-5] Ex. 21 (APD Taser Policy) at 7. Based on Officer Cameron's testimony that she deployed her taser because she believed the risk posed by going "hands on" was too high, Officer Cameron's actions would comply with APD policy.

threatened by a suspect who, although not actively resisting the officers, remains non-compliant and is potentially armed and dangerous.

Moreover, Plaintiffs have not shown, nor does the record reflect, that the Court erred in concluding Officer Cameron possessed an objective and reasonable belief Sizer posed an immediate threat to his son, who the officers believed "may [have] be[en] shot and in need of life-saving medical attention." Plaintiffs have thus failed to meet their burden of showing the Court committed a manifest error of law in concluding Officer Cameron's use of force was neither clearly excessive nor objectively unreasonable.

Third, Plaintiffs contend the Court erred in failing to find Officer Cameron lacked taser retraining or recertification. Yet Plaintiffs have failed to explain the import of this claimed error. To the extent Plaintiffs are arguing Officer Cameron used excessive force because she failed to prove she received taser retraining or recertification, Plaintiffs have cited no legal authority in support of this argument and thus have failed to show reconsideration is warranted. If Plaintiffs are instead arguing Officer Cameron's supposed lack of taser retraining or recertification supports their municipal liability claims, this argument is likewise unconvincing. As this Court previously held, Plaintiffs must first prove the existence of a constitutional violation in order to hold a municipality liable for failing to properly train or supervise its officers or implementing inadequate policies governing the use of tasers. *See* Order of June 1, 2017 [#73] at 25 (citing *City of L.A. v. Heller*, 475 U.S. 796, 799 (1986)). Having failed to do so, Plaintiffs' municipal liability claims were properly dismissed.

Conclusion

Reconsideration of a court's final order and judgment is "an extraordinary remedy that should be used sparingly." *Templet*, 367 F.3d at 479. To justify this extraordinary remedy,

Plaintiffs were required to show a manifest error of law or fact, an inadvertent clerical error, or newly-discovered evidence. Having failed to do so, Plaintiffs are not entitled to relief under Rule 59(e).

Accordingly,

IT IS ORDERED that Plaintiffs' Motion for New Trial [#77] is DENIED.

SIGNED this the 18th day of July 2017.

Sam Sparks

SAM SPARKS
UNITED STATES DISTRICT JUDGE