IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

NOBLE COOPER, Estate of NORMAN COOPER, JENNIFER COOPER, NATHAN COOPER, CARLY LOPEZ, Individually and as Next Friend of Nason Cooper and Nevon Cooper, Minors, NASON COOPER, a Minor, NEVON COOPER, a Minor,	§	NO. 5:16-CV-77-DAE
Plaintiffs,	§	
vs.	§	
CITY OF SAN ANTONIO, OFFICER OLIVER FLAIG, OFFICER ARNOLDO SANCHEZ, and INTERIM POLICE CHIEF ANTHONY TREVINO,	§	
Defendants.	§	

ORDER: (1) GRANTING IN PART AND DENYING IN PART OFFICERS' MOTION FOR SUMMARY JUDGMENT (DKT. # 53); AND (2) GRANTING THE CITY'S MOTION FOR SUMMARY JUDGMENT (DKT. # 54)

Before the Court are (1) Defendants Officer Oliver Flaig and Officer Arnoldo Sanchez's ("Officers") Motion for Summary Judgment (Dkt. # 53); and (2) Defendants City of San Antonio and Anthony Trevino's ("the City") Motion for Summary Judgment (Dkt. # 54). A hearing was held on these matters on May 3, 2018. At the hearing, Edward Pina represented Plaintiffs, Nathan Mark Ralls represented the Officers and the City.

After careful consideration of the memoranda in support of and in opposition to the motions, as well as the arguments of counsel at the hearing, the Court, for the reasons that follow, **GRANTS IN PART** and **DENIES IN PART** the Officers' motion for summary judgment, and **GRANTS** the City's motion for summary judgment.

BACKGROUND

This case concerns the death of Norman Cooper while in the custody of the San Antonio Police Department. The Estate of Norman Cooper originally filed this lawsuit in the 131st District Court in Bexar County, Texas, on December 31, 2015, along with additional Plaintiffs Noble Cooper (father of Norman Cooper), Jennifer Cooper (mother of Norman Cooper), Nathan Cooper (brother of Norman Cooper), Carly Lopez (wife of Norman Cooper), Nason Cooper (minor son of Norman Cooper), and Nevon Cooper (minor son of Norman Cooper). (Dkt. # 1-1.) Plaintiffs asserted a claim pursuant to 42 U.S.C. § 1983, among other causes of action, against the City of San Antonio, Officer Oliver Flaig, Officer Arnaldo Sanchez, and Interim Police Chief Anthony Trevino (collectively, "Defendants"), alleging that Defendants violated Norman Cooper's Fourth and Fourteenth Amendment rights under the United States Constitution. (Id.)

On January 25, 2016, Defendants removed Plaintiffs' state-court petition to this Court on the basis of federal-question jurisdiction. (Dkt. # 1.) Plaintiffs' Second Amended Complaint (the "Complaint"), the live complaint in this case, alleges that on the date of Norman Cooper's death, April 19, 2015, Nathan Cooper called the 911 dispatcher of the San Antonio Police Department requesting assistance because he was concerned about his brother's well-being. (Dkt. # 29 at ¶ 15.) The Complaint states that Nathan had observed Norman exhibiting unusual behavior during a visit at their parents' house, possibly due to drug use; Norman appeared disoriented and excited, was perspiring and removing his clothes, and was loudly reciting religious quotes and ideals. (Id.) Officers Flaig and Sanchez arrived at the Coopers' residence shortly thereafter ostensibly to assist Norman and Nathan, but the incident ultimately resulted in what Plaintiffs allege to be an unprovoked and brutal attack on Norman Cooper. (Id. at ¶ 18.) According to Plaintiffs, Officers Flaig and Sanchez violently assaulted Norman both verbally and physically, despite the fact that Norman never threatened or made physical contact with the officers. (Id.) They further contend that the assault culminated in the repeated and prolonged use of multiple Tasers shots on Norman in an upstairs bedroom. (Id. at ¶¶ 18–26.) Plaintiffs allege that when Nathan was finally permitted to enter the bedroom, he found Norman handcuffed and face down on the floor in respiratory distress. (Id. at ¶¶ 27–32.) According to

Plaintiffs, the Officers failed to monitor Norman's breathing or check on Norman's health and well-being or allow Nathan to do so. (Id. at ¶¶ 33–35.) Finally, the officers on the scene contacted Emergency Medical Services ("EMS"), but when EMS arrived Norman was already dead. (Dkt. # 29 at 36.)

Plaintiffs allege that the aforementioned conduct of Defendants was a proximate cause of Norman Cooper's death and assert claims under the Texas Tort Claims Act, the Texas Civil Practice & Remedies Code, and the Fourth and Fourteenth Amendments of the United States Constitution pursuant to 42 U.S.C. § 1983. (Dkt. # 29.)

On October 2, 2017, the Officers and the City each filed motions for summary judgment on all of Plaintiffs' claims against them.[1] (Dkts. ## 53, 54.) On November 22, 2017, after being granted an extension of time, Plaintiffs filed a timely, consolidated response in opposition. (Dkt. # 59.) On December 6, 2017, the Officers and the City filed a joint reply in support of their motions. (Dkt. # 65.) The Court granted Plaintiffs leave to file a sur-response on February 5, 2018. (Dkt. # 68.)

[1] Both the Officers and the City adopt each other's motions. (See Dkts. ## 53, 54.) Thus, the Court will analyze both motions jointly.

LEGAL STANDARD

A movant is entitled to summary judgment upon showing that "there is no genuine dispute as to any material fact," and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); see also Meadaa v. K.A.P. Enters., L.L.C., 756 F.3d 875, 880 (5th Cir. 2014). A dispute is only genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party meets this burden, the nonmoving party must come forward with specific facts that establish the existence of a genuine issue for trial. Distribuidora Mari Jose, S.A. de C.V. v. Transmaritime, Inc., 738 F.3d 703, 706 (5th Cir. 2013) (quoting Allen v. Rapides Parish Sch. Bd., 204 F.3d 619, 621 (5th Cir. 2000)). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Hillman v. Loga, 697 F.3d 299, 302 (5th Cir. 2012) (quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).

In deciding whether a fact issue has been created, the court must draw all reasonable inferences in favor of the nonmoving party, and it "may not make credibility determinations or weigh the evidence." Tiblier v. Dlabal, 743 F.3d

1004, 1007 (5th Cir. 2014) (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000)). At the summary judgment stage, evidence need not be authenticated or otherwise presented in an admissible form. See Fed. R. Civ. P. 56(c); Lee v. Offshore Logistical & Transp., LLC, 859 F.3d 353, 355 (5th Cir. 2017). However, "[u]nsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." United States v. Renda Marine, Inc., 667 F.3d 651, 655 (5th Cir. 2012) (quoting Brown v. City of Hous., 337 F.3d 539, 541 (5th Cir. 2003)).

ANALYSIS

The Officers move for summary judgment on the following: (1) the Estate of Norman Cooper's capacity to bring this suit; (2) whether Nathan Cooper has a cause of action; (3) whether they are entitled qualified immunity; (4) Plaintiffs' excessive force claim; (5) Plaintiffs' failure to provide medical care claim; (6) Plaintiffs' claims based on negligence; and (7) Plaintiffs' state tort claims. (Dkt. # 53.) The City moves for summary judgment on Plaintiffs' claims for negligence and deprivation of constitutional rights. (Dkt. # 54.)

I. Claims Brought on Behalf of the Estate of Norman Cooper

Defendants argue that the Complaint alleges that it is brought on behalf of the Estate of Norman Cooper, but that there is little, if any, actual reference to a claim brought on behalf of the Estate. (Dkt. # 53 at 2.) Defendants

contend that although Plaintiffs do not specifically allege a survivorship claim, to the extent the Complaint can be read to assert such a claim, it should be dismissed because a survival claim belongs only to the decedent for injuries sustained while the decedent was still alive. (Id. at 2–3.) Defendants assert that (1) none of the Plaintiffs have alleged that they are suing in representative capacity on behalf of the Estate of Norman Cooper, (2) Plaintiffs have not pled that any of them have been appointed as the personal representative of the Estate, and (3) Plaintiffs have not alleged that an administration of the Estate of Norman Cooper is pending or necessary. (Id. at 3–4.) Defendants thus contend that they are entitled to summary judgment on any claims asserted on behalf of the Estate of Norman Cooper. (Id.)

In Plaintiffs' response to the pending summary judgment motions, Plaintiffs contended that there was an administration of the Estate pending. (Dkt. # 59 at 23.) Indeed, in a supplement filing to the Court submitted on March 29, 2018, Plaintiffs submitted evidence of the March 19, 2018 state court order appointing Plaintiff Noble Lee Cooper, Jr. ("Noble"), the decedent's father, as the Administrator of Norman Cooper's Estate, as well as the Certified Letters of Administration. (Dkts. ## 74-1, 74-2.) Thus, given Noble's appointment as the Administrator of the Estate, Plaintiffs assert that they have properly brought these claims pursuant to section 71.021 of the Texas Civil Practice and Remedies Code. (Id.)

"Standing under the Civil Rights Statutes is guided by 42 U.S.C. § 1988, which provides that state common law is used to fill the gaps in administration of civil rights suits." Pluet v. Frasier, 355 F.3d 381, 383 (5th Cir. 2004); 42 U.S.C. § 1988(a). "Therefore, a party must have standing under the state wrongful death or survival statutes to bring a claim under 42 U.S.C. §§ 1981, 1983, and 1988." Id. (citing Rhyne v. Henderson Cnty., 973 F.2d 386, 390–91 (5th Cir. 1992)); Handley v. City of Seagoville, Tex., 798 F. Supp. 1267, 1269 (N.D. Tex. 1992). Under the Texas Survival Statute, heirs, legal representatives, and the estate of the injured person may bring a survival action. Tex. Civ. Prac. & Rem. Code § 71.021(b). "Generally, only personal representatives of the estate are entitled to bring a personal injury action." Austin Nursing Ctr., Inc. v. Lovato, 171 S.W.3d 845, 848–50 (2005) (citing Shepherd v. Ledford, 962 S.W.2d 28, 31 (1998)). Courts have recognized that, where the individual bringing suit on behalf of the estate is not the estate's representative, the question is one of capacity; the estate plainly has standing. See, e.g., Lovato, 171 S.W.3d. at 848–50 ("A change in the status of the party authorized to assert the decedent's personal injury claim, however, does not change the fact that the decedent has been personally aggrieved and would not, therefore, eliminate the decedent's justiciable interest in the controversy."); Pluet, 355 F.3d at 383 ("Although Fredrick Pluet's estate would have standing under the [Texas Survival Statute] to pursue his 28 U.S.C. § 1983

claims, at the time she filed her complaint, Sandra Hardeman was not the administrator of Fredrick Pluet's estate.").

Defendants' contention is correct that there is no question in this case that Plaintiffs lacked the capacity to bring this lawsuit on behalf of the Estate of Norman Cooper at the time the suit was initiated. Nevertheless, Texas law allows for later-acquired capacity to cure lack of capacity, even if by the time capacity is acquired, the statute of limitations has run on the claims brought. Lovato, 171 S.W.3d at 853; Lorentz v. Dunn, 171 S.W.3d 854, 856 (2005); Damian v. Bell Helicopter Textron, Inc., 352 S.W.3d 124, 142–43 (Tex. App.—Fort Worth 2011, pet. denied).

In two cases decided on the same day, the Texas Supreme Court made clear that post-limitations acquisition of capacity cures a pre-limitations lack of capacity, and the survival claim is not barred by the statute of limitations because the subsequent acquisition of capacity relates back. Lovato, 171 S.W.3d at 853; Lorentz v. Dunn, 171 S.W.3d 854, 856 (2005). Furthermore, Lovato also provides that, when capacity is challenged, "the trial court should abate the case and give plaintiff a reasonable time to cure any defect." Lovato, 171 S.W.3d at 853 n.7.

Therefore, because Texas law clearly provides that defects in capacity may be cured without rendering a claim time-barred, and because the Texas Supreme Court has indicated a preference for allowing plaintiffs whose capacity

has been challenged "a reasonable time to cure any defect," the Court finds that Plaintiffs have cured the original defect in capacity in this case.[2] Lovato, 171 S.W.3d at 853 n.7. Accordingly, the Officers motion for summary judgment on this issue is denied.

II. Nathan Cooper's Claims

The Officers next move for summary judgment on the claims of Plaintiff Nathan Cooper ("Nathan"), the brother of the decedent, on the basis that it is unclear what claims Nathan is asserting in this case. (Dkt. # 53 at 4.) The Officers contend that Nathan (1) has no cause of action under § 1983; (2) is barred from bringing a state tort bystander cause of action against them; and (3) has no standing to maintain a wrongful death claim or survivorship claim under § 1988. (Id.) The Officers also argue that they are entitled to summary judgment on Noble and Jennifer Cooper's (parents of the decedent) punitive damages claims. (Id. at 6.)

[2] The Texas Supreme Court also determined that "it would be pointless to require that the plaintiff file an 'amended' pleading containing the same allegations of capacity as were stated in her original petition. The estate commenced the suit before limitations expired; [the plaintiff] cured the defect in her capacity before the case was dismissed. Under those circumstances, the estate had standing and was ultimately represented by a person with capacity to pursue the claim on its behalf." Lovato, 171 S.W.3d at 853.

A. Bystander Claim Under Section 1983

The Officers first argue that to the extent Nathan brings a bystander claim under 42 U.S.C. § 1983, Nathan has not properly alleged that his personal rights were violated. (Id.) The Officers contend that although Nathan has alleged a bystander claim as a result of watching the interaction between Defendants and Norman Cooper, as well as being present at the time of Norman's death, there is no constitutional right to be free from witnessing police action. (Id. at 4–5.)

The Court agrees with the Officers' contention. "[I]t is well-established that a civil rights claim must be based upon a violation of a plaintiff's personal rights." Thomas v. Frederick, 766 F. Supp. 540, 556 (W.D. La. 1991). "A bystander who witnesses a police action, but who is not himself an object of that action, cannot recover for any resulting emotional injuries under § 1983, although there may be such a claim under state tort law." Id. "There is no constitutional right to be free from witnessing police action." Id. (citing Grandstaff v. Borger, 767 F.2d 161, 172 (5th Cir. 1985), cert. denied 480 U.S. 916 (1987); Coon v. Ledbetter, 780 F.2d 1158 (5th Cir. 1986); Archuleta v. McShan, 897 F.2d 495 (10th Cir. 1990)). Accordingly, the Court will grant summary judgment in favor of the Officers for Nathan's bystander claim brought § 1983.

B. State Tort Bystander Claim

The Officers further argue that they are entitled to summary judgment on any state tort bystander claim Nathan may assert against them because such a claim is barred by the election of remedies provision of Section 101.106, et. seq. of the Texas Tort Claims Act ("TTCA"), as they argue below. (Dkt. # 53 at 5.)

Indeed, the TTCA bars a plaintiff's intentional tort claim against a governmental employee when the plaintiff sues both the employee and the governmental unit that employed him or her. Bustos v. Martini Club Inc., 599 F.3d 458, 463 (5th Cir. 2010). "If a suit is filed under [the TTCA] against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit." Tex. Civ. Prac. & Rem. Code Ann. § 101.106(e). Accordingly, to the extent Nathan asserts such a cause of action against the Officers, Nathan's state tort bystander claim is dismissed.

C. Nathan's Claims under § 1988

The Officers next argue that they are entitled to summary judgment to the extent Nathan asserts a wrongful death or survivorship claim under 42 U.S.C. § 1988 because Nathan has no standing to bring these claims. (Dkt. # 53 at 5.) According to the Officers, under the Texas Wrongful Death Statute, Nathan is not a named beneficiary, nor have Plaintiffs alleged that Nathan is pursuing a claim on

behalf of the Estate of Norman Cooper to properly bring a claim for survivorship as discussed above. (Id.)

Again, pursuant to § 1988, the Court must look to Texas state law to determine whether Nathan has standing to assert a wrongful death claim under § 1983. See Aguillard v. McGowen, 207 F.3d 226, 231 (5th Cir. 2000). The Texas Wrongful Death statute provides that only the decedent's spouse, children, and parents may bring an action for wrongful death. See Tex. Civ. Prac. & Rem. Code § 71.004. Thus, because Nathan is neither of these, he cannot maintain a wrongful death action and summary judgment is granted in favor of the Officers for such a claim brought by Nathan.

To the extent Nathan brings a claim for survivorship on behalf of the Estate of Norman Cooper, he may only do so if he is the personal representative of the estate. See Lovato, 171 S.W.3d at 848–50. Here, the evidence indicates that Noble, not Nathan, is the personal representative of the Estate of Norman Cooper. Thus, the Court will grant summary judgment on any survivorship claim brought by Nathan.

D. Noble and Jennifer Cooper's Punitive Damages Claims

The Officers also contend that they are entitled to summary judgment on Noble and Jennifer Cooper's (again, parents of the decedent) claims for punitive damages. (Dkt. # 53 at 6.) The Officers assert that they are not "heirs" of the

decedent as defined by the Texas Constitution and common law of the state of Texas. (Id.)

Article XVI, section 26 of the Constitution of the State of Texas, which governs the recovery of punitive damages in wrongful death actions, reads as follows:

> Every person, corporation, or company, that may commit a homicide, through wilful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide.

Tex. Const. art. XVI, § 26.

"It is well established that this provision defines the class of persons who are entitled to recover punitive damages for wrongful death; parents of the deceased . . . are not included in article XVI, § 26 and are therefore unable to recover punitive damages." Gen. Chem. Corp. v. De La Lastra, 852 S.W.2d 916, 923 (Tex. 1993) (citing Winnt v. Int'l & G.N. Ry. Co., 74 Tex. 32, 11 S.W. 907, 908 (Tex. 1889)). Therefore, the Court will grant the Officers' motion for summary judgment insofar as it seeks to dismiss Noble and Jennifer Cooper's request for punitive damages.[3]

[3] Plaintiffs' response to the summary judgment motion appears to assert for the first time a claim by Noble and Jennifer Cooper for bystander liability. (See Dkt. # 59 at 25.) However, Plaintiffs may not raise a bystander claim for the first time in their response.

III. Qualified Immunity

The Officers argue that they are entitled to qualified immunity on Plaintiffs' claims. (Dkt. # 53 at 8.) "To state a claim under § 1983, a plaintiff must first show a violation of the Constitution or of federal law, and then show that the violation was committed by someone acting under color of state law." Atteberry v. Nocona Gen. Hosp., 430 F.3d 245, 252–53 (5th Cir. 2005). "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a person would have known." Pearson v. Callahan, 555 U.S. 223, 231 (2009) (internal quotation marks omitted). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Id. Because qualified immunity is immunity from suit rather than a defense to liability, immunity questions should be resolved at the earliest possible stage in litigation. Id. at 231–32.

"To defeat a claim of qualified-immunity, the plaintiff has the burden to demonstrate the inapplicability of the defense." McLin v. Ard, 866 F.3d 682, 689 (5th Cir. 2017) (citing Atteberry, 430 F.3d at 253; McClendon v. City of Columbia, 305 F.3d 314, 323 (5th Cir. 2002) (en banc) (per curiam)). To

discharge this burden, the plaintiff must satisfy a two-prong test. U.S. ex rel. Parikh v. Brown, 587 F. App'x 123, 127–28 (5th Cir. 2014); Atteberry, 430 F.3d at 251–52. First, the plaintiff must show, viewing the summary judgment evidence in the light most favorable to him, the defendant violated a constitutional right. Brown v. Callahan, 623 F.3d 249, 253 (5th Cir. 2010); Freeman v. Gore, 483 F.3d 404, 410 (5th Cir. 2007). If the court determines "that the alleged conduct did not violate a constitutional right, [the] inquiry ceases because there is no constitutional violation for which the government official would need qualified immunity." Lytle v. Bexar Cnty., Tex., 560 F.3d 404, 410 (5th Cir. 2009). Second, the plaintiff must show the defendant's actions were objectively unreasonable in light of the law that was clearly established at the time of the alleged violation. Brown, 623 F.3d at 253; Freeman, 483 F.3d at 411. If the court answers both of these questions in the affirmative, the official is not entitled to qualified immunity. Lytle, 560 F.3d at 410. "Even if the government official's conduct violates a clearly established right, the official is entitled to qualified immunity if his conduct was objectively reasonable." Davis v. McKinney, 518 F.3d 304, 317 (5th Cir. 2008) (citing Hare v. City of Corinth, Miss., 135 F.3d 320, 325 (5th Cir. 1998)).

"For immunity to apply, the actions of the officer must be objectively reasonable under the circumstances, such that a reasonably competent officer would not have known his actions violated then-existing clearly established law."

Mesa v. Prejean, 543 F.3d 264, 269 (5th Cir. 2008) (internal quotation marks omitted). The focus of the inquiry "should be on 'fair warning': qualified immunity is unavailable . . . so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." Wernecke v. Garcia, 591 F.3d 386, 393 (5th Cir. 2009) (internal quotation marks omitted). "Courts have discretion to decide which prong of the qualified-immunity analysis to address first." Morgan v. Swanson, 659 F.3d 359, 371 (5th Cir. 2011). The Court will consider whether the Officers are entitled to qualified immunity as to each of Plaintiffs' § 1983 claims in turn.

A. Excessive Force Claim

Plaintiffs state a § 1983 claim for the violation of the Fourth Amendment right to be free from excessive force, alleging that the Officers used excessive force to effect the detention of Norman Cooper. (Dkt. # 29 at 19.) The Fourth Amendment confers a right to be free from excessive force during an arrest. Deville v. Marcantel, 567 F.3d 156, 169 (5th Cir. 2009) (per curiam). To establish a claim of excessive force under the Fourth Amendment, a plaintiff must show "(1) an injury (2) which resulted directly and only from the use of force that was clearly excessive to the need and (3) the force used was objectively unreasonable." Cass v. City of Abilene, 814 F.3d 721, 731 (5th Cir. 2016) (citation and internal quotation marks omitted).

"Excessive force claims are necessarily fact-intensive; whether the force used is 'excessive' or 'unreasonable' depends on 'the facts and circumstances of each particular case.'" Deville, 567 F.3d at 167 (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)). Guiding this inquiry, the Supreme Court has identified three sets of facts which deserve careful consideration in determining whether the force used is "excessive" or "unreasonable": (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 the suspect is actively resisting arrest or attempting to evade arrest by flight. Graham, 490 U.S. at 396; see also Griggs v. Brewer, 841 F.3d 308, 313–14 (5th Cir. 2016) ("A court must measure the force used under the facts as a reasonable person would perceive them, not necessarily against the historical facts"). Courts must evaluate the officer's action "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Poole v. City of Shreveport, 691 F.3d 624, 628 (5th Cir. 2012) (citing Graham, 490 U.S. at 396).

In support of their motion, the Officers offer evidence that Officer Flaig received a dispatch call for a family disturbance from a male caller (Nathan Cooper), indicating that his brother (Norman Cooper) was intoxicated, screaming, and refusing to leave their parents' home, who were out of town at the time. (Dkt. # 53-8; Ex. G-1 (COBAN recording of Officer Flaig).) According to Officer Flaig,

he arrived on the scene, and noticed that an SUV was parked in front of the house—partially in the driveway and sidewalk. (Dkt. # 53-8 at 2; Ex. G-1 (COBAN recording of Officer Flaig).) Additionally, Officer Flaig indicates that the vehicle was parked in an angled position, its lights were on, and the driver door was swung open with the engine running. (Dkt. # 53-8 at 2; Ex. G-1 (COBAN recording of Officer Flaig).) Given this situation, Officer Flaig "believed that something was out of the ordinary." (Dkt. # 53-8 at 2.) Officer Flaig further indicated that when he approached the door of the residence, he knocked on the door, but that "the door moved open on his knock," and that he saw a man walk up to him. (Id.) Upon entering, Officer Flaig stated that he noticed that the front door was damaged at the frame, and that the trim was broken. (Id.) According to Officer Flaig, the man who first walked up to him, later identified as Nathan Cooper, told him that "he" (Norman) broke the door and that "he" (Norman) was not supposed to be there. (Id.) Thereafter, Officer Flaig stated that he saw a man (Norman) come into the room "who was significantly bigger in stature than [Flaig] and Nathan." (Id.) Officer Flaig stated that Norman was not wearing a shirt, his belt was undone, his pants were loose, and he looked to be profusely sweating. (Id.) Norman was also rambling, loud, and confrontational. (Dkt. # 53-8 at 2.) According to Officer Flaig, Nathan informed him that he was scared of Norman.[4]

[4] Defendants offer the COBAN audio recording from both of the Officers

(Id.) Officer Flaig indicated that he attempted to calm Norman, asking him to "cool down" and "chill out." (Id.)

A short time later, the evidence indicates that Officer Sanchez arrived on the scene. (Dkt. # 53-8 at 2.) Officer Sanchez had a conversation on the front porch with Nathan where Nathan told him that the house belonged to his parents—Noble and Jennifer, who were out of town. (Dkt. # 58-9 at 2.) According to Officer Sanchez, Nathan told him that Norman had broken into the house, was causing a disturbance, and refused to leave. (Id.) The COBAN audio recording of the incident indicates that Nathan told Officer Sanchez that he did not know if Norman had a gun, and that when Norman was on drugs, "he scared the crap out of [Nathan]." (Id.; Ex. H-1 (COBAN recording of Officer Flaig).)

Meanwhile, after asking Norman for his identification, Officer Flaig accompanied Norman upstairs in the house. They entered a small bedroom where Norman, according to Officer Flaig, began aggressively approaching Officer Flaig and then backing away as he was shouting, and that he did this repeatedly. (Dkt. # 53-8 at 2.) By this time, Officer Sanchez had also come upstairs into the bedroom. (Id.) Officer Flaig indicated that he "was unsure of [Norman's] behavior" and that he "felt uncomfortable." (Id.) Once again, Officer Flaig asked

---

concerning this incident; however, much of the audio is hard to decipher, although there are a couple of voices on the audio which match the Officers' account of the events as stated in their declarations. (See COBAN recordings of Officers Flaig and Sanchez; see also Dkt. # 53-8, Dkt. # 53-9.)

Norman for his identification, but Norman did not comply. (Id.) According to Officer Flaig, Norman continued to move his hands and that his approach was aggressive in nature. (Id.) Officer Flaig stated that he became concerned for his and Officer Sanchez's safety, so he tried to detain Norman with handcuffs until he could further investigate the situation. (Id.) Officer Flaig further determined that he "thought the situation could result in an emergency detention because Norman appeared to be a danger to himself." (Dkt. # 53-8 at 2.) Both Officers told Norman to turn around, but he would not comply after being asked to do so several times. (Id.) According to the Officers, at this point, Officer Sanchez pulled out his Taser device, pointed it at Norman's abdomen area, asked again for Norman to turn around, and told Norman that he would use it on him if he did not comply. (Id.) The Officers indicate that Norman saw the Taser, but continued to refuse to comply after being asked several more times. (Id.) Still, Officer Flaig stated that Officer Sanchez re-holstered his Taser, attempting to use only his hands to place Norman in handcuffs, but that Norman actively resisted by pulling his arms away from the Officers. (Id. at 2–3.)

According to Officer Flaig, Norman proceeded to pick up an open laptop computer on a desk and attempted to explain something on it. (Id. at 3.) At this time, Officer Flaig states that he thought Norman may attempt to use the laptop as a weapon, so both he and Officer Sanchez pulled out their Tasers.

Officer Flaig then deployed his Taser, and one prong struck Norman's thigh. (Id.) Officer Flaig indicates that this strike had no effect on Norman, but that the laptop fell to the floor. (Id.) Officer Sanchez then deployed his Taser, and that it was somewhat effective because Norman's chest began flexing and got stiff. (Id.) According to Officer Flaig, Norman fell backwards against the window and then fell onto the floor between the desk and the window, but that his head did not hit anything. (Id.) While the strike was somewhat effective, Officer Flaig stated that the Officers could not get to Norman's arms because he was behind the desk. (Id.)

Thereafter, Officer Flaig indicates that Norman "got back up and on his feet," but that he was still not complying and they could not get their hands on him to handcuff him because he was still pulling away from the Officers. (Dkt. # 53-8 at 3.) According to Officer Flaig, Norman was a very large man whose "strength was immense and [he] could not hold onto his arm." (Id.) Officer Flaig, thinking there was no longer a cartridge in his Taser, decided he would try to "dry-stun" Norman. (Id.) At some point, Officer Flaig's baton fell to the floor, concerning him that Norman would try to get the baton and use it on him or Officer Sanchez. (Id.) Officer Flaig indicates that he again used his Taser, now realizing there was indeed a cartridge inside of it, but that it was ineffective on Norman because he was too close even though it struck Norman's left chest or rib area. (Id.) Officer Flaig believes this strike was not effective at all, and that

Officer Flaig himself actually got stung by one of the Taser's wires. (Id.) At this point, the evidence indicates that Officer Sanchez again deployed his Taser, striking Norman's chest area. (Id.) Officer Flaig states that this strike "was somewhat effective," and that he could see Norman's body stiffen and that Norman was back on the floor on his right shoulder. (Id.) According to Officer Flaig, he had his handcuffs in his hand, but he placed them in his pocket because he needed his hands free to put his hands on Norman. (Id.) Officer Flaig put his hands on Norman's right arm, and Officer Sanchez had Norman's left arm. (Id.) Officer Flaig stated that he pulled out Officer Sanchez's handcuffs and placed them on Norman, but that it was a struggle because Norman was big and was still actively resisting. (Id.) Thereafter, Officer Sanchez got on the radio, asking for Emergency Medical Services ("EMS") and a supervisor because of the use of the Taser. (Id.)

According to Officer Flaig, Norman was situated on his right shoulder when both officers tried to turn Norman over onto his stomach, but Norman was pushing with his legs and actually pushed Officer Sanchez backwards. (Dkt. # 53-8 at 3.) Officer Flaig asked over his radio for the first arriving officer to bring leg restraints and, upon arrival, two other officers came into the bedroom with leg irons. (Id.) Nevertheless, according to Officer Flaig, when the other officers arrived, Norman was no longer combative, but was still breathing and laying on his

right shoulder and pelvic area, with his head and face on the right side facing the door. (Id.)

At this point, Officer Flaig stated that he "could tell [Norman] was not fighting or talking anymore," and he "saw a change in his condition as it went 180 degrees," and that he was "unsure if it was a change in his health or if he was taking a breather." (Id. at 5.) In any case, Officer Flaig indicates that he and another officer still decided to put on the leg restraints, but that he notified EMS "to step it up over the radio because [he] was concerned for [Norman's] health and wellbeing." (Id.) Officer Flaig stated that "[w]e wound up double cuffing him with the handcuffs . . . because he was such a large man" and that even though he was calm, Officer Flaig was not sure if he was done fighting. (Id.) According to Officer Flaig, he and Officer Sanchez checked Norman's pulse and he was still breathing, so they never started any medical resuscitation on him. (Id.) Officer Sanchez stated that he believed Norman was exhausted from the struggle and that was why he was not moving, but the Officers continued to monitor Norman's condition and even placed a pillow underneath his head to keep him comfortable. (Dkt. # 53-9 at 4.) According to the Officers, upon the arrival of EMS, it was determined that Norman was unresponsive, and the handcuffs were removed so that Norman could be treated. (Id.) Norman was pronounced dead a short time later. (Dkt. # 53-8 at 5.)

Plaintiffs' version of the night in question differs from the Officers' version. (See Dkt. # 29; Dkt. # 53-3 at 29.) Nathan asserts that the Officers did not have consent to enter the house. (Dkt. #59-2 at 10.) Nathan contends that it was Officer Flaig, and not Norman, who was loud and aggressive toward Norman. (Id. at 11.) According to Nathan, Norman was not yelling or screaming at him or the Officers, but was instead singing and preaching biblical gospel. (Id. at 9.) Additionally, Nathan contends that he never heard Norman threaten either officer, nor attempt to touch or make physical contact with either. (Dkt. #59-4 at 17.) Plaintiffs also argue that Norman never threatened to use the laptop computer as a weapon, citing the differences in the Officers' accounts in their report made right after the incident, and their declaration made several months later. (See Dkts. ## 59-8, 59-9, 59-10, 59-11.)

Additionally, while Nathan was not in the room while the Officers were upstairs with Norman, he heard the Officers tase Norman at least seven times prior to handcuffing him. (Dkt. # 29 at 7; Dkt. # 53-8 at 4.) Nathan asserts that when he finally reached the bedroom where the Officers were with Norman, he saw Norman face-down on the floor with his hands behind his back and he was not resisting in any way. (Dkt. # 53-3 at 29.) Nathan contends that this position, combined with the Officers' weight on top of Norman's back and neck was

avoidable, excessive, and unnecessary, ultimately increasing the stress on Norman's heart and causing his death. (Dkt. # 29 at 8.)

1. Whether the Officers Violated a Constitutional Right

Again, to overcome the Officers' claims of qualified immunity,[5] Plaintiffs must show: "(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." Poole, 691 F.3d at 628. Here, Norman undisputedly suffered an injury; therefore, the relevant inquiries are whether the injury resulted from a use of force that was clearly excessive and whether the excessiveness was clearly unreasonable. These inquiries are intertwined. See id. Relevant to these inquiries are the Graham factors, again: (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 the suspect is actively resisting arrest or attempting to evade arrest by flight. Graham, 490 U.S. at 396.

The first Graham factor suggests a low threshold for excessive force. Under the facts presented, it is not entirely clear whether Norman had committed any crime prior to the Officers' use of force. Indeed, Officer Flaig's declaration states that he "decided to detain [Norman] with handcuffs until [he] could figure

[5] Given that Officer Flaig and Officer Sanchez's actions were simultaneous concerning the incident which gives rise to Plaintiffs' claims of excessive force in this case, the Court will conduct the qualified immunity analysis together for the Officers.

out what exactly we had other than a broken door and him high [on drugs]." (Dkt. # 53-8 at 3.) Still, given the surrounding circumstances and Nathan's call for police assistance, Officer Flaig stated that he thought Norman "could have been trespassing or burglarizing the house," and that Officer Flaig thought an emergency detention was warranted "because Norman appeared to be a danger to himself." (Id.)

Under the second Graham factor, a court considers whether the suspect poses an immediate threat to the safety of the officer or others. Even under Plaintiffs' version of the events, it is evident from the record that Norman posed a threat not only to himself, but to Nathan as well as the Officers. (See, e.g., Nathan Cooper's 911 call—Officer's Exhibit A-1; Noble Cooper's 911 call—Officer's Exhibit A-1.) It is well-documented that Norman was suspected of being under the influence of drugs at the time of the incident and that he was very sweaty with his shirt off and pants unbuckled. (See, e.g., Nathan Cooper's 911 call—Officer's Exhibit A-1; Noble Cooper's 911 call—Officer's Exhibit A-1, Dkt. # 53-3 at 5, Dkt. #53-4 at 2–3, Dkt. # 53-5 at 4.) Additionally, there is evidence in the record that Nathan related to Officer Flaig that Norman was not supposed to be at the house and that Norman broke down the door.[6] (See Nathan Cooper's 911 call—

[6] In deposition, however, Nathan testified that, while Norman "broke the latch on the door," Nathan "was going to let him in." (Dkt. # 53-3 at 3.) Although not specifically alleged, to the extent Plaintiffs bring a §1983 claim for a Fourth

Officer's Exhibit A-1; Noble Cooper's 911 call—Officer's Exhibit A-1; Dkt. # 53-7 at 6; Dkt. # 53-8 at 2.) Additionally, the 911 call recordings from Nathan Cooper and Noble Cooper on the evening in question support that Nathan believed that Norman was a threat to Nathan. (See, e.g., Nathan Cooper's 911 call—Officer's Exhibit A-1; Noble Cooper's 911 call—Officer's Exhibit A-1.) Nathan's 911 call states that he "is scared for [his] life," that Norman "broke in," and that he doesn't know if Norman "going to hurt [him] or not." (Nathan Cooper's 911 call—Officer's Exhibit A-1.) Likewise, Noble Cooper's call informs the 911 dispatcher that Norman "is on drugs," and that "he is holding the other one" and "won't let him out of the house." (Noble Cooper's 911 call—Officer's Exhibit A-1.) There is also evidence that Norman's demeanor on the evening was "loud[] and confrontational," and that he would come back and forth at Officer Flaig "aggressively and then step away" and that he would do it repeatedly. (Dkt. # 53-8 at 3.) The COBAN audio recordings from both Officers supports that Norman was

---

Amendment violation for warrantless entry into the home, the Court will grant the Officers' qualified immunity for this claim. See Rockwell v. Brown, 664 F.3d 985, 995 (5th Cir. 2011) ("Under the Fourth Amendment, a warrantless intrusion into a person's home is 'presumptively unreasonable unless the person consents, or unless probable cause and exigent circumstances justify' the intrusion.") (quoting Gates v. Tex. Dep't of Protective & Regulatory Servs., 537 F.3d 404, 420 (5th Cir. 2008)). The evidence in the record clearly indicates that the Officers had probable cause to enter based on the totality of the circumstances, especially in relation to the 911 calls for assistance to the home, and therefore it was not unreasonable for the Officers to enter the house—whether Nathan let them inside or not.

shouting very loudly and was confrontational to the Officers when repeatedly asked to turn around so that the Officers could place him in handcuffs prior to being Tased. (COBAN Audio Recording from Officers Flaig and Sanchez—Defendants' Exhibit G-1 and H-1.) Officer Flaig related also that Norman was bigger than him and that he got an uncomfortable feeling when Norman would come into his personal space. (Id.) Additionally, Officer Flaig indicated that he dropped his baton on the floor and he feared Norman might be able to get to it and use it on the Officers. (Id.)

The third Graham factor requires a court to consider whether the suspect is actively resisting arrest or attempting to evade arrest by flight. For this factor, the Court only has the Officers' account of the events because Nathan, by his own admission, was not in the bedroom with Norman and the Officers prior to Norman's restraint in handcuffs.[7] (Dkt. # 53-3 at 6.) According to Officer Flaig, he asked Norman to turn around so that he could place him in handcuffs, but

[7] Nathan testified that he could hear the electrical noise from the Taser devices "going off," and that he could hear Norman making noises like "[a]hh, ahh," and "Jesus" in reaction. (Dkt. # 53-3 at 6.) Additionally, during the incident, Nathan had placed a call to his father Noble and the two were connected for the duration of the incident. (Id.) Norman placed a call to his mother from a phone in the bedroom where his mother apparently heard the events with the Officers and Norman. (Dkt. # 53-8 at 3.) According to Officer Flaig, while Norman did not realize that his mother was on the other end of the line, Officer Flaig could hear a "female's voice yelling from the phone and [that he] believe[d] it was coming from the speaker." (Id.) Importantly, however, none of the Plaintiffs' proffered evidence directly contradicts one of the key facts attested to by the Officers: Norman continued to resist arrest even after he was tasered multiple times.

Norman did not comply. (Dkt. # 53-8 at 3.) Thereafter, Officer Sanchez asked Norman to comply, but Norman did not comply and "kept talking about the gospel and how he was going to preach it." (Id.) After the Officers made several attempts, asking Norman to "turn around" and "put your hands behind your back," the COBAN audio recordings indicate that Norman continued to resist. (COBAN Audio Recording from Officers Flaig and Sanchez—Defendants' Exhibit G-1 and H-1.) Additionally, the audio indicates that one of the Officers warned Norman that "[t]his is your last chance" to comply prior to using the Taser. (Id.) According to the Officers' version of the events, it was at this point that a decision was made by the Officers to first threaten use of the Taser device before actually using it. (Id.) As already described above, Officer Sanchez pointed the laser at Norman's abdomen and told him that he was going to use it if Norman did not comply, but Norman continued to refuse to comply. (Id.) According to Officer Flaig, and supported by the audio, they asked Norman "numerous times" to comply but Norman never did prior to their use of the Taser. (Id.) By Officer Flaig's account, he and Officer Sanchez tried an additional time to use their hands to effectuate the detention, but that it did not work because Norman "was actively resisting by pulling his arms away from" them. (Id. at 4.) Subsequently, Officer Flaig recites that he and Officer Sanchez decided to use their Taser to attempt to detain Norman. (Id.) And, after tasing Norman, one of the Officers is heard on the

audio pleading for Norman to "just put em behind your back." (COBAN Audio Recording from Officers Flaig and Sanchez—Defendants' Exhibit G-1 and H-1.) After discharging their Taser devices at least seven times on Norman, with varying degrees of success, the Officers were finally able to restrain Norman with handcuffs. (Id.)

Still, in regard to the third Graham factor, Plaintiffs have presented some evidence that they believe demonstrates Norman was not actively resisting the arrest, only passively resisting. (See Dkt. # 59-1 at 7.) Plaintiffs cite the San Antonio Police Department ("SAPD") Manual, wherein it defines "active resistance" as "the resistance offered by an individual in the form of active physical aggression towards an officer or another person and includes the threat of or actual use of a weapon by an individual against an officer or another person." (Dkt. # 59-7 at 1.) The SAPD Manual defines "passive resistance" as "a refusal to comply with an officer's verbal commands or open/empty hands control techniques and does not convey a threat to the officer or another person." (Id. at 14.) In regard to the laptop which the Officers contend that Norman picked up and might possibly use as a weapon, Plaintiffs offer evidence that Norman was concerned about his brother Nathan viewing pornography, and that Norman did not attempt to utilize the computer as a weapon contrary to the Officers' account. (Dkt. # 59-1 at 7.) As support, Plaintiffs provide Officer Flaig's report of the

incident made soon after Norman's death, wherein he states only that Norman "picked up an opened laptop off the desk and he was trying to explain something on it," and that both Officers "pulled out [their] Tasers at this time." (Dkt. # 59-8 at 3.) Additionally, Officer Sanchez's report, made around the same time, does not mention Norman picking up a computer at all. (See Dkt. # 59-9.) Plaintiffs also rely on the Use of Force reports made by the Officers in which both Officers checked the box "No" for the question "Did the Officer believe the suspect had a weapon?" (Dkts. ## 59-10, 59-11.)

Applying the Graham factors, the Court finds that a fact issue exists as to whether the force used by the Officers to restrain Norman was objectively reasonable. Under the first two Graham factors, burglary or trespassing is a serious offense, and the record supports that Norman's behavior on the evening of his death was erratic and potentially violent and that he was a threat to at least himself.[8] However, in regard to the third Graham factor, while the Officers' account of the events and their audio recordings support that Norman had been, and continued to, demonstrate resistance during the course of the emergency detention, viewing the evidence in a light most favorable to Plaintiffs, Plaintiffs

[8] There is also evidence that the Officers perceived Norman to be experiencing "excited delirium," for which they had been trained to recognize the physical behaviors of, including violent behavior, aggression, violently resisting being controlled or restrained, and self-induced injury. (See Dkt. # 53-17.)

have offered evidence which creates a factual dispute as to whether Norman was only passively resisting the arrest and whether he did in fact attempt to use the laptop computer as a weapon. If Norman was only passively resisting, the Officers' use of the Taser device—deployed at least seven times—may not have been objectively reasonable.

In any case, the Taser shots were eventually effective for their purpose—Norman was eventually restrained and no longer posed a threat to himself or others. While the record evidence in this case indicates that Norman behaved aggressively, and that he undisputedly continued to resist, either passively or aggressively, after the Taser device was used, the Court cannot conclude at this time that deploying the Taser device at least seven times during the incident was clearly excessive or clearly unreasonable. Nevertheless, the record is clear that the Officers ceased any use of force after Norman was restrained in handcuffs, although the Officers' testimony indicates that Norman continued to kick for a short time after his restraint.

2. Whether the Right was Clearly Established

While the Court has determined that a factual issue exists as to whether the Officers used excessive force against Norman in violation of the Fourth Amendment, the Court must still determine if the Officers are entitled to qualified immunity under the second prong of the analysis. Again, as stated

earlier, the second prong of the qualified immunity analysis entitles the Officers to qualified immunity if their use of force was "objectively reasonable in light of clearly established law at the time the challenged conduct occurred." Bush v. Strain, 513 F.3d 492, 501 (5th Cir. 2008). And, "while the right to be free from excessive force is clearly established in a general sense, the right to be free from the degree of force employed in a particular situation may not have been clear to a reasonable officer at the scene." Id. at 502.

"The central concept is that of 'fair warning': The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.'" Kinney v. Weaver, 367 F.3d 337, 350 (5th Cir. 2004) (en banc) (quoting Hope v. Pelzer, 536 U.S. 730, 740 (2002)). And, there need not be a case directly on point, but "existing precedent must have placed the statutory or constitutional question beyond debate." Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011). "If officers of reasonable competence could disagree as to whether the plaintiff's rights were violated, the officer's qualified immunity remains intact." Tarver v. City of Edna, 410 F.3d 745, 750 (5th Cir. 2005).

Recently, in an unpublished opinion, the Fifth Circuit in Bailey v. Preston, 702 F. App'x 210 (5th Cir. July 13, 2017), distinguished between cases where an officer used force after a suspect was already restrained, and those cases where the use of force was restricted to the time before restraint. The Fifth Circuit panel in that case determined that the uncontroverted evidence indicated the officers stopped using force on the suspect once he was handcuffed and therefore the officers' use of force, under the specific facts of that case, was not objectively unreasonable in light of clearly established law. Id. at 214.

The Officers rely on the Fifth Circuit's holding in Bailey as support for their entitlement to qualified immunity on the basis that neither officer used any force on Norman after he was restrained and placed in handcuffs. (Dkt. # 53 at 21.) The Officers cite to Nathan's testimony, wherein he admits that he did not see Norman tased after he was placed in handcuffs. (Dkt. # 53-3 at 30.) While it is certainly true, and there is no dispute that the Officers did not use the Taser on Norman after he was restrained, this does not appear to be the core complaint in Plaintiffs' excessive force claim. Instead, Plaintiffs' claim focuses on the Officers' use of force prior to Norman's restraint. (See Dkt. # 29 at 21.) Still, Plaintiffs appear to complain, although not well-briefed, that the Officers' placement of Norman in a prone position after he was handcuffed, constituted excessive force because it inhibited his ability to breathe and caused him to go into cardiac arrest.

(See Dkt. # 29 at 21.) While such a contention may support one of their other allegations against the Officers or the City, the Court finds that Plaintiffs have not presented sufficient evidence that such conduct constituted excessive force in violation of the Fourth Amendment after Norman was placed in handcuffs.

Regarding the Officers' use of force prior to Norman's restraint, though no binding case law is directly on point, a review of recent Fifth Circuit cases involving Taser deployment suggests an officer's use of force is justified where at least two of the Graham factors support the use of force. See, e.g., Pratt v. Harris Cnty., Tex., 822 F.3d 174, 182 (5th Cir. 2016); Poole, 691 F.3d 624, 629 (5th Cir. 2012) (affirming grant of summary judgment to officers where the plaintiff, who was pulled over during a traffic stop, verbally and physically resisted the officers and posed an immediate threat to their safety, and the officers reacted with "measured and ascending" actions to the plaintiff's escalating resistance); Batiste v. Theriot, 458 F. App'x 351, 355 (5th Cir. 2012) (reversing denial of qualified immunity where it was reasonable for the officers to chase and Taser a fleeing suspect with a felony arrest warrant). On the other hand, where none of the Graham factors counsel in favor of the officer's use of force, the Fifth Circuit has concluded a plaintiff's excessive force claim survives summary judgment. See, e.g., Newman v. Guedry, 703 F.3d 757, 762–63 (5th Cir. 2012) (concluding the officers' tasing of the plaintiff was objectively unreasonable where the plaintiff

was pulled over for a minor traffic stop, did not attempt to flee, and did not present a serious threat); Massey v. Wharton, 477 F. App'x 256, 263 (5th Cir. 2012) (affirming denial of qualified immunity to officer who tased the plaintiff twice and pepper sprayed him, even though the plaintiff was not a threat to the officers, was not attempting to flee, and was driving away at the officer's command); Autin v. City of Baytown, 174 F. App'x 183, 185–86 (5th Cir. 2005) (affirming denial of qualified immunity where the officer tased a plaintiff multiple times and the plaintiff was, at most, committing the minor crime of criminal mischief, was not a threat to the officers or others, and was not resisting arrest).

As discussed above, at least two of the Graham factors counsel in favor of the force the Officers used against Norman. Norman, at the very least, (1) exhibited some resistance to the Officers' commands to present his identification and later to comply with their attempt to restrain him for an emergency detention, (2) was suspected of a serious crime, and (3) the Officers reasonably believed he posed an immediate threat to himself, the safety of the officers, and his brother, Nathan. Thus, the Graham factors would not have put a reasonable officer on notice that deployment of a Taser under these circumstances was unreasonable in light of clearly established law. Nevertheless, given the unsettlement in the law regarding this second prong of the analysis, and without any very certain or clear guidance in the law, the Court cannot find as a matter of

law that the Officers' use of force was "objectively reasonable in light of clearly established law at the time the challenged conduct occurred." See Bush, 513 F.3d at 501. Accordingly, the Officers' motion for summary judgment on this issue is denied. The Court finds that genuine issue of material fact exists as to whether the Officers are entitled to qualified immunity on Plaintiffs' § 1983 claim for excessive force.

B. Failure to Provide Medical Care Claim

Plaintiffs also allege a § 1983 claim against the Officers for failure to provide medical care, stating that "[i]t was plain to see that Norman Cooper was in extremis," and that the Officers "made absolutely no effort to check on Norman Cooper's health or well-being." (Dkt. # 29 at 9.) Plaintiffs further allege that the Officers also prevented Nathan from checking on his brother's health and well-being. (Id.) The Officers move for summary judgment on this claim, arguing that they are entitled to qualified immunity because neither officer was deliberately indifferent to Norman's medical needs, and that after they became concerned for his health, they took active steps to help him. (Dkt. # 53 at 28.)

"[P]retrial detainees have a constitutional right, under the Due Process Clause of the Fourteenth Amendment, not to have their serious medical needs met with deliberate indifference on the part of the confining officials." Thompson v. Upshur Cty., 245 F.3d 447, 457 (5th Cir. 2001) (citing Estelle v. Gamble, 429 U.S.

97, 103 (1976)). Deliberate indifference means that: "(1) the official was aware of facts from which an inference of substantial risk of serious harm could be drawn; (2) the official actually drew that inference; and (3) the official's response indicates the official subjectively intended that harm to occur." Id. at 458–59. "[A]ctual knowledge is critical to the inquiry. A state actor's failure to alleviate 'a significant risk that he should have perceived but did not' . . . does not rise to the level of deliberate indifference." McClendon v. City of Columbia, 305 F.3d 314, 326 n.8 (5th Cir. 2002) (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)).

Thus, deliberate indifference "cannot be inferred merely from a negligent or even a grossly negligent response to a substantial risk of serious harm," Upshur Cty., 245 F.3d at 459; it is a "stringent standard of fault." Bd. of Cty. Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397, 410 (1997). Moreover, "[a] serious medical need is one for which treatment has been recommended or for which the need is so apparent that even laymen would recognize that care is required." Gobert v. Caldwell, 463 F.3d 339, 345 n.12 (5th Cir. 2006).

Here, even assuming that Plaintiffs had sufficient evidence that the Officers were aware of a substantial risk of harm to Norman, the Court finds that Plaintiffs have failed to prove deliberate indifference. While it is true that Norman had been subjected to at least seven Taser activations, the evidence indicates that the Officers became concerned for Norman's health after he became quiet and

stopped moving. Although, as Officer Flaig indicates, he was not sure if Norman was taking a "breather" from resisting, or was experiencing a change in his health, Officer Flaig's COBAN audio recording clearly indicates that Officer Flaig radioed for EMS to "step it up" because he was concerned for Norman's well-being. (Ex. G-1 (COBAN recording of Officer Flaig).) The evidence also indicates that Officer Sanchez placed a pillow under Norman's head, and that when he checked his pulse, Norman was still breathing. (Dkt. # 59-8 at 4.) Additionally, Officer Sanchez's report on the night of Norman's death states that once he became concerned about Norman's health, the Officers "immediately rolled the suspect from facedown onto his side and positioned his head so as to make sure his airway was open." (Id.) Officer Sanchez "put on gloves and remember[ed] checking his pulse at least twice and he had a pulse both times," and that he stayed with Norman until EMS arrived, placing a pillow under his head and keeping him comfortable. (Id.)

In response to the Officers' motion, Plaintiffs have not offered sufficient evidence, if any, that the Officers had subjective knowledge of, and were deliberately indifferent to, Norman's medical needs. Plaintiffs have therefore failed to present evidence that would satisfy the stringent standard for showing deliberate indifference; accordingly, the Officers' motion for summary judgment,

with respect to Plaintiffs' claim that Norman received inadequate medical care, is granted.

IV. Negligent and Grossly Negligent Use of Handcuffs and Tasers Against the Officers

Plaintiffs also allege claims against the Officers for "negligent and grossly negligent use of handcuffs and Tasers," pursuant to the Texas Tort Claims Act ("TTCA"). (Dkt. # 29 at 7.) The Officers move for summary judgment on these claims, arguing that the claims are legally barred by the TTCA's Election of Remedies provision, which states in pertinent part that:

> If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

Tex. Civ. Prac. & Rem. Code § 101.106(f) ("Section 101.106(f)"). The Officers contend that Plaintiffs have conceded that the Officers were acting within the general scope of their employment with the City at the time of the incident, and furthermore, that Texas state law has determined that even claims based on intentional torts are subject to the provisions of Section 101.106(f). (Dkt. # 53 at 30.)

The Court finds that the Election of Remedies provision of the TTCA bars Plaintiffs' state law negligence claims against the Officers. In interpreting this provision, the Texas Supreme Court in Franka v. Velasquez held that any state law tort claim brought against a government employee in his individual capacity based on actions within the general scope of his or her employment must be dismissed. 332 S.W.3d 367, 381–85 (Tex. 2011). District courts generally abide by this construction of the statute. See, e.g., Estate of Aguirre v. City of San Antonio, No. 5:15-cv-371-DAE, at *54 (W.D. Tex. May 19, 2017); Perez v. Texas A&M Univ. at Corpus Christi, Civ. A. No. 2:13-CV-225, 2013 WL 6230353, at *12 (S.D. Tex. Dec. 2, 2013) (finding that, under Section 101.106(f), tort "claims against the individual defendants—in both their individual and official capacities and for both money and injunctive relief—must be dismissed" (internal citations omitted)).

Here, the Officers are undisputedly employees of the City, and were concededly "acting within the course and scope of their employment or official duties and in furtherance of the duties of their office or employment" with the City's police department. See Dkt. # 29 at 10; see also Ikossi-Anastasiou v. Bd. of Supervisors of La. State Univ., 579 F.3d 546, 550 (5th Cir. 2009) ("Factual assertions in the complaint are 'judicial admissions conclusively binding' on the plaintiff." (quoting Morales v. Dep't of Army, 947 F.2d 766, 769 (5th Cir. 1991))).

Where Plaintiffs' Complaint alleges the Officers utilized handcuffs and the Taser devices negligently and grossly negligently during their attempt to detain Norman, these are tort claims that fall squarely within the TTCA. See Bernard v. City of Hous., Civil Action No. H-15-734, 2017 WL 1088348, at *9 (S.D. Tex. Mar. 2, 2017) ("[S]ection 101.106(f) of the TTCA applies to all common-law tort theories" (citing Franka, 332 S.W.3d at 369)). Therefore, per the plain meaning of the TTCA, the claims must be dismissed upon the employees'—here, the Officers'—motion. Accordingly, the Court grants summary judgment in favor of the Officers on Plaintiffs' state law negligence and grossly negligent claims under the TTCA.

V. Violation of SAPD Policies

Plaintiffs have also alleged that the Officers violated SAPD procedure 512.090(10) by tasing a person they knew to be under the influence of drugs, and that they also violated SAPD procedure 601.07 A, by failing to use reasonable care and diligence to preserve the lives, health and safety of prisoners. (Dkt. # 29 at 32.) Upon review, the Court finds that even if the Officers violated an SAPD procedure,[9] "[u]nder § 1983, the issue is whether [the Officers] violated the Constitution, not whether [they] should be disciplined by the local police force." Stroik v. Ponseti, 35 F.3d 155, 159 n.4 (5th Cir. 1994) (quoting Smith v. Freland,

[9] Plaintiffs have submitted evidence that both Officers received written reprimands for violating SAPD Standard Operating Procedure 512.09(O)(10), which states that a Taser device should not be used on a person known to be under the influence of drugs. (See Dkt. # 59-21, Dkt. # 59-22.)

954 F.2d 343, 347 (6th Cir. 1992)). The Fifth Circuit has determined that "[a] city can certainly choose to hold its officers to a higher standard of liability than that required by the Constitution without being subjected to increased liability under § 1983." Id. Accordingly, the Court will grant summary judgment in favor of the Officers for Plaintiffs' claims against them based on the alleged violations of SAPD procedure.

VI. State Law Negligent Use of Tangible Property Claim Against the City

Plaintiffs have also alleged a negligence claim against the City on the basis that the Officers' misuse of tangible personal property—i.e., negligent use of handcuffs, leg restraints, and Tasers—led to Norman's death. (Dkt. # 29 at 12.) The City moves for summary judgment on this claim, arguing that Plaintiffs cannot circumvent the TTCA's intentional tort exception to a waiver of liability by pleading the Officers' use of handcuffs and the Taser devices was negligent. (Dkt. # 54 at 4.) The Officers contend that their use of the handcuffs and the Taser constitutes intentional conduct as a matter of law for which the City has immunity. (Dkt. # 54 at 4.) In other words, the City argues that Plaintiffs' negligence claims do not fall within the limited waiver of sovereign immunity under the TTCA. (Id.)

In response, Plaintiffs contend that their negligence claim is not based on any intentional acts of the Officers, but are instead based on the Officers' inaction after Norman was restrained and had problems breathing. (Id.) Plaintiffs

further assert that they are not arguing that either Officer intended to kill Norman, only that their negligent actions "set into motion foreseeable physiological stresses that caused Norman's death." (Id. at 4.) For instance, Plaintiffs contend that the Officers' actions became negligent when they knew, or should have known, that placing Norman face down on the floor with his hands behind his back after being Tased multiple times, with their added weight and force on his back in order to handcuff Norman, caused Norman to gasp and stop breathing. (Id. at 5.) Plaintiffs assert that the Officers had a duty to Norman to use their City-issued equipment—handcuffs and Tasers—in a non-negligent manner, and that it was foreseeable that the Officers' inattention to an arrestee or detainee in handcuffs would have difficulty breathing and die; therefore, according to Plaintiffs, the City can and should be held liable under the TTCA. (Id.)

Under the doctrine of sovereign immunity, a governmental unit is not liable for the torts of its officers or agents in the absence of a constitutional or statutory provision creating such liability. Tex. Civ. Prac. & Rem. Code Ann. § 101.001 et seq.; Dallas Cty. Mental Health & Mental Retardation v. Bossley, 968 S.W.2d 339, 341 (Tex. 1998), cert. denied, 525 U.S. 1017 (1998); State v. Terrell, 588 S.W.2d 784, 785 (Tex. 1979). The TTCA creates a limited waiver of sovereign immunity. Tex. Civ. Prac. & Rem. Code Ann. § 101.021. In order for immunity to be waived under the TTCA, the claim must arise under one of the

three specific areas of liability for which immunity is waived. Id.; Alvarado v. City of Brownsville, 865 S.W.2d 148, 155 (Tex. App.—Corpus Christi 1993), rev'd on other grounds, 897 S.W.2d 750 (Tex. 1995). The three specific areas of liability for which immunity has been waived are: (1) injury caused by an employee's use of a motor-driven vehicle; (2) injury caused by a condition or use of tangible personal or real property; and (3) claims arising from premises defects. Tex. Civ. Prac. & Rem. Code § 101.021. However, the waiver of immunity does not extend to claims "arising out of assault, battery, false imprisonment, or any other intentional tort." Tex. Civ. Prac. & Rem. Code § 101.057. The Legislature has not created, statutorily or otherwise, any exception to the intentional tort exclusion.

Here, despite their argument to the contrary, Plaintiffs have attempted to characterize their claim in terms of negligent rather than intentional conduct. Thus, the Court finds that the Officers' use of handcuffs, leg restraints, and Taser devices in the present case was intentional conduct. "If a plaintiff pleads facts which amount to an intentional tort, no matter if the claim is framed as negligence, the claim generally is for an intentional tort and is barred by the TTCA." Harris Cty. v. Cabazos, 177 S.W.3d 105, 111 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citations omitted). Texas courts have consistently held that claims based on factual allegations of intentional conduct cannot be masked as negligence claims

simply to circumvent the intentional tort exclusion of the TTCA. See, e.g., id.; City of Waco v. Williams, 209 S.W.3d 216, 222 (Tex. App.—Waco 2006, pet. denied); Harris Cty. v. Cabazos, 177 S.W.3d 105, 110–113 (Tex. App.—Houston [1st Dist.] 2005, no pet.); Medrano v. City of Pearsall, 989 S.W.2d 141, 144–45 (Tex. App.—San Antonio 1999, no pet.).

Accordingly, insofar as Plaintiffs have sued the City for state law tort claims arising out of the Officers' intentional conduct, the City enjoys immunity from such claims. Tex. Civ. Prac. & Rem. Code § 101.057; see also Pineda v. City of Hous., 175 S.W.3d 276, 279 (Tex. App.—Houston [1st Dist.] 2004, reh'g overruled) (immunity not waived for intentional torts of employees which involved allegations of excessive force and assault); City of Garland v. Rivera, 146 S.W.3d 334, 338 (Tex. App.—Dallas 2004, no pet.) (immunity not waived for officers use of pepper spray, handcuffs, and dog during arrest of plaintiff); City of San Antonio v. Dunn, 796 S.W.2d 258, 261 (Tex. App.—San Antonio 1990, writ denied) (immunity not waived where plaintiff's claims arose out of allegations of false arrest and excessive force because these are intentional torts). The Court concludes that the City is immune from Plaintiffs' state law negligence claims on this basis and these claims must be dismissed with prejudice.

VII. State Law Negligent Training Claims Against the City

The City also contends that Plaintiffs' negligent training claims do not fall within the limited waiver of immunity under the TTCA and are therefore barred by the TTCA. (Dkt. # 54 at 4.) The City argues that Plaintiffs have not properly alleged an injury resulting from the "condition or use of tangible personal or real property," and that Texas law doesn't recognize such a claim that "information" is tangible property for which immunity from suit is waived. (Dkt. # 54 at 7.)

Plaintiffs' complaint alleges that "the officers were trained or should have been in the increased dangers of shocking a person with a Taser multiple times as well as the increased dangers of more than one officer tasing the same individual who is exhibiting signs of excited delirium and/or mental illness." (Dkt. # 29 at 12.) Plaintiffs argue that the law is unsettled whether a "negligent use of information" can be maintained in Texas, but that the Court here should allow such a claim. (Dkt. # 59 at 6.)

Despite Plaintiffs' arguments to the contrary, the Fifth Circuit has held that "[t]he TTCA is . . . not the appropriate vehicle for claims of negligent failure to train or supervise." Goodman v. Harris Cty., 571 F.3d 388, 394 (5th Cir. 2009). "Such claims are not within the purview of the TTCA because 'a plaintiff must allege an injury resulting from the condition or use of tangible personal or

real property' and 'information is not tangible personal property, since it is an abstract concept that lacks corporeal, physical, or palpable qualit[ies].'" Id. (quoting Texas Dep't of Pub. Safety v. Petta, 44 S.W.3d 575, 580 (Tex. 2001)). Therefore, because failure to train or supervise is not a proper cause of action under the TTCA, Petta, 44 S.W.3d at 580–81, the City is entitled to summary judgment on Plaintiffs' state law claims of negligent training, or by extension, negligent use of handcuffs, leg restraints, and Taser devices.

VIII. Constitutional Claims Against the City

In addition to his claims against the Officers, Plaintiffs also seek relief against the City for its allegedly unconstitutional practices or policies. (Dkt. # 29.) These claims are based on the City's alleged

> failure to properly train, supervise, regulate, and/or discipline officers who routinely use excessive force in making arrests including Defendants (who have not, to date, been disciplined in any meaningful way for the acts complained of herein), or to otherwise control their employees and the failure to promulgate proper guidelines for the use of force and deadly force constitutes an official policy, practice or custom of condoning unjustified use of deadly force in violation of the constitutional rights of the decedent and others and serves to condone the illegal behavior as alleged.

(Dkt. # 29 at 22–23.) Although not well-pled, Plaintiffs also appear to allege a constitutional claim against the City for inadequate training regarding medical treatment for prisoners. (Id. at 10.) Additionally, Plaintiffs assert a constitutional

claim for lack of proper or adequate training on how to recognize the signs of positional asphyxiation and excited delirium.

A. Municipal Liability Under § 1983

In Monell v. Dept. of Social Serv., 436 U.S. 658 (1978), the Supreme Court held that municipalities and local government agencies cannot be held liable for constitutional torts under § 1983 under a theory of respondeat superior, id. at 691, but they can be held liable "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Id. at 694. In other words, merely establishing a constitutional violation by an employee of a local government entity is not enough to impose liability upon that entity under § 1983.

Rather, to succeed on a Monell claim against a local government entity, the plaintiff must establish (1) an official policy or custom, of which (2) a policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose "moving force" is that policy or custom. McGregory v. City of Jackson, 335 F. App'x 446, 448 (5th Cir. 2009) (citing Rivera v. Hous. Indep. Sch. Dist., 349 F.3d 244, 247–49 (5th Cir. 2003)). Locating an official "policy" or "custom" ensures that a local government entity will be held liable only for violations of constitutional rights that resulted from the decisions of

those officials whose acts may fairly be said to be those of the government entity itself. Bryan Cty. Comm'rs v. Brown, 520 U.S. 397 (1997).

B. Policy or Practice

A plaintiff can hold a city liable for an official practice or custom that violated his constitutional rights using a failure to train or supervise theory. Roberts v. City of Shreveport, 397 F.3d 287, 292 (5th Cir. 2005). To do so, a plaintiff must show that the city is responsible for failing to provide proper training or supervision due to deliberate indifference, and that failure actually caused the plaintiff's injury. Id. In the context of police encounters, the failure must be a result of the city's deliberate indifference to the rights of those with whom the police come into contact. Brown v. Bryan Cnty., Okla., 219 F.3d 450, 459 (5th Cir. 2000). A plaintiff can prove deliberate indifference by showing that the inadequacy of training or supervision is "obvious and likely to result in a constitutional violation." Cousin v. Small, 325 F.3d 627, 637 (5th Cir. 2003).

Although failure to train and supervise typically require evidence of a pattern of similar violations, "under certain circumstances, § 1983 liability can attach for a single decision not to train an individual officer even where there has been no pattern of previous constitutional violations." Sanders-Burns, 594 F.3d at 381; Brown, 219 F.3d at 459. "[W]ith respect to specific officers, a need for more or different training can be so obvious and the inadequacy of training so likely to

result in a violation of constitutional right that the [county] can reasonably be said to have been deliberately indifferent to the need for training." Id. "For liability to attach based on an 'inadequate training' claim, a plaintiff must allege with specificity how a particular training program is defective." Roberts, 397 F.3d at 293.

Here, Plaintiffs argue that the City is responsible for the Officers' conduct because of the City's failure and refusal to follow their own established policies and procedures in training its officers. (Dkt. # 59 at 11.) First, Plaintiffs cite a portion of Procedure 501 of the SAPD's General Manual which discusses that an officer should understand that "protection of property and apprehension of criminal offenders is subservient to the protection of life including their own." (See Dkt. #53-14 at 2–4.) Procedure 501 also requires officers to consider several factors when assessing the need to use force. (Id.) Plaintiffs apparently argue that the City did not properly train its officers on this policy and that they elevated the apprehension of Norman over the protection of his life. (Dkt. # 59 at 9–10.)

Next, Plaintiffs point to Procedure 512 in support of their argument, which states, *inter alia*, that: (1) "no more than one officer at a time should activate [a Taser device] against a person"; (2) "[t]hroughout the [Taser] incident, [Taser] operators will continually assess compliance level and breathing ability of the subject before applying additional cycles to the subject," and that following the

Taser activation, "officers should not use a restraint technique that restricts breathing"; and (3) "[a]ttention to the subject(s) after utilization of the [Taser] is vital," and "Officers needs to be aware and look for obvious signs of injury that may incidental to [Taser] use." (Dkt. # 59-19.) Procedure 512 further states that "[Electronic Control Devices] shall not be utilized in the following circumstances: . . . [a]gainst persons known to be under the influence of drugs." (Id. at 6.) Plaintiffs cite Procedure 512 in support of their argument that the City never actually trained its officers in conformity with this procedure, despite newly enacting Procedure 512 in 2008.[10] Plaintiffs assert that the Officers used the Taser device on Norman simultaneously in violation of Procedure 512, and that the Officers failed to assess Norman's compliance before deploying the Taser again, as well as failed to use a restraint technique that did not restrict Norman's breathing. (Dkt. # 59 at 16.)

In further support of their contentions, Plaintiffs offer evidence of an email sent on October 16, 2015, from Captain James Flavin, the Executive Officer of the SAPD, to an attorney in the Bexar County District Attorney's Office, which states:

[10] Plaintiffs cite an October 5, 2008 San Antonio Express News Article discussing that the SAPD did not have any "parameters on how many times officers could shock someone and didn't require training on the risks of shocking someone on drugs." (Dkt. # 59-34.) According to Plaintiffs, SAPD changed its policies, enacting Procedure 512 in response to this article. (Dkt. # 59 at 15.)

> To follow up on our conversation from yesterday, here is what I have found . . . Sometime around November of 2014, discussion began between the SAPD Training Academy Tactics Supervisor . . . and [the] Tactics Coordinator . . . concerning the phrase in the SAPD General Manual Procedure 512-Electronic Control Devices, which read, "ECDs [Electronic Control Devices such as Taser devices] shall not be utilized in the following circumstances: Against persons known to be under the influence of drugs." The "shall not" language in the procedure was found by the Academy Tactics staff to be in conflict with manner in which officers had been and were being trained/certified with ECDs at the SAPD Training Academy as well as in conflict with the limitations and recommendations from the ECD manufacturer (Taser International). The Training Academy Tactics staff made the recommendation to change the "shall not" language to "should not" in order to allow the officers the opportunity to evaluate all the information they received at the scene before they decided to deploy or not deploy the ECD. In June of 2015, the language in the ECD procedure was changed to reflect the "should not" language and the revised procedure was released to all Department members. It should be noted, the "shall not" language in the procedure was always in conflict with actual training practices of the SAPD Training Academy and the Tactics instructors who taught the ECD classes. The SAPD Training Academy and its instructors have **never** taught officers that they shall not use an ECD on persons known to be under the influence of drugs.
>
> Officer Oliver Flaig #0078 was Taser certified in 2012 and he attended Taser recertification each year (2013, 2014, 2015).
>
> Officer Arnoldo Sanchez #0568 was Taser certified in 2013 and he attended Taser recertification each year (2014, 2015).

(Dkt. # 59-25 (emphasis in original).) Plaintiffs offer this evidence, along with Procedure 501 and 512 of the SAPD General Manual, in support of their argument that the City, "through its training academy, continued to teach and train its officers to use their Taser without any training on the consequences of multiple

discharges or discharges by more than one officer on the same person or, the consequences of tasing someone clearly exhibiting signs of a mental episode or believed to be on drugs." (Dkt. # 59 at 17.)

In response, the City has attached as evidence the affidavit of SAPD Deputy Chief Gustavo Guzman, who, at the time of Norman's death in April 2015, was the Captain of the Professional Standards Division/Internal Affairs of the SAPD. (Dkt. # 53-14.) As a result of his position, Deputy Chief Guzman states that he is familiar with SAPD's policies and procedures contained in the General Manual. (Id.) Deputy Chief Guzman testifies, *inter alia*, that all officers are educated on the policies and procedures contained in the General Manual, including Procedure 501 "Use of Force"; Procedure 502 "Warrantless Arrests, Search & Seizure"; and Procedure 512 "Electronic Control Devices."[11] (Id.) Rather than condone or permit the use of excessive force, Deputy Chief Guzman testifies that Procedure 501 provides in part that "officers shall use only the level of force that is necessary to accomplish a lawful police objective [and] any time force is used, the officer shall apply a level of force that is reasonable for the

[11] See also Dkt. # 53-10, at 8–9, "Expert Report of Albert Ortiz" (retired SAPD Chief of Police who opined, *inter alia*, that (1) the General Manual and training curriculum is taught to every SAPD officer during their six-month training at the SAPD Academy and through additional 40 hours of required in-service training every two years, and (2) SAPD officers employ a version of escalating force, the Use of Force Continuum, that does not condone or permit excessive force, but rather teaches levels of force to use reasonably and proportionally to the situation at hand).

situation." (Id. at 3.) Deputy Chief Guzman explains that Procedure 501 provides a continuum of force policy, which begins at the lowest level with the officer's presence and verbal communications and extends up to intermediate weapon and deadly force, "according to and proportional with the circumstances of the situation." (Id.)

Additionally, the City has presented evidence that in order to serve as law enforcement personnel in for SAPD, an officer must hold a peace officer license, the requirements of which are dictated by the Texas Legislature and Texas Commission on Law Enforcement ("TCOLE"). (Dkt. # 53-10 at 8.) During training required for licensing, officers participate in use of force training. (Id.) Upon licensing, an officer must also participate in mandatory continuing education courses through TCOLE. (Id.) Both Officers Flaig and Sanchez are licensed by TCOLE and participated in training on use of force and force options. (Id.)

Further, as for Plaintiffs' arguments concerning Procedure 512, according to the deposition testimony of SAPD Officer Dezi Rios, the main allowable reason to keep someone detained in a prone position is to get somebody under control, and the level of control an officer feels he or she has over a detainee may be entirely "situational" and different compared to the next officer. (Dkt. # 52-15 at 2–4.) Officer Rios testified that SAPD officers are taught not to hog-tie persons they have detained. (Id. at 4–5.) Officer Rios also testified that he teaches

a course on positional asphyxia in the SAPD, and he uses teaching materials that instruct officers to be aware of putting detainees in positions that prevent them for breathing, such that "the only time" the prone position should be used is when officers are trying to get or maintain control. (Id. at 2.)

Additionally, in regard to Plaintiffs' evidence concerning the City's decision not to train its Officers that they "shall not" use a Taser device on persons known to be under the influence of drugs, Plaintiffs have not presented sufficient evidence that this decision was so inadequate that the City was deliberately indifferent to the "highly predictable consequence" of a violation of constitutional rights. See Canton, 489 U.S. at 390 n.10. The email evidence indicates that the SAPD made a decision that such language conflicted with its training in that officers should be allowed "the opportunity to evaluate all the information they received at the scene before they decided to deploy or not deploy the ECD," instead of a blanket determination that the Taser should *never* be used on a person known to be under the influence of drugs. (Dkt. # 59-25.) Plaintiffs have failed to specifically allege, nor offer any evidence, how this training program is defective. See Roberts, 397 F.3d at 293. Nor have Plaintiffs presented sufficient evidence of a pattern of violations that would have put the City on notice that the ECD training was insufficient in preventing the constitutional injury alleged in their complaint. See Rios v. City of Del Rio, Tex., 444 F.3d 417, 427 (5th Cir. 2006).

In regard to Plaintiffs' claims of failure to train on the risk of positional asphyxia or the recognition of excited delirium, Defendants point to the deposition testimony and affidavit of Officer Jon Sabo, a designated mental health officer in the SAPD and a member of the Crisis Intervention Team who teaches Crisis Intervention ("CIT") classes. (Dkt. # 53-16 at 3.) Per Officer Sabo, all officers in the SAPD must attend crisis intervention training, a 40 hour block of instruction that the SAPD has been teaching and mandating since 2010. (Id. at 3–4.) As part of the CIT training, mental health officers such as Officer Sabo provide training regarding Excited Delirium Syndrome, how to recognize the symptoms, and what actions to take when facing individuals experiencing excited delirium. (Id. at 5–6.) Officer Sabo also testified that although verbal de-escalation techniques are taught, they often do not work with individuals experiencing excited delirium, and that therefore, officers may use physical restraint ranging from simply hands-on to handcuffing a person. (Dkt. # 53-16 at 14.)

Where the individual Officers' affidavits and other evidence indicates that they were concerned about the potential for Norman posing a danger to himself or the Officers themselves, the Court finds – without further controverting summary judgment evidence – that there are no genuine issues of material fact as to whether the City trains its officers on the proportional use of reasonable force, the use of Tasers, and on the methods for recognizing signs of excited delirium and

the dangers of positional asphyxia. The City's summary judgment evidence, uncontroverted, indicates that the City has training regarding procedures for the use of force, Tasers, and recognizing excited delirium and the dangers of positional asphyxia, and that moreover, the City is not "deliberately indifferent" to an individual's federally protected rights. See City of Canton, 489 U.S. at 385–89. And in any event, proof of more than a single instance of inadequate training is normally required because such inadequacy can constitute deliberate indifference to impose municipal liability, which is a "stringent" standard and which has not been challenged by the summary judgment evidence. See Upshur Cty., 245 F.3d at 459; Piotrowski, 237 F.3d at 579.

"In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident." Canton, 489 U.S. at 392. However, merely pointing to something that the City could have done is insufficient to give rise to § 1983 liability; a plaintiff must show that the City was deliberately indifferent. Plaintiffs have not met their burden in making such a showing. Accordingly, the Court will grant the City's Motion for Summary Judgment regarding Plaintiffs' § 1983 claims.[12]

[12] To the extent Plaintiffs raise a failure to render medical aid claim, summary judgment is also granted in favor of the City. Plaintiffs have failed to specifically allege or provide sufficient evidence that Procedure 601, "Prisoners," is inadequate

IX. Equal Protection Claims

Plaintiffs also allege claims against the City for violation of their Fourteenth Amendment right to equal protection and due process. (Dkt. # 29 at 23–24.) The equal protection clause of the Fourteenth Amendment requires that persons similarly situated be treated the same way. Dudley v. Angel, 209 F.3d 460, 463 (5th Cir. 2000). To state a claim for intentional discrimination under § 1983, a plaintiff must allege that a state actor intentionally discriminated against him because of his membership in a protected class. Williams v. Bramer, 180 F.3d 699, 705 (5th Cir. 1999); Washington v. Davis, 426 U.S. 229, 247–48 (1976). Here, Plaintiffs have offered no evidence in support of such claims; accordingly, summary judgment is granted in favor of the City on this basis.

X. Chief Anthony Trevino

Anthony Trevino is sued in his individual capacity and in his capacity as the Chief of Police and chief policy maker for SAPD. (DKt. # 29 at 3.) To the extent he is sued in his official capacity, those claims are dismissed because "a suit against a governmental officer 'in his official capacity' is the same as a suit 'against [the] entity of which [the] officer is an agent.'" McMillian v. Monroe Cnty., Ala., 520 U.S. 781, 785 n.2 (1997) (quoting Kentucky v. Graham, 473 U.S. 159, 165 (1985)). "[V]ictory in such an 'official-capacity' suit 'imposes liability

---

or that the City is deliberately indifferent in training Officers on first aid procedures and medical aid for persons in custody.

on the entity that [the officer] represents.'" Id. (quoting Brandon v. Holt, 469 U.S. 464, 471 (1985)). The Court has already granted summary judgment in favor of the City on Plaintiffs' claims against it.

As for Plaintiffs' suit against Trevino in his individual capacity, Plaintiffs have failed to offer any evidence in support of such claims. It is well settled that "[t]here is no vicarious or respondeat superior liability of supervisors under § 1983." Rios v. City of Del Rio, 444 F.3d 417, 425 (5th Cir. 2006). "Rather, a plaintiff must show either the supervisor personally was involved in the constitutional violation or that there is a 'sufficient causal connection' between the supervisor's conduct and the constitutional violation." Id. (quoting Evett v. DETNTFF, 330 F.3d 681, 689 (5th Cir. 2003); see also Southard v. Tex. Bd. of Criminal Justice, 114 F.3d 539, 550 (5th Cir. 1997) ("[T]he misconduct of the subordinate must be affirmatively linked to the action or inaction of the supervisor."). The Fifth Circuit has held that district courts "use the same standard in assessing an individual supervisor's liability under § 1983" as that used "in assessing a municipality's liability." Doe v. Taylor ISD, 15 F.3d 443, 453 (5th Cir. 1994) (en banc). Supervisory liability under § 1983 requires a showing of the supervisor's "deliberate indifference" to the "known or obvious fact" that constitutional violations would be committed by subordinates based on the supervisor's action (or inaction), and this "generally requires that a plaintiff

demonstrate at least a pattern of similar [constitutional] violations." See Rios, 444 F.3d at 427 (quoting Johnson v. Deep E. Tex. Reg'l Narcotics, 379 F.3d 293, 309 (5th Cir. 2004)).

A supervisor may be liable for failure to supervise or train a subordinate employee if: "(1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference." Goodman v. Harris Cnty., 571 F.3d 388, 395 (5th Cir. 2009) (quoting Smith v. Brenoettsy, 158 F.3d 908, 911–12 (5th Cir. 1998)). Similarly, "failure [by a supervisor] to adopt a policy can be deliberately indifferent when it is obvious that the likely consequences of not adopting a policy will be a deprivation of constitutional rights." Porter v. Epps, 659 F.3d 440, 446 (5th Cir. 2011) (quoting Rhyne v. Henderson Cnty., 973 F.2d 386, 392 (5th Cir. 1992)).

"Liability for failure to promulgate policy and failure to train or supervise both require that the defendant have acted with deliberate indifference." Id. at 446. The Fifth Circuit has held that "'deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." Id. at 446–47 (quoting Connick v. Thompson, 563 U.S. 51, 61 (2011)). To establish that a state actor disregarded a known or

obvious consequence of his actions, there must be "actual or constructive notice" that "a particular omission in their training program causes . . . employees to violate citizens' constitutional rights" and the actor nevertheless "choose[s] to retain that program." Connick, 563 U.S. 51, 61 (citing Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 407 (1997)). With respect to a failure-to train or failure-to-supervise claim, "[a] pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference." Porter, 659 F.3d at 447 (citation omitted); see also Thompson v. Upshur Cnty., 245 F.3d 447, 459 (5th Cir. 2001) ("Proof of more than a single instance of the lack of training or supervision causing a violation of constitutional rights is normally required before such lack of training or supervision constitutes deliberate indifference."). Any less stringent standard, explained the Fifth Circuit, would turn a failure-to-train claim (or failure-to-promulgate-policy claim) into "de facto respondeat superior liability." Porter, 659 F.3d at 447 (quoting Bryan Cnty., 520 U.S. at 407).

Here, Plaintiffs have failed to produce sufficient evidence that any policy, practice, custom or procedure of the City was the moving force behind any alleged constitutional violation of Norman's rights, or that Chief Trevino was aware of the same and was deliberately indifferent to those rights. Accordingly, summary judgment is granted for Plaintiffs' claims against Anthony Trevino.

XI. Remaining State Law Claims

To the extent any claims remain under state law, the Court will grant summary judgment in favor of the Officers and/or the City. Plaintiffs have not produced sufficient evidence to overcome summary judgment in support of such claims.

CONCLUSION

Based on the foregoing, the Court **GRANTS IN PART and DENIES IN PART** the Officers' Motion for Summary Judgment (Dkt. # 53). The motion is **DENIED** as to Plaintiffs' § 1983 claim for excessive force against the Officers because there is a fact issue as to whether the Officers are entitled to qualified immunity; the motion is **GRANTED** as to all other claims against the Officers and those claims are **DISMISSED WITH PREJUDICE**. The Court further **GRANTS** the City's Motion for Summary Judgment (Dkt. # 54), and Plaintiffs' claims against the City and Chief Trevino are **DISMISSED WITH PREJUDICE.** The Court will set a date for trial by separate order.

IT IS SO ORDERED.

DATED: San Antonio, Texas, May 15, 2018.

David Alan Ezra
Senior United States Distict Judge