[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10204

D.C. Docket No. 1:16-cv-01632-WSD

MONTYE BENJAMIN,
as Administratrix of the Estate of her son,
Jayvis Ledell Benjamin, and on her own behalf,

Plaintiff - Appellant,

versus

LYNN THOMAS,
individually,

Defendant - Appellee.

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

(March 13, 2019)

Before MARTIN, JILL PRYOR and JULIE CARNES, Circuit Judges.

PER CURIAM:

This appeal arises out of the tragic fatal shooting of the appellant Montye Benjamin's 20-year-old son, Jayvis Benjamin, by Lynn Thomas, a police officer in the Avondale Estates Police Department.[1] Benjamin filed a lawsuit under 42 U.S.C. § 1983, alleging among other things a claim for excessive force against Thomas. Thomas moved for summary judgment on the excessive force claim, arguing that he was entitled to qualified immunity. The district court agreed with Thomas and granted his motion.

Benjamin contends on appeal that genuine disputes of material fact exist that should have precluded the district court's entry of summary judgment. To establish these disputes, Benjamin relies on affidavits from her son Steven and herself. These affidavits describe a dash camera video that differs in material respects from the dash camera footage Thomas attached to his summary judgment motion. Because these affidavits are inadmissible and irreducible to admissible form, however, we may not consider them on summary judgment. Viewing the evidence that we may properly consider in the light most favorable to Benjamin, we conclude that Thomas is entitled to qualified immunity and therefore affirm the district court.

[1] Thomas was a sergeant when the fatal shooting occurred; he is now Chief of the Avondale Estates Police Department. Thomas was not the only defendant named in the complaint, but he is the only defendant who is party to this appeal.

I. BACKGROUND

A. Facts

We discuss here only those facts that are properly supported in the record.

As Thomas in his patrol car entered an intersection near a residential part of Avondale Estates, Georgia, a Ford Mustang ran a red light and zoomed by. Thomas pursued and soon discovered that the Mustang had skidded across a front yard and crashed into another vehicle sitting in a driveway. Thomas parked his patrol car about thirty feet away from the Mustang and walked toward it. As Thomas approached the Mustang, he repeatedly instructed the driver, Jayvis, to remain inside. Jayvis banged on the car door, attempting to force it open. Thomas reached into the driver's side window, which had been blown out in the crash, to try to contain Jayvis. Jayvis nevertheless exited the Mustang through the window as Thomas stepped backwards.

Once Jayvis exited the vehicle, he began to approach Thomas. Eyewitnesses described Jayvis as taller, larger, and younger than Thomas. According to dash camera footage obtained from Thomas's patrol car and eyewitness testimony, Thomas retreated as Jayvis continued to advance. Thomas repeatedly instructed Jayvis to stop, get down, and get back in the car, but the dash camera video shows that Jayvis failed to comply with any of these orders. Instead, Jayvis kept coming toward Thomas, swinging his arms and shouting, "[Y']a[]ll see what he's doing to

me?" Doc. 27-5 at 3 ¶ 6.[2] Jayvis then struck Thomas. The evidence is in dispute as to what happened after Jayvis struck Thomas: some witnesses testified that Thomas tripped over nearby bushes, others testified that Thomas fell to the ground, and others testified that Thomas remained crouching or standing. We accept for summary judgment purposes the version of the facts most favorable to Benjamin, that Thomas remained standing after being struck. Thomas then pointed his gun at Jayvis and fired a single, fatal gunshot. The distance between Jayvis and Thomas when Thomas fired the fatal shot is also disputed, but when viewed in the light most favorable to Benjamin, the evidence indicates that Jayvis was roughly six feet away from Thomas.

B. Procedural History

As relevant to this appeal, Benjamin, as Administratrix of Jayvis's Estate and on her own behalf, sued Thomas under 42 U.S.C. § 1983, alleging that Thomas violated Jayvis's Fourth Amendment right to be free from the use of excessive force. At the close of discovery, Thomas moved for summary judgment on the ground that he was entitled to qualified immunity. The district court agreed, granted Thomas's summary judgment motion, and dismissed the action.

This is Benjamin's appeal.

[2] "Doc. #" refers to the numbered entries on the district court's docket.

II. STANDARD OF REVIEW

We review a district court's order granting summary judgment *de novo*, applying the same legal standards as the district court. *Hegel v. First Liberty Ins. Corp.*, 778 F.3d 1214, 1219 (11th Cir. 2015). To prevail on summary judgment, the movant must show " 'that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *Chapman v. Procter & Gamble Distrib., LLC*, 766 F.3d 1296, 1312 (11th Cir. 2014) (quoting Fed. R. Civ. P. 56(a)). "If the movant meets its evidentiary burden, the burden shifts to the nonmoving party to establish—with evidence beyond the pleadings—that a genuine dispute material to each of its claims for relief exists." *Stein v. Ala. Sec'y of State*, 774 F.3d 689, 692 (11th Cir. 2014). On summary judgment, we "view the evidence and the inferences from that evidence in the light most favorable to the nonmovant." *Id.*

III. DISCUSSION

Benjamin contends on appeal that genuine disputes of material fact exist that should have precluded the district court's entry of summary judgment. She further contends that when we construe the disputed facts in her favor, as we must on summary judgment, Thomas is not entitled to qualified immunity. We address each of these contentions in turn.

A. The Benjamins' Affidavits Create No Genuine Dispute of Material Fact.

Benjamin argues that at least two material facts remain in dispute. First, she contends that the evidence is in dispute as to whether Jayvis was walking toward or away from Thomas after Jayvis exited the Mustang. Second, Benjamin contends that it is disputed whether, in the moments preceding the fatal gunshot, Thomas pushed Jayvis, who then attempted to move past Thomas. Thomas responds that no genuine dispute of material fact exists because the evidence on which Benjamin relies to create such a dispute is precluded by the best evidence rule. We agree with Thomas.

As evidentiary support for the factual disputes she raises, Benjamin relies on affidavits from herself and her son, Steven. In these affidavits, the Benjamins provided accounts of the moments immediately preceding the fatal shooting. Neither Benjamin nor Steven was present at the scene of the shooting. Rather, the Benjamins testified in their affidavits that the district attorney's office showed them a dash camera video before and during a grand jury proceeding against Thomas that differed in key respects from a dash camera video later provided to their attorney. Specifically, the Benjamins testified that they believe the dash camera video was edited sometime after the grand jury proceeding. But Benjamin has neither identified an individual responsible for altering the footage nor located

a version of the dash camera footage that portrays the events preceding the shooting as the Benjamins described in their affidavits.

The Benjamins' accounts of the events preceding the fatal shooting are inadmissible under Federal Rule of Evidence 1002 (the "best evidence rule"). The best evidence rule provides that "[a]n original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise." Fed. R. Evid. 1002. As the Ninth Circuit has stated, the best evidence rule thus applies "when a witness seeks to testify about the contents of a writing, recording or photograph without producing the physical item itself—particularly when the witness was not privy to the events those contents describe." *United States v. Bennett*, 363 F.3d 947, 953 (9th Cir. 2004); *see also Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1543 (11th Cir. 1994) ("Rule 1002 requires production of an original document only when the proponent of the evidence seeks to prove the content of the writing. It does not, however, require production of a document simply because the document contains facts that are also testified to by a witness." (internal quotation marks and citation omitted)).

Under an exception to this general rule, articulated in Rule 1004, "[a]n original is not required and other evidence of the content of a writing, recording, or photograph is admissible if . . . all the originals are lost or destroyed, and not by the proponent acting in bad faith; [or] an original cannot be obtained by any available

judicial process." Fed. R. Evid. 1004(a)-(b). The best evidence rule therefore requires "the proponent [to] produce the original . . . or explain its absence." *Bennett*, 363 F.3d at 953. Here, Benjamin has done neither. She has neither introduced the purportedly unaltered video into evidence nor explained its absence such that her testimony about its contents could be admitted under either Rule 1002 or 1004.

It is true that evidence does not have to be in admissible form to be considered at the summary judgment stage. But "[o]n motions for summary judgment, we may consider only that evidence which can be reduced to an admissible form." *Rowell v. BellSouth Corp.*, 433 F.3d 794, 800 (11th Cir. 2005). As an example, we may consider on summary judgment evidence in the form of inadmissible hearsay when the declarant is available to testify at trial directly about the matter at issue. *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1293-94 (11th Cir. 2012). We nevertheless have cautioned that "[t]he possibility that unknown witnesses will emerge to provide testimony . . . is insufficient to establish that [a] hearsay statement could be reduced to admissible evidence at trial," especially "when the hearsay statement is rebutted by evidence that can be reduced to admissible form." *Id.* at 1294.

Here, the record contains no indication that the Benjamins' accounts of the events preceding the fatal shooting are reducible to admissible form. The unedited

video the Benjamins testified they have seen that supports their accounts is missing from the record. The record contains no indication that this unedited video is available anywhere. The Benjamins have not identified any individual with personal knowledge that the video in the record has been edited such that the accounts in their affidavits could be admitted under Rule 1004. The record also identifies no person who could supply eyewitness testimony regarding the events preceding the shooting that would corroborate the Benjamins' accounts of the video they describe in their affidavits. Because the accounts in the Benjamins' affidavits are inadmissible and irreducible to admissible form at trial, we may not consider them on summary judgment. Put differently, in viewing the evidence in Benjamin's favor, we may not rely on the facts as described in the Benjamins' affidavits.

B. Thomas Is Entitled to Qualified Immunity.

We next consider whether, based on the facts construed in the light most favorable to Benjamin, Thomas is entitled to qualified immunity. A government official who raises qualified immunity as an affirmative defense "bears the initial burden of showing he was acting within his discretionary authority." *Glasscox v. Argo*, 903 F.3d 1207, 1213 (11th Cir. 2018) (internal quotation marks omitted).

When, as here, the official makes this showing,[3] the burden shifts to the plaintiff to show that "(1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004).

We begin with the first step in the qualified immunity inquiry—whether Thomas violated Jayvis's constitutional rights. The Fourth Amendment prohibits the government from violating an individual's right "to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV. Under well-settled precedent, "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). To determine whether an officer's use of deadly force was constitutionally excessive, "a court must ask whether a reasonable officer would believe that this level of force is necessary in the situation at hand." *Lee v. Ferraro*, 284 F.3d 1188, 1197 (11th Cir. 2002) (internal quotation marks omitted).

As the Supreme Court instructed in *Graham v. Connor*, 490 U.S. 386 (1989), the task of "[d]etermining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment

[3] Neither party contends that Thomas has failed to carry his burden of showing that he was acting within his discretionary authority when he shot Jayvis.

interests against the countervailing governmental interests at stake." 490 U.S. at 396 (internal quotation marks omitted). In balancing the individual and the governmental interests, we "must evaluate a number of factors, 'including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer[] or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.' " *Lee*, 284 F.3d at 1197-98 (quoting *Graham*, 490 U.S. at 396).

Viewing the facts in the light most favorable to Benjamin, we conclude that Thomas's actions were reasonable under the rapidly evolving circumstances he faced. Considering the *Graham* factors out of turn, the second factor, whether Jayvis posed an immediate threat to Thomas's safety, weighs strongly in Thomas's favor. After Thomas discovered Jayvis's crashed vehicle, Thomas approached the car and directed Jayvis to remain inside. Instead of remaining in the car as directed, Jayvis climbed out of the vehicle's window and began to advance toward Thomas. Thomas repeatedly instructed Jayvis to stop, get down, and get back in the car. But Jayvis did not comply. Instead, he continued advancing toward Thomas while yelling and waving his arms and then struck Thomas. How close Jayvis was to Thomas when Thomas fired the fatal shot is a matter of dispute, but the evidence, when viewed in Benjamin's favor, indicates that Jayvis was roughly six feet away from Thomas. Jayvis's distance from Thomas does not disturb our

conclusion that Thomas reasonably believed that Jayvis posed an immediate threat to his safety.

The third *Graham* factor, whether Jayvis was resisting or attempting to evade arrest, also weighs in Thomas's favor. Jayvis repeatedly disregarded Thomas's commands to remain in the car, to stop advancing toward him, to get on the ground, and to get back in the car. Thomas had probable cause to arrest Jayvis after witnessing his reckless driving; we thus conclude that Jayvis's conduct in disobeying Thomas's commands amounted to resisting arrest.[4] No admissible evidence shows that Jayvis ceased resisting before he was shot.

Because the second and third *Graham* factors strongly indicate that Thomas's conduct was constitutionally reasonable under the circumstances, we need not reach the first one. *See Scott v. Harris*, 550 U.S. 372, 383 (2007) ("[A]ll that matters [to determine whether a use of force was excessive] is whether [the officer's] actions were reasonable."); *Garner*, 471 U.S. at 11 ("Where the officer

[4] The Supreme Court has stated that one "common definition" of "resisting arrest" is "intentionally preventing a peace officer from effecting a lawful arrest." *Heck v. Humphrey*, 512 U.S. 477, 486 n.6 (1994) (emphasis omitted). Under Georgia law, "[a] person commits the offense of obstruction of an officer when he knowingly and willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties." *Lebis v. State*, 808 S.E.2d 724, 734 (Ga. 2017); *see also* O.C.G.A. § 16-10-24. We conclude that Jayvis's conduct amounted to resisting an officer under either definition. *See Lebis*, 808 S.E.2d at 734-35 (concluding that a person obstructed a police officer when the person "deliberately and intentionally disobeyed [an officer's] lawful requests" to "put away her cell phone, stop walking toward [the officer], and show [the officer] her hands" and "actively approached [the officer] to the extent that [another] officer was required to take [the person] to the ground").

has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.").

The facts of this case are undeniably tragic, and our hearts are heavy for the Benjamin family. But we must conclude that Thomas acted reasonably in using deadly force based on the uncontradicted evidence that Jayvis posed an immediate threat to Thomas's safety. In reaching this decision, we are mindful that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97. Because Thomas's conduct was not unreasonable under the circumstances, he did not violate the Fourth Amendment and therefore is entitled to qualified immunity.[5]

IV. CONCLUSION

For the foregoing reasons, we affirm the district court's order granting Thomas summary judgment.

AFFIRMED.

[5] Given our conclusion that no constitutional right was violated here, we do not discuss whether any such right was clearly established.