**IN THE UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF ARKANSAS**
**WESTERN DIVISION**

**JOHNNIE CAMPBELL, *ET AL.*** **PLAINTIFF**

**VS.** **4:17-CV-00077-BRW**

**CHRISTOPHER JOHANNES, *ET AL.*** **DEFENDANT**

**ORDER**

Pending are Defendants' Motions for Summary Judgment (Doc. Nos. 26, 27). Responses and replies have been filed.[1] For the reasons set out below, the Motion for Summary Judgment by Christopher Johannes, Chief Stuart Thomas, Chief Kenneth Buckner, and the City of Little Rock (Doc. No. 26) is GRANTED in PART and DENIED in PART. The Motion for Summary Judgment by ERMC II, LP and Park Plaza Mall (Doc. No. 29) is DENIED.

## I. BACKGROUND[2]

On December 27, 2011, Christopher Johannes, a Little Rock police officer, was working off-duty as a security guard at Park Plaza Mall. A woman complained to mall security that some men were trying to convince her to get into their car. Officer Johnnes and mall security went to the area of the parking deck described by the woman and saw Plaintiffs backing out of a parking space.

Plaintiffs Johnnie Campbell, Keithen Pettus, and Joseph Williams were all inside the car that was backing out. After Mr. Williams, the driver, ran over a beverage that splashed on another vehicle, he stopped the car and got out to talk to the owner of the other vehicle. However, after he saw Officer Johannes and other security guards approaching, he got back in the car, and attempted to drive out of the parking deck – admittedly, to avoid the approaching

[1]Doc. Nos. 37, 40, 43, 44.

[2]Unless otherwise noted, the undisputed material facts are from the parties' Statement of Facts and Responses (Doc. No. 27, 31, 39, 42).

security officers. When Mr. Williams was "attempting to get away . . . as quickly as possible," a security officer, Officer Johannes, and unidentified white male were behind the vehicle.[3] As the vehicle accelerated forward to leave, Officer Johannes drew his service weapon and fired twelve shots toward the driver's side of the vehicle. Mr. Williams was shot four times in the back and Keithen Pettus was shot in the left side of his face. Ultimately, Plaintiffs' car struck a concrete median. Plaintiffs attempted to flee on foot, but were apprehended and arrested.

## II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided on purely legal grounds.[4] The Supreme Court has established guidelines to assist trial courts in determining whether this standard has been met:

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.[5]

The Court of Appeals for the Eighth Circuit has cautioned that summary judgment is an extreme remedy that should be granted only when the movant has established a right to the judgment beyond controversy.[6] Nevertheless, summary judgment promotes judicial economy by preventing trial when no genuine issue of fact remains.[7] A court must view the facts in the light

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[3]Doc. No. 26-20.

[4]*Holloway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987); Fed. R. Civ. P. 56.

[5]*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

[6]*Inland Oil & Transport Co. v. United States*, 600 F.2d 725, 727 (8th Cir. 1979).

[7]*Id.* at 728.

most favorable to the party opposing the motion.[8] The Eighth Circuit has also set out the burden of the parties in connection with a summary judgment motion:

> [T]he burden on the party moving for summary judgment is only to demonstrate, *i.e.*,"[to point] out to the District Court," that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and, if the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted.[9]

Only disputes over facts that may affect the outcome of the suit under governing law will properly preclude the entry of summary judgment.[10]

## III. DISCUSSION

### A. Officer Johannes – Excessive Force

"A § 1983 claim for apprehension by force, deadly or not, constitutes a seizure subject to the Fourth Amendment," and the test is whether the seizure "was objectively reasonable" under the Fourth Amendment.[11] A court must consider the totality of the circumstances at the time of the seizure when examining whether an officer's actions are "objectively reasonable."[12] In a Fourth Amendment context, determining reasonableness "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether

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[8] *Id.* at 727-28.

[9] *Counts v. MK-Ferguson Co.*, 862 F.2d 1338, 1339 (8th Cir. 1988) (quoting *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273-74 (8th Cir. 1988) (citations omitted)).

[10] *Anderson*, 477 U.S. at 248.

[11] *Billingsley v. City of Omaha*, 277 F.3d 990, 993 (8th Cir. 2002) (citing *Graham v. Conner*, 490 U.S. 386, 395 (1989)).

[12] *Graham v. Conner*, 490 U.S. 386, 397 (1989).

the suspect poses an immediate threat to the safety of officers or others, and whether he is actively resisting or attempting to evade arrest by flight."[13]

The United States Supreme Court has held:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.[14]

The undisputed facts are that Plaintiffs were in a car that was attempting to leave the mall parking lot before being confronted by security officers. When Officer Johannes fired shots at the car, it was driving away from him. Yet, he says he used deadly force because he believed Plaintiffs' car was going to either hit him or one of the other security officers.[15] However, the location of Officer Johannes, a security guard, and a pedestrian are all in dispute. This factual dispute is material to Officer Johannes's claim that he fired shots because he thought people were in danger of serious physical harm. There also appears to be a factual dispute as to whether Officer Johannes ever directed Plaintiffs to stop. Accordingly, a jury must make factual determinations and decide whether Officer Johannes's actions were objectively reasonable in light of the circumstances.

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[13]*Id*. at 396.

[14]*Tennessee v. Garner*, 471 U.S. 1 (1985).

[15]Officer Johannes asserts that he "fired twelve shots into the driver's side of the vehicle . . . because I feared for my and Security Officer Hawkins' life." Doc. No. 26-17.

**B. Officer Johannes – Qualified Immunity**

Officer Johannes argues that he is entitled to qualified immunity on the excessive force claim.[16] To overcome a qualified immunity defense, first, a plaintiff's allegations must "show the officer's conduct violated a constitutional right."[17] Next, a court must determine "whether the right was clearly established . . . [and if] it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[18]

A reasonable officer would know that Plaintiffs had a clearly established right to be free from deadly force if Plaintiffs did not pose a threat of serious physical harm to anyone.[19] If a jury believe Plaintiffs' version of events – that they saw the mall security (including Officer Johannes) approaching them; wanted to leave before being confronted; and no one was directly in the path of their vehicle – then a jury could find that Officer Johannes's conduct was unlawful. Whether Plaintiffs actions posed a seriously threat of physical harm to anyone depends on what occurred – a fact issue reserved for the jury in this case.[20]

**C. Chief of Buckner, Chief Thomas, and City of Little Rock**

Plaintiffs allege that the City of Little Rock and its police chiefs ("Little Rock Defendants"), were "[p]ermitting and maintaining a widespread custom of permitting excessive

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[16]Doc. No. 28.

[17]See *Saucier v. Katz*, 533 U.S. 194, 201 (2001), overruled in part by *Pearson v. Callahan*, 555 U.S.223, 227, 242 (2009) ("We now hold that the *Saucier* protocol should not be regarded as mandatory in all cases . . . Our decision does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases.").

[18]*Id*. at 202-03.

[19]*Nance v. Sammis*, 586 F.3d 604, 611 (8th Cir. 2009) ("Existing case law would have made it sufficiently clear to a reasonable officer that a suspect cannot be apprehended by use of deadly force unless that individual poses a threat of serious physical harm.").

[20]*Franklin for Estate of Franklin v. Peterson*, 878 F.3d 631, 638 (8th Cir. 2017).

force."[21] Plaintiffs point out several instances where other Little Rock police officers allegedly used excessive force or misbehaved. For the same reasons set out in *Perkins v. Hastings*, the examples Plaintiffs submitted (which were the same examples submitted in *Perkins*) of alleged bad acts by Little Rock officers fail to support a claim against the Little Rock Defendants.[22]

Plaintiffs also point to several complaints involving Officer Johannes:

- In 2009, Demetrius Curtis filed suit against Officer Johannes based on excessive force. The Internal Affairs investigation concluded Curtis's allegations were false and cleared the officers. However, in 2012, the City of Little Rock settled Curtis's excessive force case involving Officer Johannes.
- In May of 2005, a William Gray, III filed a complaint alleging that Officer Johannes hit him in the back of the neck with a baton and kicked after being handcuffed. Nothing became of this complaint.
- In November of 2005, Sydney Macfoy filed a complaint alleging that Officer Johannes taunted him and beat him.
- In May of 2006, Sheldon Wheaton filed a complaint alleging that Officer Johannes called him a pussy after his head was slammed against the car divider.
- In September of 2007, Kelly Smith filed a complaint against Officer Johannes after he taunted him and then punched him. Nothing was done.[23]

While these allegations against Officer Johannes are troubling, Plaintiffs failed to provide any documentation to support the allegations or to question the outcome of investigations of the incidents. Without requisite evidentiary support, I am unable to find that the Little Rock Defendants were deliberately indifferent to an obvious risk of unconstitutional behavior by Officer Johannes. Accordingly, Plaintiffs have failed to meet their burden.

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[21]Doc. No. 1.

[22]No. 4:15-CV-00310 (E.D. Ark. Jan. 27, 2017), Doc. No. 74.

[23]Doc. No. 41.

Additionally, Plaintiffs did not respond to Defendants' arguments on failure to train, failure to supervise, and negligence by the Little Rock Defendants. Regardless, based on the record, summary judgment was appropriate.

**D. Park Plaza and ERMC**

Plaintiffs allege that "Defendants, Johannes, Simmons, Hawkins, Park Plaza and ERMC had a duty to use reasonable care in their treatment of Plaintiffs as they were business invitees."[24] Defendants argue that, at the time of the shooting, Plaintiffs were no longer invitees, but trespassers and "willful and wanton conduct" is required to establish liability. The following facts are undisputed, (1) Plaintiffs had been shopping at the mall; (2) another shopper advised security that some men were pestering her (it is disputed what, exactly, was said to the female customer); and (3) when security approached Plaintiffs' car to question them, Plaintiffs immediately attempted to get out of the parking lot. Defendants rely on after-the-fact evidence to support their claim that Plaintiffs had become trespassers rather than invitees; none of this (selling cocaine, possession of illegal drugs, possession of stolen firearms) was known to Officer Johannes or the security guards when they approached the vehicle. As far as security knew, Plaintiffs were invitees when the officers approached the car, and Plaintiffs were owed the duty of invitees.

**E. Defendant Sara Hawkins**

The Complaint alleges that Defendant Sara Hawkins was "working as Security Officers for Park Plaza and/or ERMC" and "[h]ad a duty to use reasonable care in [her] treatment of Plaintiffs as they were business invitees."[25] According to the Complaint, Ms. Hawkins failed to

[24]Doc. No. 1.

[25]*Id.*

provide adequate security; failed to properly investigate; failed to provide training, supervision, and instructions; failed to screen off-duty police officers; and failed to use the appropriate amount of force.[26] None of these claims against Ms. Hawkins are supported by the facts in this case. It is undisputed that Ms. Hawkins was a supervising security officer who was asked to respond to a complaint in the parking deck. She was approaching Plaintiffs' car to question them, but they sped off before she reached the car. She never engaged Plaintiff before the shooting nor is she alleged to have used any force against them. Basically, she was a witness to the incident. Additionally, all of the generic allegations regarding duty fall to her employer. Accordingly, Defendant Hawkins is DISMISSED with prejudice. If Plaintiffs believe this conclusion is in error (none of the summary judgment papers – except for the undisputed material facts mention Ms. Hawkins), Plaintiffs may disabuse me by filing a motion for reconsideration by 5 p.m. Wednesday, October 3, 2018.

**F. Defendant Trista Simmons and John Does**

On July 28, 2017, Plaintiff were granted an extension of time – until July 9, 2017 – to serve Defendant Trista Simmons. To date, she has not been served. There are also John Does and John Doe Corporations named as defendants. Because trial less than two weeks away, they are all DISMISSED without prejudice.

**CONCLUSION**

Based on the findings of fact and conclusions of law above, Defendants Motion for Summary Judgment by Christopher Johannes, Chief Stuart Thomas, Chief Kenneth Buckner, and the City of Little Rock (Doc. No. 26) is GRANTED in PART and DENIED in PART. Summary

[26] *Id.*

Judgment is GRANTED for Chief Stuart Thomas, Chief Kenneth Buckner, and the City of Little Rock. Summary Judgment is DENIED for Christopher Johannes.

The Motion for Summary Judgment by ERMC II, LP and Park Plaza Mall (Doc. No. 29) is DENIED.

Defendant Sara Hawkins is DISMISSED with prejudice. If Plaintiffs believe this is error, they must file a motion for reconsideration by 5 p.m. Wednesday, October 3, 2018.

Defendants Trista Simmons, John Does, and John Doe Corporations are DISMISSED without prejudice.

IT IS SO ORDERED this 28th day of September, 2018.

/s/ Billy Roy Wilson_____
UNITED STATES DISTRICT JUDGE