[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12944
Non-Argument Calendar

D.C. Docket No. 1:17-cv-03996-SDG

DEMETRIC R. FAVORS,

Plaintiff - Appellant,

versus

CITY OF ATLANTA,
a municipal corporation of the State of Georgia,

Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(March 10, 2021)

Before WILSON, MARTIN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

Demetric Favors was a passenger in a vehicle when a police officer employed by the City of Atlanta ("the City") discharged a firearm five times to stop that vehicle from moving. Two bullets hit Favors. He sued the City pursuant to 42 U.S.C. § 1983, alleging the City was liable for excessive force. Following cross-motions for summary judgment, the district court granted judgment to the City. Favors now appeals, arguing the court misapplied precedent on municipal liability, improperly weighed the evidence in a light unfavorable to him, and made impermissible adverse credibility determinations of his witnesses. After careful consideration, we vacate the judgment and remand for further proceedings.

I

A. Factual Background[1]

On a Saturday night in 2015, Favors visited an adult entertainment club in Atlanta with a group of people. Emmanuel Thompson was on patrol as an officer for the Atlanta Police Department ("APD") and was parked across the street from the venue in a squad car. The evening ended with Thompson shooting Favors, resulting in physical injuries.

The trouble began when a male patron took another patron's money, including a Styrofoam to-go plate containing over $600 in cash, and ran out of the

[1] We recount the version of events most favorable to Favors, the nonmovant. See McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1239 n.2 (11th Cir. 2003) (per curiam).

building. The entertainment venue's head of security alerted Thompson of the theft, and Thompson left his squad car to search for the suspect.

Around this time, Favors also left the venue and got into the front passenger seat of a white Chevrolet Traverse. A security officer saw the suspect enter the same white Chevrolet and sit in the backseat. As the Chevrolet began to pull out of the parking lot, the security officer ran alongside the vehicle to prevent it from leaving. The vehicle did not stop. While the car continued its exit from the parking lot, Thompson, still on foot, discharged his firearm five times at the vehicle. Three bullets struck the car. The two remaining bullets pierced the front passenger door and struck Favors in the right thigh and ankle.

The Chevrolet soon crashed into another vehicle. The driver and the suspect fled on foot, while Favors remained at the site of the crash. Thompson arrested Favors, who was then transported to the hospital for treatment.

The Atlanta Police Department's Office of Professional Standards ("OPS") investigated the shooting. Although Thompson claimed he fired at the vehicle to protect the security guard and other people in the parking lot, OPS found that the video footage of the incident contradicted Thompson's rationale. Instead, OPS found "no evidence to support any articulable threat of violence towards" Thompson, or, for that matter, "anyone present." OPS concluded that Thompson

lacked justification for shooting at the vehicle and recommended he be fired. Not long after OPS issued its findings, Thompson resigned from the APD.[2]

B. Procedural History

In 2017, Favors sued, asserting one claim of municipal liability against the City under 42 U.S.C. § 1983 and one claim for attorney's fees under 42 U.S.C. § 1988. The City filed a motion for summary judgment on both claims. Favors filed a cross-motion for partial summary judgment on the issue of whether his constitutional rights were violated.

In defending against the City's motion for summary judgment on municipal liability, Favors presented evidence that the City failed to provide Thompson with annual training under O.C.G.A. § 17-4-20, which sets forth limits on the use of deadly force, and failed to provide Thompson with a copy of the statute, as required. See O.C.G.A. § 17-4-20(e). Favors also presented expert testimony, from a former police officer with 28 years of law enforcement experience who conducted over 100 use-of-force investigations. This expert opined about how the City's failure to train possibly caused Thompson to shoot at the vehicle and injure Favors. And Favors introduced deposition testimony from the City's Rule 30(b)(6) witness in another excessive force case, concerning the City's training on the use

[2] Thompson was also criminally prosecuted. In 2019, he pled guilty to simple assault and was sentenced to 12 months' probation. His Peace Officers Standards and Training Counsel certification was also revoked.

of force. That testimony indicated that the City did not provide training on the appropriate use of force in apprehending a suspect in a vehicle. The City, for its part, countered that its training was not inadequate. It asserted that it was entitled to judgment as a matter of law, because the City provided hours of training in excess of that required under state law, including on the use of force. It also provided evidence of the APD's internal disciplinary process. It did not provide expert testimony.

The district court granted both Favors's motion for partial summary judgment and the City's cross motion for summary judgment. The court began by ruling in favor of Favors on his claim that his Fourth Amendment rights were violated when Thompson shot him. But it went on to find that Favors had not identified genuine disputes of material facts on the question of the City's liability, and that the City established it was not deliberately indifferent to Favors's constitutional rights. On this basis, it granted summary judgment to the City on the municipal liability claim. Because the request for attorney's fees was derivative of the municipal liability claim, the court entered judgment for the City on that count as well.

This is Favors's appeal.

II

We review de novo a district court's grant or denial of summary judgment. Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1311 (11th Cir. 2002). Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, presents no genuine dispute as to any material fact and compels judgment as a matter of law. Fed. R. Civ. P. 56(a); State Farm Mut. Auto. Ins. Co. v. Duckworth, 648 F.3d 1216, 1219 n.5 (11th Cir. 2011). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions," not those of a court ruling on a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id.

III

Favors argues the district court erred in granting summary judgment to the City for three reasons. First, he says the court erred in its interpretation and application of Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018 (1978), and its progeny. Second, he argues the court improperly weighed the evidence in a light unfavorable to him, as the nonmovant. Third, he argues the court erred by discounting his expert's opinions and making adverse credibility determinations. For the reasons below, we agree.

A. The Monell Standard

Favors brings his Monell claim under 42 U.S.C. § 1983. That statute provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

In Monell, the Supreme Court held that municipalities and other local governmental bodies are "persons" within the meaning of § 1983. 436 U.S. at 688–89, 98 S. Ct. at 2034–35. However, a municipality may not be held liable under § 1983 under a theory of respondeat superior—that is, "solely because it employs a tortfeasor." Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 403, 117 S. Ct. 1382, 1388 (1997) (collecting cases). Instead, "a plaintiff seeking to impose liability on a municipality under § 1983" must "identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." Id.

As this Court has explained, "to impose § 1983 liability on a municipality, a plaintiff must show: (1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that

constitutional right; and (3) that the policy or custom caused the violation." McDowell v. Brown, 392 F.3d 1283, 1289 (11th Cir. 2004). We address each of the three requirements in turn.

B. Analysis

1. The City Violated Favors's Constitutional Rights

The first element necessary for § 1983 liability is easily met here. The district court found, and the City does not contest, that Favors suffered a constitutional violation. Because Thompson lacked probable cause to believe that Favors or anyone in the vehicle posed a threat of physical harm, the use of deadly force violated the Fourth Amendment. See Mercado v. City of Orlando, 407 F.3d 1152, 1160 (11th Cir. 2005) ("Using deadly force in a situation that clearly would not justify its use is unreasonable under the Fourth Amendment."). We affirm the district court's ruling on this point.

2. The Facts Are Disputed as to Whether the City had a Custom or Policy that Constituted Deliberate Indifference to Favors's Constitutional Rights

The second element asks whether "the municipality had a custom or policy that constituted deliberate indifference to that constitutional right." McDowell, 392 F.3d at 1289. To establish deliberate indifference, "a plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any

action." Gold v. City of Miami, 151 F.3d 1346, 1350 (11th Cir. 1998). A city may be held liable under § 1983 for inadequate police training "where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." City of Canton v. Harris, 489 U.S. 378, 388, 109 S. Ct. 1197, 1204 (1989).

a. Notice

We begin by addressing whether the City was on notice of the need to train in the particular area that allegedly caused the constitutional violation here—namely the use of deadly force in apprehending a suspect in a vehicle. Gold, 151 F.3d at 1350–51. The district court found the City was on notice. Specifically, it found that "the City was on notice of the need to train its officers about the proper justifications for the use of deadly force and of using such force by shooting into vehicles to stop fleeing felons," including the "precise type of situation" that Thompson faced. The court noted the repeated incidents of APD officers shooting into vehicles, including two reported incidents (and a potential unreported incident) in 2013, two in 2014, and six in 2015, the year Thompson shot Favors.[3]

Given this evidence, the court ruled that the City should know to a "moral certainty" that its officers would be "required to deal with suspects attempting to

[3] These shootings are a subset of the general category of APD firearms incidents, with around 15 per year during the 2013–2015 time frame.

flee in vehicles and need to know when the use of deadly force is appropriate." The City does not contest the district court's determination and agrees that the "undisputed evidence . . . showed that the City was on notice that its officers needed training on the use of deadly force." Thus, we affirm this ruling as well.

b. Deliberate Indifference

To recap, the record establishes that the City knew of a need to train in the particular area of deadly force used against fleeing vehicles. Thus, our next task is to determine whether the municipality made a deliberate choice not to take any action despite that notice. See Gold, 151 F.3d at 1350. We conclude the district court erred in its application of Monell and impermissibly resolved disputes of fact in the light most favorable to the City, the movant. We start by addressing Favors's affirmative arguments and then turn to the district court's resolution of the conflicting evidence.

To begin, Favors argues the district court erred in discounting Thompson's testimony. As everyone agrees, the information available to Thompson at the time he fired into the vehicle was such that he should have known that the shooting was unjustified. After all, the crime that was reported to Thompson was a misdemeanor theft, not a forcible felony. See O.C.G.A. § 16-11-131(e). There was no evidence that Favors or any of the people in the vehicle possessed a deadly weapon or had committed a crime that involved the infliction of serious harm.

Such circumstances are required by O.C.G.A. § 17-4-20(b) to justify the use of deadly force.

Favors presented Thompson's testimony stating that he did not receive training on the use of deadly force in situations involving vehicles, and that he believed his lack of training contributed to his decision to shoot into the vehicle. Thompson said he didn't "believe [he] was quite prepared" for the scenario he encountered, that he "[d]efinitely" should have received more training on how to "deal[] with vehicles and shooting, no shooting." Critically, Thompson said he did not believe at the time of the incident that his decision to fire at the vehicle was a mistake.

The district court, however, discounted Thompson's testimony as "subjective" and "self-serving." This was error. Even if Thompson's testimony could be characterized as "self-serving," nothing in the Federal Rules of Civil Procedure precludes self-serving testimony at the summary judgment phase. See United States v. Stein, 881 F.3d 853, 856 (11th Cir. 2018) (en banc) (overruling circuit precedent "to the extent it holds or suggests that self-serving . . . statements in a[n] . . . affidavit cannot create an issue of material fact"). And to the extent the district court assessed Thompson's motives or credibility, that is the job of a jury, as opposed to a court on summary judgment. Anderson, 477 U.S. at 255, 106 S.

Ct. at 2513. Properly credited, Thompson's testimony raises questions about the adequacy of the City's training.

We therefore turn to the district court's weighing of some of the remaining evidence regarding the City's training. Of course, "weighing the evidence and reaching factual inferences contrary to [the nonmovant's] competent evidence" go against "the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party." Tolan v. Cotton, 572 U.S. 650, 660, 134 S. Ct. 1861, 1868 (2014) (per curiam). In granting judgment to the City as a matter of law, the district court focused its analysis on the number of hours of training Thompson received overall. The court relied on the fact that the APD provided additional basic training beyond that required by the Peace Officers Standards and Training Counsel. The court also observed that the City maintained written policies regarding the appropriate use of deadly force. And it ultimately decided that this record foreclosed a failure-to-train theory of liability. The City echoes this reasoning on appeal.

We conclude the district court's, and the City's, focus is misplaced. To be sure, the record shows that Thompson received training on the use of force generally and also received annual in-service training. But the question is whether such training addresses the scenario the City was on notice to prepare for—the fact that its police officers would be "required to deal with suspects attempting to flee

in vehicles and need to know when the use of deadly force is appropriate." As explained in Canton, "[i]n resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform." 489 U.S. at 390, 109 S. Ct. at 1206 (emphasis added). That Thompson received training on other matters of firearm usage is no answer to whether he received adequate training on the "usual and recurring" use of deadly force when pursuing a suspect fleeing in a vehicle. Id. at 391, 109 S. Ct. at 1206.

This Court's decision in Depew v. City of St. Marys, 787 F.2d 1496 (11th Cir. 1986), is instructive. There, as here, the city provided rules and regulations for the operation of its police department. Id. at 1499. Even so, this Court held that the city was liable under Monell because the city failed to take remedial steps despite repeated instances involving the use of unreasonable and excessive force by officers that occurred in violation of its written rules. Id. at 1499, 1501. And in Vineyard v. County of Murray, 990 F.2d 1207 (11th Cir. 1993) (per curiam), this Court affirmed the judgment against a county for failure to train. Id. at 1212. It did so in light of the expert opinion that the municipality's efforts to address excessive force incidents—separate from whatever policies it had on the books—were inadequate. Id. As such, it is not enough to say that the City has written policies on the use of deadly force.

The district court did not discuss this Court's precedent in Depew or Vineyard. Instead, it relied on out-of-circuit authority to find that a record of some training undercuts a finding of deliberate indifference.[4] But that is not the law in this circuit. As this Court made clear in Gold, deliberate indifference can be shown by "evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action." 151 F.3d at 1350 (emphasis added).

When we evaluate the evidence of the City's training on the use of deadly force with respect to a suspect in a moving vehicle, we find that genuine disputes of material fact remain. Favors presented evidence that the City failed to provide Thompson with annual training on the circumstances that justify the use of deadly force under O.C.G.A. § 17-4-20. The City also failed to provide Thompson with a copy of the statute, as required. See O.C.G.A. § 17-4-20(e). The City, in response, produced no documentation or testimony that Thompson was provided with a copy

[4] See R. Doc. 146 at 27–28 (citing Blankenhorn v. City of Orange, 485 F.3d 463, 484 (9th Cir. 2007); Marable v. W. Pottsgrove Twp., 176 F. App'x 275, 283 (3d Cir. 2006) (unpublished); Sova v. City of Mt. Pleasant, 142 F.3d 898, 904 (6th Cir. 1998); Campbell v. City of Philadelphia, 927 F. Supp. 2d 148, 174 (E.D. Pa. 2013)), 33 (citing Valle v. City of Houston, 613 F.3d 536, 548 (5th Cir. 2010)). The district court's reliance on these cases was misplaced because they addressed cases in which there was a failure to train a single officer, or where a particular officer violated a policy, or some training was provided to address the scenario the officer faced. Here, of course, Favors provided evidence suggesting that the City failed to train all of its officers, beyond just Thompson, on the appropriate use of deadly force by shooting into vehicles to stop fleeing suspects.

of O.C.G.A. § 17-4-20(e).[5] Favors also presented evidence showing that in 2015, when the shooting occurred, the City had six reported incidents in which officers discharged their firearms into a vehicle. But none of the reports prepared for these incidents contained information regarding the facts justifying the shootings, or documentation of a supervisor's evaluation of the shootings. There was also a lack of incident reports with proper information and evaluation for the years 2013 and 2014 as well. These incomplete reports are contrary to APD.SOP.3010's reporting requirements. In addition to this evidence, Favors offered expert testimony that proper documentation and review following the use of force are important in reducing the number of such occurrences.

The district court discounted Favors's expert opinion, but this too was error. The court found that the expert opinion was contradicted by the City's policy embodied in APD.SOP.3050 (the "vehicle-on-vehicle pursuit policy"), which applies to a police vehicle pursuit of another vehicle. See APD.SOP.3050. But APD.SOP.3050 does not apply to this case. Thompson shot at the vehicle while he was on foot, and the City's own witness testified that the vehicle-on-vehicle pursuit policy does not apply where the officer is on foot. The district court did not

[5] The City's Use of Force policy (APD.SOP.3010) addressing the use of deadly force references O.C.G.A. § 17-4-20 and requires that all officers be provided with a copy of the policy. The City produced Thompson's training file, which contained no documentation that he was ever provided with a copy of APD.SOP.3010. Thompson also testified that he did not recall whether he received a copy of the policy.

address this testimony. Even if that policy applied here, the City's witness did not testify that the APD actually provides any training on it. To the contrary, the City's witness said the APD provides no academy or in-service training specifically addressing the circumstances that would justify an officer shooting into a moving vehicle. Therefore, when properly credited, as must be done at the summary judgment stage, the expert opinion offered by Favors creates a genuine dispute of material fact.

Finally, we dispatch with the notion that the City cannot be held liable for a failure to train that results in an officer's use of deadly force. In arguing for affirmance, the City says Thompson "made an individual decision to shoot at the moving SUV which resulted in [Favors] being shot." This characterization, however, is belied by the frequency and predictability of the scenario Thompson faced, which the City itself acknowledged it was on notice to address. As the Supreme Court has recognized, the use of force in pursuing suspects is a scenario that City policymakers should know to prepare for:

> [C]ity policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

Canton, 489 U.S. at 390 n.10, 109 S. Ct. at 1205 n.10 (citation omitted).

Given this state of the law, as well as the conflicting evidence in this case, whether the City was deliberately indifferent is a question that should have been left to a jury. See also Brown, 520 U.S. at 409, 117 S. Ct. at 1391 ("The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected 'deliberate indifference' . . . ."). In viewing the evidence in the light most favorable to Favors, the non-movant, we conclude genuine disputes of material fact remain on this element. See Anderson, 477 U.S. at 255, 106 S. Ct. at 2513.

3. The Facts Are Disputed Regarding Causation

Last, we examine causation, which is the third element of municipal liability. See McDowell, 392 F.3d at 1289. The causation prong asks whether the injury would have been avoided "had the employee been trained under a program that was not deficient in the identified respect." Canton, 489 U.S. at 391, 109 S. Ct. at 1206. In a failure-to-train case, "the identified deficiency in a city's training program must be closely related to the ultimate injury." Id. See also id. at 390–91, 109 S. Ct. at 1206 (explaining the role of the factfinder in determining the element of causation). We have held that a single constitutional violation may establish municipal liability when there is "sufficient independent proof that the moving

force of the violation was a municipal policy or custom." Vineyard, 990 F.2d at 1212 (quotation marks omitted).

The City argues that Favors has provided "no link" between the City's training and his constitutional injury. This record suggests otherwise. For instance, Favors provided evidence that Thompson was not trained in the use of less-than-lethal force in the 22 months leading up to the shooting. Favors's expert stated that this lack of training "possibly caused" Thompson to resort to lethal force. He opined that Thompson's "immediate[] resort[] to a lethal force option" reflected the fact that the only training besides defensive tactics that Thompson had received since he graduated from the police academy was to use lethal force. The expert witness stated that officers typically "fall back" on their training, "especially in a time of a real or perceived crisis."

Our precedent indicates that this kind of expert testimony can create a genuine dispute of material fact. In Vineyard, for example, a plaintiff sought to hold a municipality liable for excessive force after police officers repeatedly beat him while he was handcuffed to a hospital bed. 990 F.2d at 1209. The plaintiff's expert testified at trial that the county's lack of adequate training and supervision allowed abuses like the one Vineyard suffered to occur. Id. at 1213. In affirming the jury verdict against the municipality, this Court concluded that the plaintiff's expert opinion provided an adequate basis for the jury to find causation. Id.

Likewise, Favors has presented competent evidence in support of this element. Drawing reasonable inferences in his favor, as we must at this stage, we conclude Favors has "set forth specific facts showing that there is a genuine issue for trial" regarding causation. Anderson, 477 U.S. at 248, 106 S. Ct. at 2510 (quotation marks omitted).

* * *

Because triable issues remain on Favors's municipal liability claim, we vacate the entry of summary judgment to the City and remand for further proceedings.

VACATED AND REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

March 10, 2021

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-12944-DD
Case Style: Demetric Favors v. City of Atlanta
District Court Docket No: 1:17-cv-03996-SDG

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Pursuant to Fed.R.App.P. 39, costs taxed against appellee.

Please use the most recent version of the Bill of Costs form available on the court's website at www.ca11.uscourts.gov.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Bradly Wallace Holland, DD at 404-335-6181.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6151

OPIN-1A Issuance of Opinion With Costs