Case No. 22-30662

IN THE UNITED STATES COURT OFAPPEALS
FOR THE FIFTH CIRCUIT

DEANNA THOMAS,

Plaintiff—Appellant

v.

ROBERT TEWIS, OFFICER; KIRT ARNOLD,OFFICER

Defendants—Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA, NO. 2:21-CV-00698,
HONORABLE GREG GERARD GUIDRY, PRESIDING

DEANNA THOMAS'S BRIEF AS APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of 5TH CIR. R. 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Ms. Deanna Thomas, the Plaintiff-Appellant, respectfully requests oral argument. This case presents significant constitutional issues regarding the Fourth Amendment rights of unhoused persons to be free from excessive force and to be secure in their possessions. The record contains several disputes of material fact, and the district court's brief decision contains four significant errors of law. Oral argument would aid the Court's decisional process, permitting counsel to highlight the significance and importance of the disparate reports present in the record.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS ii

STATEMENT REGARDING ORAL ARGUMENT iv

TABLE OF CONTENTS...v

JURISDICTIONAL STATEMENT xii

STATEMENT OF THE ISSUES...xiii

INTRODUCTION 1

I. Factual History 4

II. Procedural History...8

SUMMARY OF THE ARGUMENT 10

STANDARD OF REVIEW 13

ARGUMENT 13

I. The District Court Incorrectly Concluded that Ms. Thomas' Injuries Were Insufficient for Purposes of a Fourth Amendment Excessive Force Claim 13

A. The District Court Incorrectly Held that a Plaintiff's Testimony, Without Corroborating Records, Cannot Establish Injury in an Excessive Force Case 15

B. The District Court Erred in Holding That Ms. Thomas's Significant Testimonial Evidence of Her Injuries Was Insufficient to Overcome Summary Judgment and Proceed to Trial. 19

C. The District Court Erred in Finding That Defendant Tewis Was Justified in Throwing Ms. Thomas to the Ground and Kneeling on Her Back While She Was Handcuffed. 21

II. The Question of Whether Deanna Thomas Had a Clearly Established Right to Be Free From Excessive Force Should Be Addressed by the District Court in the First Instance. 27

A. This Court Should Maintain Its General Practice of Only Reviewing Questions That Have Been Addressed by the District Court....28

B. Ms. Thomas' Right to Be Free From Excessive Force Was Clearly Established. 31

III. The District Court Erred in Dismissing Ms. Thomas' Claim That Defendants' Destruction of Her Property Was an Unreasonable Seizure. 36

A. Officer Arnold's Order That Ms. Thomas's Property be Removed and Destroyed Established his Personal Involvement in the Deprivation of Ms. Thomas's Property Rights Sufficient to Support Her 1983 Claim Against Him. 37

B. Ms. Thomas Has a Clearly Established Right to Be Free From the Unreasonable Seizure Committed by Officer Arnold. 39

CONCLUSION....45

CERTIFICATE OF SERVICE 46

CERTIFICATE OF COMPLIANCE....47

TABLE OF AUTHORITIES

Cases

Aguirre v. City of San Antonio, 995 F.3d 395 (2021)...................................... 35, 36

Alexander v. City of Round Rock, 854 F.3d 298 (5th Cir. 2017)................ 21, 22, 23

Anderson v. Liberty Lobby, Inc, 477 U.S. 242 (1986)..33

Anderson v. McCaleb, 480 F. App'x 768 (5th Cir. 2012) 16

Arnold v. Williams, 979 F.3d 262 (5th Cir. 2020) 29

Ashcroft v. al-Kidd, 563 U.S. 731 (2011) 27, 32

Benoit v. Bordelon, 596 F. App'x 264 (5th Cir. 2015)...17

Brosseau v. Haugen, 543 U.S. 194 (2004) 33, 43

*Brown v. Lync*h, 524 F. App'x 69 (5th Cir. 2013)... 14, 22

Bush v. Strain, 513 F.3d 492 (5th Cir. 2008)...35

Byrd v. Cornelius, 52 F.4th 265 (5th Cir. 2022)..23

Carswell v. Camp, 54 F.4th 307 (5th Cir. 2022) 28, 31

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 19

Chimel v. California, 395 U.S. 752 (1969)..40

Cooper v. Brown, 844 F.3d 517 (5th Cir. 2016)... 23, 36

Darden v. City of Fort Worth, Texas 880 F.3d 722 (5th Cir. 2018)........................35

Daves v. Dallas Cnty., Texas, 22 F.4th 522 (5th Cir. 2022) 31

Deville v. Marcantel, 567 F.3d 156 (5th Cir. 2009) 18, 25, 35

Douthit v. Jones, 641 F.2d 345 (5th Cir. 1981) 38

Durant v. Brooks, 826 F. App'x 331 (5th Cir. 2020) 17

Falcon v. Holly, 480 F. App'x 325 (5th Cir. 2012) 17

Flores v. City of Palacios, 381 F.3d 391 (5th Cir. 2004) 19

Garcia v. City of Los Angeles, 11 F.4th 1113 (9th Cir. 2021).................................43

Golodner v. Berliner, 770 F.3d 196 (2d Cir. 2014) 30

Gordon v. Neugebauer, No. 1:14-CV-0093-J, 2014 WL 6892716 (N.D. Tex. 2014)
....38

Graham v. Connor, 490 U.S. 386 (1989) 15, 24

Grant v. City of Houston, 625 F. App'x 670 (5th Cir. 2015) 4, 39, 41

Hanks v. Rogers, 853 F.3d 738 (5th Cir. 2017) 34

Hart v. Hairston, 343 F.3d 762 (5th Cir. 2003)...17

Hope v. Pelzer, 536 U.S. 730 (2002) 42

Horton v. California, 496 U.S. 128 (1990)..40

Humphries v. Elliott Co., 760 F.3d 414 (5th Cir. 2014) 13

Ikerd v. Blair, 101 F.3d 430 (5th Cir. 1996)... 14, 21

Jacquez v. Procunier, 801 F.2d 789 (5th Cir. 1986) 38

Joseph v. Bartlett, 981 F.3d 319 (5th Cir. 2020) 32

Lampkin v. City of Nacogdoches, 7 F.3d 430 (5th Cir. 1993) 33

Lavan v. City of Los Angeles, 693 F.3d 1022 (9th Cir. 2012) 43

Lester v. Wells Fargo Bank, N.A., 805 F. App'x 288 (5th Cir. 2020).....................16

Lozano v. Schubert, 41 F.4th 485 (5th Cir. 2022) 13

Magnolia Island Plantation, L.L.C. v. Whittington, 29 F.4th 246 (5th Cir. 2022)..29

Man Roland, Inc. v. Kreitz Motor Express, 438 F.3d 476 (5th Cir. 2006).............29

Marron v. United States, 275 U.S. 192 (1927)...40

McClendon v. United States, 892 F.3d 775 (5th Cir. 2018) 11, 16

McCoy v. Alamu, 141 S.Ct. 1364 (2021)..42

Morrow v. Meachum, 917 F.3d 870 (5th Cir. 2019)...31

Newman v. Guedry, 703 F.3d 757 (5th Cir. 2012)... 33, 35

Payne v. Dickerson, 334 F. App'x 629 (5th Cir. 2009)...33

Peña v. City of Rio Grande City, 879 F.3d 613 (5th Cir. 2018).............................29

Petta v. Rivera, 143 F.3d 895 (5th Cir. 1998) 18

Polnac v. City of Sulfur Springs, 555 F.Supp.3d 309 (E.D.Tex 2021)....................21

Reyes v. Bridgwater, 362 F. App'x. 403 (5th Cir. 2010).......................................26

Rizzo v. Goode, 423 U.S. 362 (1979)..37

Roque v. Harvel, 993 F.3d 325 (5th Cir. 2021) 32

Schmidt v. Grey, 399 F. App'x 925 (5th Cir. 2010) 20

Scott v. Harris, 5050 U.S. 372 (2007) 16

Singleton v. Wulff, 428 U.S. 106 (1976) 29

Soldal v. Cook Cnty., Ill., 506 U.S. 56 (1992) 4, 39

Solis v. Serrett, 31 F.4th 975 (5th Cir. 2022) 22

Tarver v. City of Edna, 410 F.3d 745 (5th Cir. 2005) 19, 22

Taylor v. Riojas, 141 S.Ct. 52 (2020) 42

Thomson v. Steele, 709 F.2d 381 (5th Cir. 1983) 37

Tolan v. Cotton, 572 U.S. 650 (2014) 30, 32, 33

Trammell v. Fruge, 868 F.3d 332 (5th Cir. 2017) 26

Trent v. Wade, 776 F.3d 368 (5th Cir. 2015) 32

Tyson v. Sabine, 42 F.4th 508 (5th Cir. 2022) 42

United States v. Corn, 836 F.2d 889 (5th Cir. 1988) 31

United States v. Jacobsen, 466 U.S. 109 (1984) 39

United States v. Lanier, 520 U.S. 259 (1997) 42

United States v. Neely, 345 F.3d 366 (5th Cir. 2003) 40, 41

United States v. Paige, 136 F.3d 1012 (5th Cir. 1998) 40

United States v. Ramirez, 523 U.S. 65 (1998) 40

Westfall v. Luna, 903 F.3d 534 (5th Cir. 2018) 26

Williams On Behalf of J.E. v. Reeves, 954 F.3d 729 (5th Cir. 2020) 27, 29

Williams v. Bramer, 180 F.3d (5th Cir. 1999) 14

Young v. Akal, 985 Fed.Supp.2d 785 (W.D. La 2013) 17

Statutes

28 U.S.C. § 1291 xi

28 U.S.C. § 1331 xi

28 U.S.C. § 1343(a)(3) xi

42 U.S.C. § 1983 .... xi, 3, 8, 12, 16, 19, 29, 30, 37, 38

LA R.S. 38:225 .... 5, 26, 41

Other Authorities

Karen M. Blum, § 1983 Litigation: The Maze, the Mud, and the Madness, 23 Wm. & Mary Bill Rts. J. (2015) 30

Rules

Fed. R. App. P. 32 47

Fed. R. App. P. 32(a)(5) 47

Fed. R. App. P. 32(a)(6) 47

Fed. R. App. P. 32(a)(7)(B) 47

Fed. R. Civ. P 12(b)(1) 9

Fed. R. Civ. P 12(b)(6) 9

Fed. R. Civ. P 56 3

Fed. R. Civ. P. 56(c) 15, 19

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over Plaintiff-Appellant's 42 U.S.C. § 1983 claims under 28 U.S.C. §§ 1331 and 1343(a)(3). Following its grant of summary judgement to Defendants-Appellees, the district court entered a final judgment on September 14, 2022. ROA.1164. Plaintiff-Appellant timely filed a notice of appeal on October 13, 2022. ROA.1165. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court—in contravention to Fifth Circuit precedent—erred in granting summary judgment on Ms. Thomas's excessive force claim in holding that a plaintiff cannot satisfy the injury prong of an excessive force claim based only on testimonial evidence and in the absence of corroborating medical evidence.
2. Whether it was error to find that the officers' force, including slamming a handcuffed Ms. Thomas to the ground, was justified where the evidence viewed in the light most favorable to her showed that she was not resisting arrest at the time force was used against her.
3. Whether this Court should decline to address the "clearly established" prong of the qualified immunity inquiry as to Ms. Thomas's excessive force claim where the district court did not pass on the issue and where no special circumstances favor this Court deciding it in the first instance.
4. Whether Officer Arnold's order to maintenance staff to dispose of Ms. Thomas's property established his personal involvement in an unreasonable seizure, and whether it was clearly established that the permanent destruction of Ms. Thomas's property constituted a violation of her Fourth Amendment right.

INTRODUCTION

This case is about whether a plaintiff needs more than her own testimony to establish the incurrence of injury sufficient to maintain a claim of excessive force. The Fifth Circuit has answered this question in the negative in its rulings over the last few decades. By ignoring these rulings, the district court took a divergent path and applied a non-precedential standard. This was in error. Accordingly, the lower court's decision requires reversal.

Ms. Deanna Thomas is a 56-year-old African American woman who has, in recent years, been unhoused. Ms. Thomas is unable to work and earn an income because she has Lupus, a disease that causes her extreme fatigue and muscle and joint pain. ROA.378. On the morning of April 6, 2020, Ms. Thomas was on a levee in Laketown Park in Kenner, Louisiana; she had her belongings with her, including a laptop computer, a sleeping bag, an outdoor canopy, and important legal documents, with her cell phone charging nearby. ROA.380. Officers Arnold and Tewis of the East Jefferson Parish Levee Police Department (EJLD PD) approached Ms. Thomas and requested that she remove her belongings from the levee. ROA.967. Ms. Thomas informed the officers that she needed additional time to remove her items from the levee—as she could not do so on her own—and to collect her cell phone from where it was charging. ROA.967; ROA.1045. Upon hearing her response, Officer Tewis immediately handcuffed Ms. Thomas and threw her to the

ground, despite that, according to her testimony, she did not resist the officers attempt to restrain her and arrest her. ROA.967, ROA.1045.

Because she was handcuffed behind her back, Ms. Thomas was unable to break her fall. She hit the ground face first, which caused her eyeglasses to break across the bridge of her nose; the pain caused her to lose control of her bowels, which emptied into her pants. ROA.968. While she was on the ground, Officer Tewis kneeled into her back, causing severe pain to her back and shoulder. ROA.376, 382, 968. Officer Arnold then ordered maintenance employees of the police department to dispose of all her property, including irreplaceable personal affects and legal documents. ROA.387, 989-89.

Officer Tewis thereafter wrote an arrest report charging Ms. Thomas with obstructing the levee and resisting arrest. ROA.1069. The District Attorney declined to accept the charges. ROA.385.

The force used against Ms. Thomas injured her both physically and emotionally. She suffered several physical injuries, including abrasions on her face and a cut on her nose from the impact of being thrown to the ground, pain in her shoulder, and bruising to her hand. ROA.968. She also routinely has nightmares about the incident and has not regained full mobility of her wrist. ROA.968.

The district court granted summary judgment to Defendants on Ms. Thomas's excessive force claim, finding that Ms. Thomas did not suffer an injury cognizable

under the Fourth Amendment. In so finding, the court made two errors. First, it found that Plaintiff's testimony, without corroborating evidence, such as medical records, was insufficient to establish the element of injury. ROA.1160-62. Such a rule runs counter to this and other circuits' precedent and to Fed. R. Civ. P 56. Second, the district court found that Ms. Thomas' "noncompliance" with the defendant officers justified her injuries. ROA.1161. The district court also erred in determining that the force used by Officer Tewis against Ms. Thomas was reasonable, having failed to conduct the requisite fact-intensive inquiry required in excessive force cases and without considering the facts in the light most favorable to Ms. Thomas. ROA.1159-62. Furthermore, the district court made this finding despite the fact that Defendants never argued on summary judgment that the force used against Ms. Thomas was reasonable. *See* ROA.879-83, 1160-61.

The district court also erred in dismissing Ms. Thomas' claim that Officer Arnold's destruction of her property was an unreasonable seizure. *See* ROA.1162. First, by ignoring Officer Arnold's own testimony that he ordered staff to destroy Ms. Thomas' property, the district court erred in finding Officer Arnold did not have the requisite personal involvement to be held liable under § 1983 for the unreasonable seizure. ROA.883, 895-96. Officer Arnold's direct order led to the permanent deprivation of Ms. Thomas's interest in her property. Thus, he is a proper defendant under this Court's precedent. *See* ROA.986. Second, the district court

erred in finding that Ms. Thomas's property rights were not clearly established in this case. ROA.1162. Ms. Thomas's right to be free from the permanent seizure of all the personal belongings she owned was clearly established under the law of this Court and the Supreme Court. *See infra* pp. 49*; Soldal v. Cook Cnty.*, Ill., 506 U.S. 56, 61 (1992); *Grant v. City of Houston*, 625 F. App'x 670, 675 (5th Cir. 2015).

STATEMENT OF THE CASE

I. Factual History

Deanna Thomas, an unhoused 56-year-old African American woman, brought this civil rights case against defendant officers who handcuffed and violently threw her to the ground, badly injuring her despite her continued compliance. At around 8:30am on April 6, 2020, Ms. Thomas was peacefully residing on a levee in Laketown Park, a public park in Kenner, Louisiana. Defendants Robert Tewis, a Police Officer Second Class with the EJLD PD, and Lieutenant Kirt Arnold, a lieutenant with the EJLD PD, both uniformed, approached Ms. Thomas and requested she leave the levee in accordance with LA R.S. 38:225. ROA.377, 867.

Ms. Thomas, who was alone at the time, explained that she was unable to remove her items on her own. ROA.380. Ms. Thomas suffers from Lupus, which causes her extreme fatigue, muscle pain and weakness, and joint pain. The Lupus prevented Ms. Thomas from being able to move her items from the levee, which

included a canopy tent, a rolling cart, several bags of clothing, and important documents. ROA.378, 380. Ms. Thomas told Lieutenant Arnold that she knew someone who could help her move her things in the evening and that she would be happy to move her belongings at that time. ROA.380.

But instead of allowing Ms. Thomas to do so, Officer Tewis demanded she leave the park with her belongings immediately or be arrested—despite the fact that LA R.S. 38:225 requires officers to provide forty-eight hours' notice before they are allowed to remove obstructions from the levee. ROA.380-81, 384. Ms. Thomas knew that she was going to be arrested, as she could not remove her items on her own, and informed Officer Tewis that she needed to retrieve her cellphone, which she indicated to him was charging several hundred feet away behind a restroom. ROA.381.

When Ms. Thomas went to retrieve her phone, Officer Tewis suddenly grabbed her by the jacket and began to drag her roughly back to his vehicle. ROA.381. As Officer Tewis dragged Ms. Thomas back to his vehicle, he handcuffed her behind her back. ROA.381. Ms. Thomas informed Officer Tewis that she suffered from Lupus, which causes swelling in her hands and wrists, and that the handcuffs were too tight, causing her pain and discomfort. ROA.381. Officer Tewis ignored her. ROA.381.

Officer Tewis continued to drag and pull Ms. Thomas by the handcuffs towards his vehicle. ROA.374. Despite Ms. Thomas's compliance, he subsequently threw her to the ground with both of her hands still cuffed behind her back. ROA.381. Ms. Thomas was unable to break her fall and landed face first, snapping her glasses in half against the bridge of her nose. ROA.381. Her face immediately began to swell and bruise where she had made contact with the pavement. ROA.382. The force of the impact and resulting pain caused Ms. Thomas to lose control of her bowels. ROA.382. Ms. Thomas's back, neck, and right shoulder were all injured. ROA.382.

Once Ms. Thomas was on the ground, Officer Tewis kneeled on her back with the full weight of his body, causing severe pain to her back and shoulder. ROA.968, ROA.382. For sixty-seconds, Officer Tewis knelt on Ms. Thomas's shoulder, causing further injury to her wrists, three fingers and the inside of her right hand. ROA.382. Officer Tewis, finally removing himself from her shoulder, grabbed Ms. Thomas's arms, further injuring her left shoulder, and dragged her up off the ground towards his vehicle. ROA.382. Ms. Thomas asked for a moment to collect herself before being placed in the vehicle but was once again ignored by Officer Tewis. ROA.382.

After being placed in the vehicle, Ms. Thomas laid down face first in the back of the vehicle to try to ease her pain. ROA.382. Officer Tewis refused to let her lie

down in the back of the vehicle and grabbed her once again by her forearms, pulled her from the vehicle, and forced her to sit upright causing her even more pain. ROA.382-83. He then further tightened her handcuffs. ROA.383.

Throughout the arrest, Officer Arnold was standing approximately ten feet away, and at no point during the five-minute ordeal did he intervene, interject, or otherwise prevent Officer Tewis from exerting force against Ms. Thomas. ROA.383.

Ms. Thomas was taken to the police station, where Officer Tewis removed her handcuffs, revealing that Ms. Thomas's skin was scraped off the knuckles of her right index, middle and ring fingers, and left index and middle fingers. ROA.384. Ms. Thomas was not released until 3:30pm on April 6, 2020, approximately seven hours after Officer Tewis injured her. ROA.384. Though Officer Tewis charged Ms. Thomas with obstruction of the levee and resisting arrest, the District Attorney declined to accept the charges. ROA.385.

When Ms. Thomas returned to Laketown Park, she discovered that all her belongings had been removed including her canopy tent, sleeping bag, laptop, and birth certificate. ROA.384. Ms. Thomas later learned that Officer Arnold had ordered maintenance to throw away her belongings after she was arrested. ROA.988.

Defendants dispute Ms. Thomas's version of the facts, claiming that she did not comply with Officer Tewis's commands to remove herself and her belongings from the levee. ROA.919. Defendants contend that Ms. Thomas resisted her arrest

by pulling away from and attempting to bite Officer Tewis. ROA.950. Defendants also maintain that Ms. Thomas struggled while being handcuffed, and dropped to the ground and laid partially beneath the police car with her hands underneath her body. ROA.954, 956. Ms. Thomas maintains that she complied with Officer Tewis's commands during the arrest. ROA.967 ¶¶ 7-8.

II. Procedural History

On April 5, 2021, Ms. Thomas filed a civil rights suit under 42 U.S.C. §1983 and state law seeking injunctive relief and damages against Officers Robert Tewis and Kirk Arnold. ROA.4, 391-410. Ms. Thomas alleged that Officers Tewis and Arnold violated her Fourth Amendment right to be free from excessive force. ROA.374. On December 21, 2021, Ms. Thomas filed a motion for leave to file an amended complaint, which the court granted on January 13, 2021. ROA.8-9. On January 13, 2022, Ms. Thomas filed the First Amended Complaint, adding EJLD PD and its Chief of Police as Defendants; in doing so she brought several additional claims against them and the individual defendants including a municipal liability claim for excessive force, a challenge to the Louisiana statutes under which she had been arrested while unhoused, a claim that the seizure of her property was unreasonable under the Fourth, Fifth and Fourteenth Amendments, and a bystander liability claim for failure to intervene against Defendant Officer Arnold ROA.374-411.

On January 27, 2022, Defendants moved for partial dismissal under Fed. R. Civ. P 12(b)(1) and 12(b)(6). ROA.11. Defendants sought to dismiss all claims brought against the EJLD PD and its Chief of Police. ROA.679. On July 11, 2022, the district court granted that motion in part, and denied it in part. ROA.847. The district court dismissed all of Ms. Thomas's claims against the EJLD PD and the Chief of Police and abstained from hearing the constitutionality of the Louisiana statutes. ROA.847-48. Ms. Thomas does not appeal from the district court's July 11 Order.

On August 16, 2022, Defendants filed a motion for summary judgment asserting qualified immunity as an affirmative defense as to Ms. Thomas's Fourth Amendment claims of excessive force and unreasonable property seizure. ROA.863. The Defendants argued that Ms. Thomas could not demonstrate an injury for purposes of her excessive force claim because she relied on testimonial evidence without corroborating documents, such as medical records. ROA.881-82. Defendants also argued that, in the absence of a constitutional violation, Ms. Thomas' bystander liability claim against Officer Arnold must also fail. ROA.882. Finally, they argued that her Fourth Amendment claim concerning the destruction of her property should be dismissed on qualified immunity grounds, claiming that Ms. Thomas did not allege a violation of a clearly established right. ROA.885

On September 8, 2022, the district court granted Defendants' summary judgment motion, dismissing Ms. Thomas' remaining claims. ROA.15. The district court found that Ms. Thomas failed to establish an injury because she did not produce corroborating medical evidence in addition to her testimony. ROA.1158-62. The court also found that her injuries followed from her "noncompliance," an argument not pressed by Defendants on summary judgment. ROA.1161. Lastly, the district court dismissed Ms. Thomas' claim that Defendants' destruction of her property was an unreasonable seizure, finding that the named defendants lacked personal involvement in the destruction of her property, and that Ms. Thomas could not show that the right allegedly violated was clearly established. ROA.1161-1162.

SUMMARY OF THE ARGUMENT

The district court erred in granting summary judgment for Defendants on Ms. Thomas's claim that Defendant Officers Tewis and Arnold used excessive force against her in violation of the Fourth Amendment and on her claim that Defendant Officer Arnold's destruction of her personal property was an unreasonable seizure under the Fourth Amendment. The district court made two errors in dismissing Ms. Thomas's excessive force claim. First, the district court erred in finding that Ms. Thomas did not provide sufficient evidence of a cognizable injury. The district court, contravening president, imposed a rule that a plaintiff's testimony alone, without

corroborating medical documentation, is not enough to establish the element of injury in an excessive force case. Neither this Court, nor any federal circuit, requires corroborating medical evidence to establish the element of injury in an excessive force claim. In fact, this Court has repeatedly found that a plaintiff's testimonial evidence alone can create issues of material fact sufficient to defeat a defendant's motion for summary judgment. *See McClendon v. United States*, 892 F.3d 775, 785 (5th Cir. 2018). Ms. Thomas provided sufficient testimonial evidence of the injuries she sustained when Officer Tewis handcuffed her, slammed her to the ground face first, knelt on her shoulder for sixty seconds, and roughly maneuvered her in and out of a police car. ROA.382. Ms. Thomas, in sworn statements, testified to injuries to her shoulder, face, wrists, and fingers. ROA.968 ¶¶ 10, 11, 1049. She testified that she has not regained full mobility in her wrist. ROA.968. Ms. Thomas continues to have nightmares about the incident. ROA.968 ¶¶ 16, 17.

The second error made by the district court was its failure to view the facts in a light most favorable to Ms. Thomas in its cursory finding that her "noncompliance" justified Officer Tewis's use of injurious force while she was handcuffed. ROA.1161. Viewing the facts in the light most favorable to Ms. Thomas required the district court to find that Ms. Thomas did not actively resist arrest. The district court failed to point to specific record evidence establishing that Ms. Thomas was non-compliant in any way that could possibly justify throwing handcuffed Ms.

Thomas to the ground so violently that she released her bowels from the pain. ROA.1161 n.49.

In considering Ms. Thomas's excessive force claim, the district court did not address the second prong of the qualified immunity analysis—whether Ms. Thomas's right to be free from excessive force was clearly established. This Court should not address this issue, and instead adhere to its general practice of only deciding issues that the district court has addressed and remand the case for further proceedings. Nevertheless, if this Court does choose to address prong two of the qualified immunity analysis, it should find that Ms. Thomas's right to be free from excessive force while handcuffed and not resisting arrest, was clearly established by the law of this circuit.

Finally, the district court made two errors in dismissing Ms. Thomas's Fourth Amendment claim that Officer Arnold's destruction of her personal property constituted an unreasonable seizure. First, the district court's finding that Defendants lacked the requisite personal involvement to be held liable under § 1983 ignored record evidence, including Officer Arnold's own testimony that he directed maintenance employees to destroy Ms. Thomas's property. ROA.987-88. Second, the district court erred in finding that Ms. Thomas's right to be free from the seizure and destruction of her property, including her shelter, sleeping bag, and birth certificate, was not clearly established. ROA.1162. This circuit has held that seizures

related to an arrest must be limited to those necessary to effectuate the arrest or prevent the destruction of evidence, and that destruction of a person's property may make what was once a reasonable seizure a constitutional violation. The seizure of Ms. Thomas's belongings after she was arrested served no valid purpose, and the destruction of her irreplaceable personal property constituted an irreversible deprivation of her rights.

STANDARD OF REVIEW

This Court reviews grants of summary judgment *de novo* and should only affirm if, viewing all evidence and making all inferences in the light most favorable to Deanna Thomas, Defendants-Appellees' are entitled to judgment as a matter of law. *See Lozano v. Schubert*, 41 F.4th 485, 491 (5th Cir. 2022). Appellate review is generally limited to addressing only those issues that were decided by the district court. *Humphries v. Elliott Co.*, 760 F.3d 414, 418 (5th Cir. 2014).

ARGUMENT

I. The District Court Incorrectly Concluded that Ms. Thomas' Injuries Were Insufficient for Purposes of a Fourth Amendment Excessive Force Claim

The district court erroneously granted summary judgment on Ms. Thomas' excessive force claim, holding that Officers Tewis and Arnold were entitled to qualified immunity because Ms. Thomas did not present enough evidence to establish a cognizable injury to maintain an excessive force claim under the Fourth

Amendment. ROA.1160. It is true that to succeed on a claim of excessive force, a plaintiff must show (1) an injury (2) which resulted directly from a use of force excessive and (3) that the force used was objectively unreasonable. *Williams v. Bramer,* 180 F.3d 699, 703 (5th Cir. 1999). But "as long as a plaintiff has suffered 'some injury,' even relatively insignificant injuries and purely psychological injuries will prove cognizable when resulting from an officer's unreasonably excessive force." *Brown v. Lync*h, 524 F. App'x 69, 79 (5th Cir. 2013) (citing *Ikerd v. Blair*, 101 F.3d 430, 434 (5th Cir. 1996)).

When Officer Tewis threw a handcuffed Ms. Thomas to the ground and knelt on her shoulder with all his body weight, Ms. Thomas suffered injuries to her back, neck, shoulder, wrist, and right hand, and lost control of her bowels. ROA.967-68, 1049. Ms. Thomas, unable to break her fall with her hands cuffed behind her back, landed face-first on the ground; her glasses broke from the impact resulting in lacerations to her face. ROA.381-82, 967-68. There is no question she was injured.

The district court made two errors in dismissing Ms. Thomas' excessive force claim. First, it found that Ms. Thomas was required to present medical records or other "objective evidence" to corroborate her testimony detailing her injuries. ROA. 1160-62. But no such rule exists. Moreover, Ms. Thomas provided ample testimonial evidence to support her injuries. ROA.967-68.

Second, the district court found that Ms. Thomas' "noncompliance" with officers justified her injuries, an argument not pressed in Defendants' summary judgment brief—not to mention one that stands at odds with viewing the facts in the light most favorable to the nonmoving party on summary judgment. *See* ROA.1160-61, 880-83. Tellingly, in reaching this conclusion, the district court did not specify which of Ms. Thomas' statements or behaviors justified the officers' force and accordingly did not properly apply the *Graham* factors. ROA.1161; *see Graham v. Connor*, 490 U.S. 386 (1989).

Lastly, because the district court dismissed Ms. Thomas' bystander liability and related state law claims finding liability on the underlying excessive force claim, those claims should be reinstated. *See* ROA.1156, 1162.

A. The District Court Incorrectly Held that a Plaintiff's Testimony, Without Corroborating Records, Cannot Establish Injury in an Excessive Force Case

The district court wrongly held that Ms. Thomas' evidence of the injuries she sustained from the force used against her by Officer Tewis was insufficient. In so finding, the district court ruled that sworn statements or testimony describing injuries alone, without corroborating evidence of "clinical visits and medical evaluations," could not establish injury for purposes of an excessive force claim. ROA.1160. This is not the law. Indeed, Fed. R. Civ. P. 56(c) articulates no such requirement. In fact,

neither the Fifth Circuit, nor any other federal circuit, requires corroborating medical evidence to show evidence of injury for the purposes of summary judgement or at trial.

Here, the standard favors the plaintiff's testimony unless evidence in the record makes a plaintiff's claims untenable. *Scott v. Harris*, 5050 U.S. 372, 380 (2007); *Anderson v. McCaleb,* 480 F. App'x 768, 771-2 (5th Cir. 2012) (holding that plaintiff's sworn statements as to injury must be taken as true absent objective evidence in the record that blatantly contradicts plaintiff's testimony). A non-conclusory affidavit can create genuine issues of material fact that preclude summary judgment, even if the affidavit is self-serving and uncorroborated. *Lester v. Wells Fargo Bank, N.A.*, 805 F. App'x 288, 291 (5th Cir. 2020) (*citing McClendon v. United States*, 892 F.3d 775, 785 (5th Cir. 2018) (holding that "a taxpayer's self-serving and uncorroborated, but not conclusory, statements in an affidavit or deposition can create an issue of material fact with respect to the correctness of the Government's assessments")). In *McClendon*, this Court held that under Rule 56, self-serving, uncorroborated affidavits or depositions can create an issue of material fact and that any "corroboration requirement" would need to come from some other source of law. 892 F.3d at 785. Here, Defendants do not and cannot show that another source of law, such as § 1983 or the Fourth Amendment, requires

corroborating evidence in order to establish injury. Therefore, Ms. Thomas need not put forth corroborating evidence under this Court's precedent interpreting Rule 56.

Not only has this Court never held that a civil rights plaintiff's testimony alone is insufficient to prove injury or any other element of an excessive force claim, but it has explicitly found, in several cases, that no such requirement exists. In *Durant v. Broo*ks, this Court found that plaintiff's uncorroborated sworn statements in a deposition and a declaration can suffice to defeat a motion for summary judgment. *Durant v. Broo*ks, 826 F. App'x 331, 336 (5th Cir. 2020) (finding that the plaintiff's "complaints of sore ribs and emotional distress—without corroborating medical evidence" was enough to establish injury for the purpose of the plaintiff's excessive force claim). So too here. Similarly, in *Benoit v. Bordelon*, this Court upheld a damages award for a plaintiff in an excessive force case, rejecting the defendants' argument that the plaintiff's testimony, uncorroborated by medical records, was insufficient to establish an injury to his throat. *Benoit v. Bordelon*, 596 F. App'x 264, 269 (5th Cir. 2015). The *Benoit* court found that the plaintiff's testimony alone, which was found credible by the magistrate judge in a bench trial, was sufficient to establish injury. *Id; see also Falcon v. Holly*, 480 F. App'x 325, 326 (5th Cir. 2012) (finding plaintiff's sworn testimony alone to be sufficient to overcome summary judgement in an excessive force claim (citing *Hart v. Hairston*, 343 F.3d 762, 765 (5th Cir. 2003); *Young v. Akal*, 985 Fed.Supp.2d 785, 800 (W.D. 'La 2013) (holding

that plaintiff's affidavits as to injury, taken as true, were enough to defeat defendants' motion for summary judgement).

The district court could point to no authority from this Court, or any other, that holds that a civil rights plaintiff seeking to establish the element of injury in an excessive force case must present evidence other than her own testimony. Instead, the district court cited this Court's decision in *Deville v. Marcantel*, 567 F.3d 156, 168 (5th Cir. 2009) in an effort to support its contention that "sworn statements" are inadequate to establish injury and that "corroborating evidence" such as "clinical visits and medical evaluations" are required. But *Deville* is inapposite to this case. In *Deville*, the plaintiff relied on both her own testimony and medical records to establish injury; the *Deville* court did not hold that the plaintiff was required to do so in order to establish her injuries. Similarly, the district court cited *Petta v. Rivera* for the proposition that psychological evaluations are required for the purposes of establishing a cognizable psychological injury. ROA.1161 n.52 (citing *Petta v. Rivera*, 143 F.3d 895, 903 (5th Cir. 1998). However, the court in *Petta* merely found that there was a cognizable injury in that case where there was also significant medical evidence supporting the injury. *Id.* The court in *Petta* did not hold that psychological evaluations are required to substantiate a claim of psychological injury, nor that the amount of evidence present in that case created a threshold requirement for future excessive force claims. *Id.*; *see also Flores v. City of Palacios*,

381 F.3d 391, 397-98, 401 (5th Cir. 2004) (holding that the district court properly denied summary judgement where plaintiff alleged psychological injuries because purely psychological injuries may support an excessive force claim).

B. The District Court Erred in Holding That Ms. Thomas's Significant Testimonial Evidence of Her Injuries Was Insufficient to Overcome Summary Judgment and Proceed to Trial.

The district court incorrectly found that Ms. Thomas's testimony alone was insufficient to support her claimed injuries. Its ruling necessarily called into question the credibility of Ms. Thomas's sworn statements because they were uncorroborated by medical or additional objective evidence. ROA.1160. This was a legal error because courts may not make credibility determinations as to evidence provided at the summary judgement stage. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (citing Fed. R. Civ. P. 56(c)); *see also Tarver v. City of Edna*, 410 F.3d 745, 753 (5th Cir. 2005) (holding that any credibility determination made between the plaintiff's and an officer's version of events is inappropriate for summary judgement) (internal citations omitted); *Lester*, 805 F. App'x at 291; *Hart*, 343 F.3d at 765 (holding that plaintiff's sworn affidavits are competent evidence to defeat summary judgement). Furthermore, this Court has never imposed a requirement that evidence of injury be corroborated in § 1983 claims. In imposing such a requirement, the district court violated binding precedent. Ms. Thomas' own statements, which the Court must

accept as true for the purposes of summary judgement, are more than sufficient to establish injury in this case.

Ms. Thomas put forth summary judgement evidence sufficient to support her excessive force claim. Ms. Thomas provided sworn statements in both her declaration and deposition that, when Officer Tewis threw her to the ground, a handcuffed Ms. Thomas, unable to break her fall, hit the ground face-first and suffered lacerations when her eyeglasses broke across the bridge of her nose. ROA.381-82, 967-68. As a result of the arrest, Ms. Thomas suffered injuries to her nose, knuckles, shoulders, and wrists. ROA.968, 1049. Ms. Thomas testified that she lost control of her bowels when Officer Tewis slammed her to the ground. ROA.1056, 967. Ms. Thomas provided evidence that Officer Tewis kneeled on her back with the full weight of his body once she was already on the ground, causing severe pain to her back and shoulders. ROA.968, 382 Ms. Thomas also provided testimony that she has not regained full mobility of her wrists and that she continues to have nightmares about the arrest. ROA.968 ¶¶ 16, 17.

These sworn statements are sufficient to show evidence of injury under the established summary judgement standard for excessive force claims in the Fifth Circuit. *See Schmidt v. Grey*, 399 F. App'x 925, 928 (5th Cir. 2010) (finding pain, soreness, and bruising to a finger after an officer slammed it in a trunk enough to show the element of injury); *Alexander v. City of Round Rock*, 854 F.3d 298, 309

(5th Cir. 2017) (finding that injuries to plaintiff's body and mouth, coupled with emotional and psychological injuries enough to show injury); *Ikerd v. Blair,* 101 F.3d 430, 433 (5th Cir. 1996) (holding that a "minor soft tissue injury to the forearm" and potential nerve damage were sufficient to plead injury); *see also Polnac v. City of Sulfur Springs*, 555 F.Supp.3d 309, 332 (E.D.Tex 2021) (holding that plaintiff sufficiently pleaded injury for summary judgment purposes by alleging injuries resulting from his impact with the ground and the officers' bodies while handcuffed).

C. The District Court Erred in Finding That Defendant Tewis Was Justified in Throwing Ms. Thomas to the Ground and Kneeling on Her Back While She Was Handcuffed.

In addition to finding that Ms. Thomas could not establish the requisite injury based solely on sworn testimony, the district court also found that "Ms. Thomas's fleeting harms followed her noncompliance with the instructions of the Defendant-Officers." ROA.1161. The district court provided no more analysis than this one sentence and cited a single page of Plaintiff's summary judgment opposition brief to support its finding that Ms. Thomas was noncompliant. ROA.1161 n.49. In doing so, the district court did not specify which facts detailed on that page of the brief relied on to make the determination that the force used was justified.

In any event, none of the facts on the cited page interpreted in the light most favorable to Ms. Thomas could support a finding that the force used by the officers was reasonable or that her injuries were de minimis. According to Ms. Thomas'

account of the events, she sustained injuries that were the result of force that was not justified by what the district court called her "noncompliance." Ms. Thomas suffered significant injuries when Officer Tewis threw her to the ground while she was handcuffed and, according to her testimony, not resisting. ROA.967-68. Therefore, the district court erred by failing to view the facts in the light most favorable to Ms. Thomas and failing to accept her testimony that she did not actively resist arrest. *See Deville,* 567 F.3d at 167-68 (finding plaintiff's "passive" resistance did not justify force).

i. **Unreasonable Force That Causes "Some Injury" Is Actionable Under the Fourth Amendment.**

The requirement for showing injury in an excessive force claim in this circuit is not onerous. *Alexander v. City of Round Rock*, 854 F.3d 298, 309 (5th Cir. 2017) (quoting *Brown v. Lynch*, 524 F. App'x 69, 79) ("As long as a plaintiff has suffered 'some injury,' even relatively insignificant injuries and purely psychological injuries will prove cognizable when resulting from an officer's unreasonably excessive force"). A plaintiff need not show that an injury was "significant" to prevail on an excessive force claim, "but the injury must be more than de minimis." *Solis v. Serrett*, 31 F.4th 975, 981–82 (5th Cir. 2022) (citing *Tarver v. City of Edna*, 410 F.3d 745, 752 (5th Cir. 2005)). "Any force found to be objectively unreasonable necessarily exceeds the de minimis threshold, and, conversely, objectively

reasonable force will result in de minimis injuries only." *Byrd v. Cornelius*, 52 F.4th 265, 274 (5th Cir. 2022) (quoting *Alexander v. City of Round Rock*, 854 F.3d 298, 309 (5th Cir. 2017). In other words, where the force used is unreasonable under the circumstances, even insignificant injuries qualify as more than de minimis.

As shown *supra* at 28-29, Ms. Thomas has plainly exceeded the bar of showing some injury, having suffered injuries including abrasions and bruising to her face as well as a cut to her nose, soreness in her shoulder, and the skin being scraped off her knuckles, fingers, and wrists resulting from being forcibly handcuffed, thrown to the ground face-first, and then forced into and out of the police vehicle. ROA.936, 383-86, 968, 723-24, 955-57, 1078-79; *see also Cooper v. Brown*, 844 F.3d 517, 525 (5th Cir. 2016) (holding that a reasonable officer would know that it is objectively unreasonable to use force against a suspect who is not resisting arrest).

Because the facts viewed in a light most favorable to Ms. Thomas establish both that she can show some injury, and, as demonstrated below, that the force used by the officers was objectively unreasonable, the district court's finding of de minimis injury was in error.

ii. The District Court Erred in Finding Defendants' Use of Force Justified.

The district court's finding that the officers' use of force was justified by what it called Ms. Thomas' "noncompliance" fails to draw all reasonable inferences in Ms. Thomas' favor as required under Rule 56. It is also contrary to this Court's precedent applying *Graham v. Connor*, 490 U.S. 386, (1989). The district court provided virtually no analysis as to the reasonableness of the force exerted against Ms. Thomas. In the single sentence it devoted to this issue, the court found that Ms. Thomas' injuries "followed her noncompliance with the instructions of the Defendant-Officers." ROA.1161. However, in Ms. Thomas' testimony she states at no point did she "bite, kick, scratch, spit, nothing" before or after she was handcuffed. ROA.1047.

The district court did not specify which of Ms. Thomas' statements, in its view, established that her noncompliance was of the sort that would permit officers to use injurious force. ROA.1161.[1] Nor did it explain why, under the *Graham* factors, her

[1] The district court cited to one page of Plaintiff's summary judgment brief to support its finding that her noncompliance rendered the force reasonable. *See* ROA 1161 n. 49 (citing to page four of Plaintiff's brief). On page four and throughout her summary judgment filing, Ms. Thomas made clear that she never physically resisted the officers. ROA.933. She did claim that when the officers first approached her and asked her to remove her belongings from the levee, she informed them that she needed to wait until later in the day when a man would assist her. *Id*. She also stated that when she realized she was going to be arrested, she informed the officer that she needed to retrieve her cell phone, which was charging outside a nearby public restroom." The court did not specify which of these, or any other, statements it relied upon in finding that Ms. Thomas was noncompliant in a way that justified Officer Tewis' use of force.

statements justified the officers' force. But as this Court has often recognized, "[e]xcessive 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 (*citing Graham* 490 U.S. at 396). An analysis of the *Graham* factors that views the facts in the light most favorable to Ms. Thomas and draws all reasonable inferences in her favor, does not support the district court's finding that Ms. Thomas' injuries were de minimis because the force was justified.

To determine whether an officer used unreasonable force, courts apply the *Graham* factors, looking to: (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. This court later contextualized the *Graham* factors in *Deville v. Marcantel*, stating that the factors are used to reason if the officer could have "plausibly" thought the force used was necessary. *See Deville,* 567 F.3d at 168.

Applying the *Graham* factors here shows that Officer Tewis used unreasonable force to arrest a non-resisting 56-year-old woman. To the extent the district court applied the *Graham* factors, it appears to only have relied on the third factor for its conclusion. The third *Graham* factor rests on whether the suspect was actively resisting arrest or attempting to flee. *Graham*, 490 U.S. at 396. Ms. Thomas'

statements show that she never actively resisted arrest and that she never attempted to flee. ROA.933.

The district court did not address the first two *Graham* factors, the severity of the crime and any threat posed to the officers by Ms. Thomas, nor could such any argument based on these factors succeed. ROA.1159-63. The crime to which the officers were responding was the misdemeanor offense of obstruction of a levee under LA R.S. 38:225. ROA.960. Where the alleged crime is a misdemeanor, the severity factor "militate[s] against use of force." *Westfall v. Luna*, 903 F.3d 534, 548 (5th Cir. 2018); *Trammell v. Fruge*, 868 F.3d 332, 340 (5th Cir. 2017) (citing *Reyes v. Bridgwater*, 362 F. App'x. 403, 407 n.5 (5th Cir. 2010). Moreover, the district court made no finding, nor could such a finding be supported, that Ms. Thomas posed an immediate threat to the officers. ROA.1156, 1161.

The district court's finding that Ms. Thomas' "noncompliance" justified the force used and rendered her injuries de minimis was thus made in error. It made this finding without engaging in the requisite fact-intensive inquiry——and without drawing all inferences in her favor as is required on summary judgment. *See Graham*, 490 U.S. at 396; ROA.1158-60. Moreover, it did so without the urging of Defendants, whose only argument on the merits prong of qualified immunity was that Plaintiff lacked "competent medical evidence" to show injury. ROA.1155. Defendants will likely pursue a theory of reasonable force if this case proceeds to

trial, given that they claim that Ms. Thomas engaged in acts of active resistance that she disputes. *See* ROA.933, 950-52. However, given the disputed facts in this case, particularly on the question of whether Ms. Thomas actively resisted the officers' attempts to arrest and subdue her, the district court's finding on summary judgment that the Defendants force was justified was erroneous.

The district court's dismissal of Ms. Thomas's excessive force claim was in error. This Court should remand this claim to the district court along with instructions to reinstate her bystander liability claim and related state law claims, which the district court dismissed along with her excessive force claim. *See* ROA.1164.

II. The Question of Whether Deanna Thomas Had a Clearly Established Right to Be Free From Excessive Force Should Be Addressed by the District Court in the First Instance.

Courts apply a two-part analysis in addressing a qualified immunity defense: 1) whether plaintiff has alleged a violation of a federal right and 2) whether the right was clearly established at the time of the challenged conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). The district court declined to address the second prong of qualified immunity, whether Ms. Thomas had a clearly established right to be free from excessive force. ROA.1161-62. This Court should not depart from its general practice of considering only those issues that the district court has addressed. *See Williams On Behalf of J.E. v. Reeves*, 954 F.3d 729, 735 (5th Cir. 2020). This Court

has often noted that it is a "court of review, not of first view." *E.g., Carswell v. Camp*, 54 F.4th 307, 314 (5th Cir. 2022) (cleaned up). However, if this Court does exercise its authority to address the second part of the qualified immunity analysis, it should find that Ms. Thomas, who was not suspected of a serious crime, did not pose any immediate threat to officers and was not actively resisting, had a clearly established right to be free from the force used against her by defendant Officer Tewis.

A. This Court Should Maintain Its General Practice of Only Reviewing Questions That Have Been Addressed by the District Court

The district court granted Defendants qualified immunity, finding that because Ms. Thomas did not, in the court's view, establish the element of injury, she could not show that her right to be free from excessive force was violated. *See* ROA.1158-62. The district court's opinion focused primarily on the evidence supporting Ms. Thomas' claim of injury and cursorily addressed the question of whether the force used was reasonable.[2] The district court did not address the second prong of the qualified immunity analysis, whether Ms. Thomas' right to be free from excessive force was clearly established at the time it occurred. ROA.1159-62. This Court should adhere to its general rule of declining to consider arguments that were

[2] As noted *supra* at 29, the district court addressed the *Graham* factors in one sentence and did not specify which facts in the record led to its conclusion that the force used was justified. *See* ROA.1161.

passed over by the district court. *See Williams*, 954 F.3d at 735 (declining to address purely legal questions raised before the district court, but not addressed by the district court's order because no "special circumstances" justified their review); *see also Magnolia Island Plantation, L.L.C. v. Whittington,* 29 F.4th 246, 252 (5th Cir. 2022) (noting the "well-established general rule" that this Court "'will not reach the merits of an issue not considered by the district court'"). In *Arnold v. Williams*, this Court reviewed a district court decision dismissing a § 1983 claim on its merits, and like here, declined to address the qualified immunity question. After reviving the dismissed claim on its merits, the *Arnold* Court remanded, stating "[b]ecause as a general rule, we do not consider an issue not passed upon below, we remand for the district court to decide in the first instance whether [qualified immunity] defeats." *Arnold v. Williams,* 979 F.3d 262, 269 (5th Cir. 2020) (quoting *Peña v. City of Rio Grande City*, 879 F.3d 613, 621 (5th Cir. 2018)).

This Court "will not consider an issue passed over by a district court" without a showing of "special circumstances." *Man Roland, Inc. v. Kreitz Motor Express*, 438 F.3d 476, 483 (5th Cir. 2006). Such circumstances would include the resolution of a pure question of law involved where "the proper resolution is beyond any doubt" or "injustice might otherwise result" *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). The issue of whether Ms. Thomas' right to be free from excessive force was clearly established is not a purely legal question the resolution of which is not beyond any

doubt [3] nor would this Court's refusal to address it in the first instance implicate any miscarriage of justice.

While the question about whether the right at issue was clearly established at the time is a legal question, the determination of the specific right at issue requires a court to examine the facts and to do so in the light most favorable to the non-moving party. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014) ("Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard."). Further, Defendants cannot claim that the resolution of this issue is "beyond any doubt." Ms. Thomas argues *supra* at 29 that, as a 56-year-old woman who neither resisted the officers' efforts to arrest her for a non-violent misdemeanor, nor posed to them an immediate threat, her right to be free from excessive force was clearly established at the time the officers used force against her. Defendants will likely claim otherwise. *See* ROA.879-83.

[3] Ms. Thomas argues infra at 39 that the law establishing her right to be free from excessive force was clearly established at the time Officer Tewis used force against her. Defendants will likely claim otherwise. *See* ROA.878-83. As one longtime scholar of qualified immunity put it, the question of what makes law clearly established is "riddled with contradictions and complexities." Karen M. Blum, § 1983 Litigation: The Maze, the Mud, and the Madness, 23 Wm. & Mary Bill Rts. J. 913, 945 (2015) (quoting Judge Hall in *Golodner v. Berliner*, 770 F.3d 196, 205 (2d Cir. 2014) as noting that '[f]ew issues related to qualified immunity have caused more ink to be spilled than whether a particular right has been clearly established, mainly because courts must calibrate, on a case-by-case basis, how generally or specifically to define the right at issue.'). Considering the strength of Plaintiff's argument and the murky nature of the "clearly established" issue in force claims, Defendants cannot credibly claim that the resolution of this issue is "beyond doubt."

Furthermore, allowing the district court to address the second part of the qualified immunity analysis on remand imposes no "miscarriage of justice" on the defendant. *United States v. Corn*, 836 F.2d 889, 894 (5th Cir. 1988) (agreeing to address a legal issue not considered below to avoid subjecting criminal defendant to an unfair sentence, which the court considered to be "miscarriage of justice"). Excessive force cases compromise an area of law where the result is entirely dependent on the facts of each case as qualified immunity is denied where existing precedent "squarely governs the specific facts at issue." *Morrow v. Meachum*, 917 F.3d 870, 876 (5th Cir. 2019).

Because this is a court of review (*Daves v. Dallas Cnty.*, Texas, 22 F.4th 522 (5th Cir. 2022)), this Court should, as in *Allen*, remand to the district court to address qualified immunity. Though it is within the court's authority to fully decide the issue, it is not this court's function to decide summary judgment in the first instance. *Carswell v. Camp*, 54 F.4th 307, 314 (5th Cir. 2022) (declining to rule on the question of qualified immunity in the first instance and remanding the case for further proceedings).

B. Ms. Thomas' Right to Be Free From Excessive Force Was Clearly Established.

If this Court decides to address the second prong of the qualified immunity analysis, despite the district court's silence on this issue, it should find that Ms.

Thomas, who did not actively resist the officers' efforts to arrest her for a non-violent misdemeanor and who was handcuffed when she was purposefully pushed to the ground, had a clearly established right to be free from the force used by Officer Tewis.

Police officers may be held liable if the state of the law at the time of the incident clearly establishes that the officers' conduct is unconstitutional. *See Tolan v. Cotton*, 572 U.S. 650, 656 (2014). The central concept is that of "fair warning," in which "the contours of the right in question are sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *see also Trent v. Wade*, 776 F.3d 368, 383 (5th Cir. 2015).

To demonstrate that the law allegedly violated was clearly established, a plaintiff must identify a case or body of relevant caselaw in which an officer acting under similar circumstances was held to have violated the constitution. *Joseph v. Bartlett*, 981 F.3d 319, 330 (5th Cir. 2020). This Court does not require a plaintiff to produce a "case directly on point" to show that a right was clearly established. *Roque v. Harvel*, 993 F.3d 325, 334 (5th Cir. 2021) (citing *Ashcroft*, 563 U.S. at 741). Instead, the case or body of caselaw must be substantially related to the facts of the case such that "existing precedent must have placed the statutory or constitutional question beyond debate." *Id*. "Furthermore, 'in an obvious case,'" the *Graham*

excessive-force factors themselves "can 'clearly establish' the right, even without a body of relevant case law." *Newman v. Guedry*, 703 F.3d 757, 764 (5th Cir. 2012) (citing *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004).

The Supreme Court has instructed courts conducting a qualified immunity analysis to define the clearly established right based on the specific context of the case. Therefore, a court must resolve disputed issues in favor of the non-moving party in determining whether the law is clearly established.[4] *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (citing *Anderson v. Liberty Lobby, Inc*, 477 U.S. 242, 249 (1986); *see* also *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). The court must "take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions." *Tolan*, 572 U.S. at 657 (quoting *Brosseau*, 543 U.S. at 198). Therefore, in determining whether the right in this case was clearly established under the Fourth Amendment, the court must credit Ms. Thomas's version of the events at the summary judgement stage. *See Payne v. Dickerson*, 334 F. App'x 629, 631 (5th Cir. 2009) (holding that plaintiff's sworn affidavits provided competent summary judgement evidence to show that defendant officer's conduct at the time was excessive and objectively unreasonable in violation of clearly

[4] At trial, it is possible that a jury may credit the officers' version of events such that they would be entitled to qualified immunity. However, at the summary judgement stage, a finding of qualified immunity is not appropriate based on the facts viewed in Ms. Thomas' favor. *See Lampkin v. City of Nacogdoches*, 7 F.3d 430, 436 (5th Cir. 1993) (holding that disputed issues of material fact preclude a qualified determination as a matter of law).

established law under the Fourth Amendment). Thus, the context of the case for the purposes of the Court's qualified immunity analysis is whether Ms. Thomas had a clearly established right under the Fourth Amendment to be free from being thrown to the ground and knelt on while she was handcuffed, not actively resisting arrest for a misdemeanor, and posing no immediate threat to the officers. ROA.967-68. Based on *Graham* itself and Fifth Circuit precedent, this right is clearly established.

Here, as in *Newman*, none of the *Graham* factors justified Officer Tewis throwing a handcuffed Ms. Thomas to the ground and kneeling on her shoulder with the full weight of his body. *See Newman*, 703 F.3d 757 at 764 (finding plaintiff's right to be free from excessive force clearly established by *Graham* where, according to plaintiff's version of the events, he did not resist, did not pose a threat to the officer, and did not commit a crime). *See also Hanks v. Rogers*, 853 F.3d 738, 747 (5th Cir. 2017) (finding an incident where suspect was arrested for minor crime, posed no threat to officer, and engaged in only passive resistance to be an "obvious case" in which the *Graham* standards independently and clearly establish the law). Similarly, Ms. Thomas did not actively resist arrest, was not suspected of committing a serious crime, and did not pose any immediate threat to the officers at the time of the arrest. ROA.967-68.

The law in this circuit has clearly established that Ms. Thomas had the right to be free from the force used by Defendants. Fifth Circuit caselaw, analyzing the

use of force under the *Graham* factors clearly establishes that Officer Tewis's use of force against Ms. Thomas was unlawful. The Fifth Circuit has held that an officer is not entitled to qualified immunity when it was clearly established, in light of prior case law, that the amount of force that can be used on an individual who is not resisting arrest is reduced. *Darden v. City of Fort Worth*, Texas 880 F.3d 722, 731-2 (5th Cir. 2018); *see also Aguirre v. City of San Antonio*, 995 F.3d 395, 412 (2021) (holding that "it has long been clearly established that, when a suspect is not resisting, it is unreasonable for an officer to apply unnecessary, injurious force against a restrained individual, even if the person had previously not followed commands or initially resisted the seizure.").

In multiple cases where the facts closely conform to those alleged by Ms. Thomas, this Court has found that officers were not entitled to qualified immunity due to their use of excessive force. *See Bush v. Strain,* 513 F.3d 492, 502 (5th Cir. 2008) (holding that it was objectively unreasonable to slam an arrestee's face into a nearby vehicle when the arrestee was not resisting or attempting to flee); *Newman v. Guedry*, 703 F.3d 757, 762-3 (5th Cir. 2012) (holding that it was objectively unreasonable for an officer to tase an arrestee where there was no evidence that he was attempting to strike an officer or holding a weapon); *see also Deville v. Marcantel*, 567 F.3d 156, 167-8 (5th Cir. 2009) (holding that Deville's passive resistance to an officer's request that she get out of her car during a traffic stop did

not justify the officer's use of force in pulling her out of her vehicle and slamming her against the side of the car).

Indeed, the Fifth Circuit has held that, even when an arrestee is resisting arrest, the degree of force that an officer can employ is reduced at the moment the arrestee stops resisting. *Cooper v. Brown*, 844 F.3d 517, 524-5 (5th Cir. 2016); *see supra 43, Aguirre*, 995 F.3d at 412. Even if Ms. Thomas's request for additional time to move her belongings from the levee somehow constituted non-compliance, Officer Tewis' subsequent use of force at the time of Ms. Thomas's arrest was unreasonable under the clearly established law in the Fifth Circuit.

Because the district court neither addressed the question of whether defendants violated the clearly established law, nor defined the legal right in question, this case should be remanded for further proceedings. ROA.1157-62. However, should the Court take up the question of qualified immunity now, it should find that Ms. Thomas, who was not suspected of a serious crime, who posed no immediately threat to the officers, and was not actively resisting her arrest, had a clearly established right to be free of the force used against her.

III. The District Court Erred in Dismissing Ms. Thomas' Claim That Defendants' Destruction of Her Property Was an Unreasonable Seizure.

The district court made two errors in dismissing Ms. Thomas' Fourth Amendment property seizure claim. First, the district court's finding that neither

Defendant had the requisite personal involvement in discarding Ms. Thomas' property ignored record evidence to the contrary. Defendant Arnold testified at his deposition that he ordered Ms. Thomas's property be seized and destroyed. Second, the district court was incorrect in finding that Ms. Thomas' right not to have her property destroyed by police was not clearly established.

A. Officer Arnold's Order That Ms. Thomas's Property be Removed and Destroyed Established his Personal Involvement in the Deprivation of Ms. Thomas's Property Rights Sufficient to Support Her 1983 Claim Against Him.

The district court erred in finding that defendant Officer Arnold was not a proper defendant because he lacked personal involvement in the destruction of Ms. Thomas's property. ROA.1162 n. 56. It is well settled that a plaintiff in a civil rights case must demonstrate both a constitutional violation and personal involvement on behalf of those alleged to have violated a constitutional right. *Thomson v. Steele*, 709 F.2d 381, 382 (5th Cir. 1983) (citing *Rizzo v. Goode*, 423 U.S. 362, 371-2 (1979) (holding that an affirmative link is needed between injury and the conduct of the named defendant)). Ms. Thomas sufficiently established Officer Arnold's personal involvement in the unlawful destruction of her property, such that he is the proper defendant in her Fourth Amendment unreasonable seizure claim.

"To hold any defendant liable under § 1983, a plaintiff must establish that the defendant was personally involved in the deprivation of plaintiff's constitutional

rights or that a causal connection exists between an act of [the defendant] . . . and the alleged constitutional violation." *Douthit v. Jones*, 641 F.2d 345, 346 (5th Cir. 1981). This Court has held that, in order to successfully plead a cause of action in § 1983 cases, plaintiff's must "enunciate a set of facts that illustrate the defendant's participation in the wrong alleged." *Jacquez v. Procunier*, 801 F.2d 789, 793 (5th Cir. 1986). Ms. Thomas has done so.

Officer Arnold's deposition testimony, presented to the court as summary judgment evidence, establishes his personal involvement in the destruction of Ms. Thomas' property. Officer Arnold told Officer Tewis that he was going to "go through [Ms. Thomas's] property . . . and after [he] went through it . . . was going to have maintenance come and pick it up . . ." ROA.986. When Officer Arnold was asked what would happen to the property once it was picked up by maintenance he responded, "it would be thrown away." By his own sworn deposition testimony, Officer Arnold ordered that Ms. Thomas's property be seized and destroyed by maintenance with knowledge at the time of the order that the property would be thrown away. ROA.987-88. A direct order to another to deprive a plaintiff of their constitutional rights establishes personal involvement sufficient to sustain a § 1983 claim. *See Gordon v. Neugebauer*, No. 1:14-CV-0093-J, 2014 WL 6892716, at *6 (N.D. Tex. 2014) (holding that there was a sufficient causal connection if the

defendant ordered another defendant officer to detain and arrest plaintiff in violation of his constitutional rights).

Officer Arnold's order that Ms. Thomas's property be collected and destroyed by an employee of the EJLD PD establishes his personal involvement in the unlawful seizure of her property. Accordingly, Officer Arnold is a proper defendant in Ms. Thomas's Fourth Amendment unreasonable seizure claim.

B. Ms. Thomas Has a Clearly Established Right to Be Free From the Unreasonable Seizure Committed by Officer Arnold.

The district court erred in granting qualified immunity on Ms. Thomas's claim that Defendants disposed of her personal property. ROA.1162. Ms. Thomas's Fourth Amendment right to be free from this most intrusive kind of property seizure was clearly established, as the destruction of an individual's personal effects constitutes an unreasonable seizure under the law of this Court and the Supreme Court.

The Fourth Amendment guarantees "[t]he right of the people, [homeless or otherwise] to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" *Grant v. City of Houston*, 625 F. App'x 670, 675 (5th Cir. 2015) (quoting U.S. Const. amend. IV). A seizure occurs when an officer meaningfully interferes with an individual's possessory interest in that property. *Soldal v. Cook Cnty.*, Ill., 506 U.S. 56, 61 (1992) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). In the absence of exigent circumstances,

warrantless searches and seizures are per se unreasonable. *Horton v. California*, 496 U.S. 128, 138 (1990).

When someone is lawfully arrested, a search and seizure incident to arrest is proper only if it is restricted to the arrestee and any evidence, in order to prevent its "concealment or destruction." *United States v. Neely*, 345 F.3d 366, 372 (5th Cir. 2003) (cleaned up) (quoting *Chimel v. California*, 395 U.S. 752, 762-63 (1969); *see also Marron v. United States*, 275 U.S. 192, 194–95 (1927) (holding that a seizure may be justified as either "incident to the execution of a warrant or as an incident right of search from the arrest of a suspect"). The right to search and seize someone's property during an arrest is not without restrictions, however. Excessive or unnecessary destruction of property during a search and seizure may violate the Fourth Amendment even if the initial search itself was lawful. *United States v. Ramirez*, 523 U.S. 65, 71 (1998). This limitation holds true even in the absence of a search, as seizures are independently subject to Fourth Amendment scrutiny. *United States v. Paige*, 136 F.3d 1012, 1021–22 (5th Cir. 1998) (holding that even in the absence of a reasonable expectation of privacy, citizens still maintain possessory interest in their property).

Officer Arnold discarded all of Ms. Thomas's personal property, including her shelter, sleeping bag, and birth certificate. ROA.930.[5] It was clearly established that the destruction of her property was a seizure, as it was plainly a "meaningful interference" with her interest in that property. *Soldal* 506 U.S. at 61; *Grant v. City of Houston*, 625 F. App'x 670, 675 (5th Cir. 2015) (citations omitted) ("destruction of property constitutes a meaningful interference with an individual's possessory interests"). Furthermore, it was clearly established that this seizure was unreasonable. It was a warrantless seizure that, while incident to arrest, was not conducted in an effort to prevent concealment or destruction of evidence, as the officers disposed of all the property. *See Neely*, 345 F.3d at 372 (stating that seizure incident to arrest is reasonable to secure a weapon or prevent destruction of evidence).

Although there is no Fifth Circuit case addressing this particular set of facts—the permanent seizure of an unhoused person's personal possessions—the Supreme Court and this Court have held, and recently reiterated that a right may be clearly established at a greater level of generality where the violation is obvious. "[A] general constitutional rule already identified in the decisional law may apply

[5] Under Louisiana Law, Ms. Thomas was entitled to forty-eight hours to move her property. ROA.723; LA R.S. 38:225 ("[I]f after 48 hours' notice by an authorized representative of the state the object or objects, structures or other obstructions have not been removed, said objects can be removed or the menace abated and any damage repaired by the state, its agency or subdivision at interest at the expense of the owner, agent or person responsible therefore").

with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)) (cleaned up). The *Hope* Court found that "[a]lthough earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." *Id.*; *see also Ashcroft*, 563 U.S. at 741 (noting that the "clearly established" question does "not require a case on point"). Instead, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741. More recently, the Supreme Court denied qualified immunity to officials based on the "obviousness of [plaintiff's] right" despite a lack of on-point precedent. *Taylor v. Riojas*, 141 S.Ct. 52, 54 n.2 (2020) (per curiam); *see also McCoy v. Alamu*, 141 S.Ct. 1364 (2021) (Mem.), granting, vacating, and remanding, 950 F.3d 226 (5th Cir. 2020) (directing reconsideration "in light of *Taylor*").

This Court recently confirmed the vitality of the "obvious violation" rule, denying qualified immunity for a sheriff's deputy alleged to have sexually assaulted the plaintiff during a welfare check. *Tyson v. Sabine*, 42 F.4th 508, 520 (5th Cir. 2022). Because the central concept of qualified immunity is fair warning, if the facts of a case obviously show a violation of a constitutional right, general standards can

clearly establish the answer, even without a body of relevant or directly on point case law. *Tyson,* 42 F.4th at 519 (quoting *Brosseau v. Haugen,* 543 U.S. 194, 199 (2004)) (holding that in an obvious case the *Graham* standard is sufficient to clearly establish the answer even without a body of case law).

The Ninth Circuit has also found that the destruction of the belongings of unhoused persons is an obvious violation of the Fourth Amendment. Relying on the Supreme Court's decision in *al* and this Court's decision in *Paige*, the Ninth Circuit held that a city's destruction of unhoused individuals' property, including identification papers, electronics, and other property was an unreasonable seizure under the Fourth Amendment. *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1030-31 (9th Cir. 2012); *see* also *Garcia v. City of Los Angeles*, 11 F.4th 1113, 1119 (9th Cir. 2021) (same). The *Lavan* Court noted that the city did not, and could not, argue that seizure was reasonable, because the violation was obvious. *Lavan,* 693 F.3d at 1131. Ms. Thomas's right to be free from the unreasonable seizure of her property was clearly established before Officer Arnold ordered its destruction.

The district court did not address the first prong of the qualified immunity analysis. That is, the court did not analyze whether, based on the undisputed facts viewed in a light most favorable to the plaintiff, it was unreasonable for these defendants to permanently seize Ms. Thomas's property. ROA.1162. Nor did the district court assess whether any material facts relating to Ms. Thomas's property

claim were in dispute. Because the district did not address the question of whether Officer Arnold's destruction of Ms. Thomas's property was an unreasonable seizure, this Court should remand to the district court for further proceedings on the issue. *See Arnold,* 979 F.3d at 269 (5th Cir. 2020); *see* also *supra* pp. 39 (arguing that this Court should adhere to its practice of deciding only those issues addressed below). Additionally, there is a material dispute of fact as it relates to Ms. Thomas's property claim that counsels against this Court deciding the issue. Officer Arnold testified that the reason he disposed of Ms. Thomas's property was that she told them to do so. ROA.936, 1135, 1156. Ms. Thomas testified that she did not. ROA.968. Because the district court did not address prong one of the qualified immunity analysis and because material facts remain in dispute, this Court should not address the issue.

CONCLUSION

For the foregoing reasons, the lower court erred in granting Defendants-Appellees' Motion for Summary Judgment. We respectfully urge this Court to reverse the district court's Order granting summary judgment to the Defendant-Appellees, remand the case for further proceedings, and grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Betsy Ginsberg, do hereby certify that on this the eleventh day of January 2023, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court for Appeals for the Fifth Circuit by using the appellate CM/ECF. All counsel of record are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ Betsy Ginsberg
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,143 words, excluding the parts of the brief exempted by Fed. R. App. P. 32.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14pt for text and Times New Roman 12pt for footnotes.

/s/ Betsy Ginsberg
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