

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

Audry L. Releford, Jr., Individually,	§	
and as Representative of the Estate	§	
of Kenneth Brian Releford,	§	
	§	
<i>Plaintiff</i>	§	
	§	
v.	§	CIVIL ACTION NO. 4:14-cv-2810
	§	
City of Houston and Jason Rosemon,	§	
	§	
<i>Defendants.</i>	§	

**DEFENDANT’S MOTION TO AMEND THE COURT’S FEBRUARY 29, 2016,
ORDER TO CERTIFY FOR PERMISSIVE APPEAL UNDER 28 U.S.C. § 1292(b)**

Pursuant to 28 U.S.C. § 1292(b), Defendant the City of Houston (“Houston” or the “City”) files this motion to amend the Court’s February 29, 2016 Memorandum and Order in order to certify for permissive appeal the Court’s denial of the City’s motion for summary judgment. The Memorandum and Order denying the City’s motion for summary judgment, Dkt 94, involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from the Order may materially advance the ultimate termination of the litigation against the City.

I. Nature and Stage of the Proceeding

This is a lawsuit under 42 U.S.C. § 1983 for alleged excessive force in the officer-involved shooting of Plaintiff’s decedent, Kenneth Releford (“Releford”). Discovery has concluded, and Houston filed its motion for summary judgment as to all of Plaintiff’s

claims. The Court denied summary judgment to both Houston and Officer Jason Rosemon (“Officer Rosemon”), and Officer Rosemon has appealed the denial of summary judgment as to his qualified immunity.

A recent Fifth Circuit decision suggests that the City is entitled to summary judgment on the claims against it. In *Rodriguez v. City of Houston*, 2016 WL 3209225, the Fifth Circuit Court of Appeals affirmed summary judgment in favor of the City of Houston, finding that the Plaintiff’s presentation of an expert report roughly comparing the City’s percentage of sustaining complaints of excessive force to other municipalities, did not establish a “culture of recklessness.” Here, the Plaintiff has relied upon the *Rodriguez* shooting and four other shooting incidents by Houston police officers to argue that the percentage of shootings found to be justified establishes that the City had a “culture of renegade policing” (Dkt 87 at 2, 4, 65, 66) and “culture of recklessness” (Dkt 87 at 66). Thus, the City requests that the Court amend its February 29, 2016 Memorandum and Order to certify for appeal the denial of the City’s Motion for Summary Judgment.

II. Issues to be Ruled Upon by the Court

1. Does the denial of summary judgment for the City involve a controlling question of law as to which there is substantial ground for difference of opinion?
2. May an immediate appeal from the denial of summary judgment for the City materially advance the ultimate termination of this litigation against the City?

III. Background

This is a lawsuit under 42 U.S.C. § 1983. Plaintiff Audry Releford (“Audry Releford”) contends that the City and Officer Rosemon violated Releford’s constitutional rights by using excessive force in the fatal shooting of Releford. Plaintiff alleges that Houston has a policy or custom of “exonerating officers who use excessive force . . . deciding not to discipline its police officers, . . . [and] overlooking constitutional violations . . . [that] was the moving force behind [Releford’s] death.” Plaintiff’s Second Amended Complaint, Dkt. 54, at 18, ¶ 57. As evidence of such a custom or policy, Plaintiff relied on the opinion of Plaintiff’s expert, William Rathburn, who testified that the City’s purported failure to find any unjustified shootings during a four-year period established a “culture of renegade policing”/“culture of recklessness”, supporting liability on the part of the City. Dkt 87 at 2, 4, 65, 66, 67. The Court denied (1) the City’s motion for summary judgment, (2) the City’s and Officer Rosemon’s motion to exclude or limit Rathburn’s testimony, and (3) Officer Rosemon’s motion for summary judgment on qualified immunity. Officer Rosemon filed an interlocutory appeal of the denial of summary judgment.

After the Court issued its Order denying summary judgment for the City, the Fifth Circuit issued an opinion in one of the cases upon which Plaintiff and his expert relied in asserting that the City had a “culture of renegade policing”/“culture of recklessness.” In *Rodriguez v. City of Houston*, 2016 WL 3209225, the Fifth Circuit affirmed summary judgment on behalf of the City of Houston, finding that the percentage of findings of

justified shootings failed to establish a “culture of recklessness.”¹

IV. New Caselaw

After this Court entered its Memorandum and Order (Dkt 94) on February 29, 2016, the Fifth Circuit Court of Appeals issued an opinion that suggests summary judgment should be granted for Houston in this case. In *Rodriguez v. City of Houston*, the Fifth Circuit affirmed summary judgment for Houston where an intoxicated off-duty officer shot two brothers—Omar Ventura and Rolando Ventura—killing Omar and injuring Rolando. No. 15-20476, 2016 WL 3209225 (5th Cir. June 9, 2016). The shooting of the Ventura brothers is one of five cases that this Court relied upon in denying Houston’s summary judgment motion. Plaintiff claims that the investigation into the Ventura shootings was similar to the investigation here, and that neither investigation would have resulted in a finding that the shooting was justified if not for a corrupt police force. The district judge in *Rodriguez* did not share Plaintiff’s view of the Ventura shootings, and neither does the Fifth Circuit.

In affirming summary judgment for Houston in *Rodriguez*, the Fifth Circuit noted: “Plaintiff’s presentation of an expert report roughly comparing the City’s percentage of sustaining complaints of excessive force to other municipalities does not establish a culture of recklessness.” *Id.* at *2, n.2. Similarly, here, Plaintiff alleges a “culture of renegade policing” and a “culture of recklessness”, and supports those allegations solely

¹ Also, after this Court denied summary judgment for the City, in *Salazar-Limon v. City of Houston, et. al*, --- F.3d---, 2016 WL 3348794, the Fifth Circuit affirmed the granting of summary judgment in favor of the City and a Houston police officer in an officer-involved-shooting case.

by an expert's opinion, Rathburn's, based on the number of shootings determined to have been justified. *See* Plaintiff's Response to Defendants' Motion for Summary Judgment, Dkt 87 at 65-67 (claiming a "culture of renegade policing"/"culture of recklessness" based on number of justified shootings). The Fifth Circuit's affirmance of summary judgment for Houston in *Rodriguez* suggests that the Ventura shootings do not support the "culture of renegade policing"/"culture of recklessness" that Plaintiff alleges here.

Plaintiff says the two investigations by HPD – Ventura and Releford – are the same. That statement is probably correct, but not in the sense that Plaintiff intends. Both investigations—the Ventura brothers shootings, and the Releford shooting—were thorough and directed toward finding the truth so that justice can prevail. And the conclusion of each investigation was correct: each shooting was justified.

Second, in *Salazar-Limon v. City of Houston*, the Fifth Circuit affirmed summary judgment for Houston where an officer shot and injured an unarmed motorist at a traffic stop. ___ F.3d ___, No. 15-20237, 2016 WL 3348794 at *1-2(5th Cir. June 15, 2016). The Fifth Circuit held that Houston could not be liable under Section 1983 for the shooting of Salazar because his constitutional rights were not violated. *Id.* at *6. The plaintiff in that case also claimed that the City had a pattern of inadequately investigating officer shootings and finding them justified, and relied on an expert's opinion that some shootings should not have been justified. Salazar-Limon's Appellant's Brief at 47, 49-52; 2015 WL 5566127 at *47, 49-52 (C.A.5) (Appellate Brief).

V. Appealability

The denial of Officer Rosemon's motion for summary judgment based on

qualified immunity is immediately appealable under 28 U.S.C. § 1291. The denial of the City's motion for summary judgment is immediately appealable only if this Court, and the Court of Appeals, grant permission under 28 U.S.C. § 1292(b). Officer Rosemon is currently appealing this Court's denial of his qualified immunity. On August 25, 2016, the Court of Appeals issued the briefing schedule. Granting this motion will allow Houston's appeal to be heard with Officer Rosemon's qualified immunity appeal.

VI. Issues for Appeal

There is one controlling issue for this permissive appeal:

1. Does the mere fact that during a four-year period, all officer-involved shootings examined were found to be justified shootings, establish a culture of recklessness by the City?

VII. Argument

This Court may authorize an immediate appeal of the denial of the City's motion for summary judgment. 28 U.S.C. § 1292(b). To satisfy Section 1292(b), the order to be appealed must involve a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from the order may materially advance the ultimate termination of the litigation. The judge must so state in writing in the order granting permission to appeal. *Id.* The decision to permit such an appeal is grounded firmly in this court's sound discretion.²

² *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 405 n. 9, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004) (Ginsburg, J., dissenting) (instructing that discretion for a § 1292(b) appeal lies "in the first instance in the district court's sound discretion").

Houston seeks to appeal the denial in the Memorandum and Order of February 29, 2016 (Dkt 94), which denied three motions that are intertwined. As noted, the denial of Officer Rosemon's qualified immunity is immediately appealable and Officer Rosemon's appeal has been filed. The denial of the City's motion for summary judgment relies solely on the testimony of Plaintiff's expert Rathburn. Rathburn opined that in a police department of approximately 5400 officers, with 99 shooting incidents over a period of four years, the fact that all of the shooting incidents were found by the HPD Internal Affairs Division (and the Harris County District Attorney's Office) to be "justified" establishes that the investigations were rigged to ensure that no officer was disciplined. Rathburn Dep., Dkt. 83-11, at 68:23-78:18. In Rathburn's opinion, "that level of perfection is unattainable." Rathburn Dep., Dkt. 83-11, at 70:12-71:14. The Court denied the City and Rosemon's motion to exclude Rathburn's testimony.

A. The issue for appeal presented above is a controlling question of law.

In denying Houston's motion for summary judgment, this Court cited Plaintiff's "evidence [of] zero findings of unjustified shootings from 2009 to 2012 [out of] the 99 incidents . . . of officer-involved shootings of people who were killed or injured during that time period." Memorandum and Order, Dkt. 94 at 18. The Court accepted Rathburn's conclusions that "the City's finding 100% of shootings to be justified is 'shocking,' 'signals[s] to officers that the [D]epartment is not really serious about holding officers accountable for adhering to the shooting policy,' and 'communicates to officers that they can essentially shoot at will.'" Memorandum and Order, Dkt. 94 at 13-14.

Rathburn starts with data showing that all 99 HPD officer-involved shootings that resulted in injury or death during a specified time period from 2009 through 2012 were found to be justified shootings, and he concludes that the City has a custom, practice, or de facto policy of inadequately investigating shootings so that the officers will be exonerated. He does not offer any methodology for reaching that conclusion; instead, he simply says that he cannot believe it. He offers no way of calculating a number or percentage of shootings that should have been found unjustified; he just assumes that some should have been.

The 99 justified shootings were referred to only as a bare statistic and were not evaluated on their merits by either Rathburn or this Court, with the exception of only five of those cases. Those five were:

1. The February 2011 shootings of Omar Ventura and his brother Ronaldo Ventura by Officer Jose Coronado, who was off-duty and intoxicated. Dkt 94 at 12. Officer Coronado was punished for five counts of violating HPD rules and regulations and was temporarily suspended, but the shooting itself was deemed justified; he was notified of that determination on February 13, 2012. [Dkt 83-28 at 3687] The Ventura shootings were the subject of the Fifth Circuit's *Rodriguez* decision discussed above in Section IV. *See* 2016 WL 3209225 (5th Cir.).
2. The September 2012 shooting of Brian Claunch by Officer Matthew Marin. Dkt 94 at 12. The shooting was deemed justified, and Officer Marin was

notified of that determination on October 21, 2013, a year *after* the Releford shooting. [Dkt 83-34 at 4224]

3. The July 2012 shooting of Rufino Lara by Officer Jillian McGowan. Dkt 94 at 12 (erroneously stating that this shooting occurred in July 2013 rather than 2012). The shooting was deemed justified, and Officer McGowan was notified of that determination on March 5, 2013, approximately five months *after* the Releford shooting. [Dkt 83-40 at 3963]
4. The May 2010 shooting of Gene Horace by Officer Jason Rice. Dkt 94 at 13. Officer Rice received a written reprimand for violating three of HPD's rules and regulations, but the shooting itself was deemed justified; he was notified of that determination on December 16, 2010. [Dkt 83-45 at 3366]
5. The October 2010 shooting of Rogelio Rodriguez by Officer Rogelio Carreon. Dkt 94 at 13. The shooting was deemed justified, and Officer Carreon was notified of that determination on May 25, 2011. [Dkt 83-49 at 3629].]

This Court noted that Rathburn did not express an opinion on the shooting of Rogelio Rodriguez. Dkt 94 at 14, n. 2. Accordingly, there is no evidence to suggest that the "justified" finding was improperly decided.³ As a matter of law, that shooting incident provides no support for Plaintiff's position.

³ The Rodriguez shooting involved a suspect who was burglarizing an officer's personal vehicle at the officer's home at approximately 2:15 a.m. The officer's wife heard an alarm sound, yelled at her husband to see what was going on, and then went outside to find the suspect at the vehicle. The officer, who had followed his wife outside, saw the suspect approach the officer's wife with

That leaves four shooting incidents to consider. Of those remaining four, only two—Horace and the Ventura brothers—had been found to be justified shootings by the time Releford was shot on October 11, 2012. Plaintiff presented no evidence that Officer Rosemon knew the results of the investigations into the Ventura brothers shooting or the Horace shooting, or that he knew of the facts of those cases.

The other two shootings—Lara and Claunch—were still under investigation and were not determined until the following year. Thus, as a matter of law, Officer Rosemon could not have known whether the Lara shooting investigation or the Claunch shooting investigation would result in a finding of justified or unjustified, and thus those shootings could not have been the moving force behind the Releford shooting.

Plaintiff presented no evidence that Officer Rosemon knew of the bare statistic that 99 officer-involved shootings from 2009 through 2012 had all been justified, that he knew of the facts of any of those, or that he had any reason for believing that he could shoot with impunity. *See* Dkt 94 at 11 (citing Plaintiff's theory).

Plaintiff rests on Rathburn's opinion of the shooting record of Houston's police officers. Yet Rathburn's opinion rests on very little—his disagreement with IAD determinations in four of the five cases he reviewed and his feelings about the bare statistics in 94 others about which he knew nothing. The Court accepted Rathburn's conclusion as evidence of a custom and denied Houston's summary judgment. Yet Rathburn's analysis mirrors the analysis the Fifth Circuit rejected in *Rodriguez* – that the

a metal object, which the officer believed to be a firearm. The officer shot the suspect believing the suspect to be a threat to his wife. The object turned out to be a screwdriver that the suspect was using to break into vehicles. Dkt 83-49 at 3640-3660.

absence of any findings of “unjustified” shootings in and of itself establishes that the City had a “culture of recklessness” that allowed officers to believe they could shoot with impunity. *Rodriguez* at *2, n.2.

B. There is substantial ground for difference of opinion.

This Court had substantial disagreement with Defendants’ argument and authorities over whether there is some numeric test or threshold for determining if a city has committed unconstitutional acts. The Fifth Circuit, for example, has rejected the notion of allowing an expert in a police shooting case to rely on a single criterion to assess constitutional compliance, explaining: “in so relying, the court has essentially constitutionalized a single criterion Liability for constitutional violations is rarely so perfunctorily assessed.” *Stokes v. Bullins*, 844 F.2d 269, 275 (5th Cir. 1988). In addition, the Supreme Court has rejected numeric tests in a civil rights suit. *See, e.g., Alexander v. Louisiana*, 405 U.S. 625, 630, 92 S. Ct. 1221, 1225, 31 L. Ed. 2d 536 (1972) (“This Court has never announced mathematical standards for the demonstration of ‘systematic’ exclusion of blacks [from juries] but has, rather, emphasized that a factual inquiry is necessary in each case that takes into account all possible explanatory factors”).

C. Immediate appeal will likely advance the termination of this litigation.

An immediate appeal from the order denying Houston’s motion for summary judgment would materially advance the ultimate termination of the litigation. If the appellate court holds, as Defendants argue, that the mere absence of any finding of an unjustified shooting within a four-year period is not sufficient to establish a custom,

pattern or practice to support liability on the part of the City, then Houston is entitled to summary judgment. If the Fifth Circuit agrees with the City, the result will be a more efficient use of judicial resources, and will materially advance the ultimate termination of this litigation.

Prayer

For these reasons, Defendant, the City of Houston respectfully asks this Court to amend its order of February 29, 2016, Memorandum and Order, Dkt. 94, to certify that the Court's denial of the City's motion for summary judgment "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," and to grant permission for permissive appeal under 28 U.S.C. § 1292(b) the following issue:

Does the mere fact that during a four-year period, all officer-involved shootings examined were found to be justified shootings, establish a culture of recklessness by the City?

Defendants also request all other relief to which they may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 26, 2016, a copy of the foregoing Defendants' Motion to Amend the Court's February 29, 2016 Order to Certify for Permissive Appeal Under 28 U.S.C. § 1292(b) was served to the following counsel of record via Electronic Court Filing (ECF):

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