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

SHANETTA GUIDRY LEWIS, Plaintiff	§	
	§	
v.	§	**Civil action NO.: 4:22-cv-00844**
	§	
CITY OF HOUSTON, TEXAS; CHIEF TROY FINNER, individually; DEVIN INOCENCIO, individually; VICTOR VILLAREAL, individually, PETER CARROLL, individually, SHAUN HOULIHAN, individually, and DOE HPD OFFICERS 1-10, Defendants	§	

DEFENDANTS CHIEF TROY FINNER, DEVIN INOCENCIO, VICTOR VILLARREAL, AND SHAUN HOULIHAN'S
RULE 12(B)(6) MOTION TO DISMISS FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Defendants Chief Troy Finner, Devin Inocencio, Victor Villarreal, and Shaun Houlihan (collectively, "Moving Officers" file this Motion to Dismiss Plaintiff's First Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure as follows:

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Nature and Stage of Proceedings

1. This is a federal civil rights case stemming from the February 7, 2022 death of Charion Lockett as Houston Police Officers attempted to execute a felony arrest warrant for aggravated robbery with a deadly weapon. On March 16, 2022, Plaintiff filed her Original Complaint [Doc. #1]. Plaintiff asserted claims pursuant to 42 U.S.C. § 1983, and the Texas common-law. On July 5, 2022, Defendant City of Houston and Chief Finner filed their rule 12(b)(6) motion to dismiss [Doc. #10]. On July 27, 2022, Plaintiff filed her First Amended Complaint [Doc. #13]. This is the second motion to dismiss by Chief Finner. This is the first responsive motion by Officers Inocencio, Houlihan, and Villarreal.

Statement of Issues to Be Ruled on and Standard of Review

I. Statement of Issues

1. Plaintiff's state law tort claims against the individual officers must be dismissed pursuant to the Texas Tort Claims Act election of remedies scheme.

2. Plaintiff's Fourteenth Amendment claims must be dismissed because Plaintiff also frames her claims under the Fourth Amendment.

3. Plaintiff's claims against the Moving Officers are conclusory and insufficient to overcome their qualified immunity.

II. Standard of Review

2. If a complaint fails to state a claim upon which relief can be granted, a trial court may dismiss the complaint as a matter of law. *See* Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims stated in the complaint and must be evaluated solely on the basis of the pleadings. *See Jackson v. Procunier*, 789 F.2d 307, 309 (5th Cir. 1986); *Morin v. Caire*, 77 F.3d 116, 120 (5th Cir. 1996). Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *and see Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "An unadorned, the-defendant-unlawfully-harmed-me accusation" will not suffice. *Iqbal,* 566 U.S. at 678-679. Thus, "dismissal is appropriate only if the complaint fails to plead 'enough facts to state a claim of relief that is plausible on its face.'" *Leal v. McHugh*, 731 F.3d 405, 410 (5th Cir. 2013).

3. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Iqbal*, 556 U.S. at 678. A claim is plausible on its face only "when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Montoya v. FedEx Ground Package Sys., Inc.,* 614 F.3d 145, 148 (5th Cir. 2010). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

4. "When considering a motion to dismiss, the court accepts as true the well-pled factual allegations in the complaint and construes them in light most favorable to the plaintiff." *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002). However, courts need not "accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Arnold v. Williams*, 979 F.3d 262, 266 (5th Cir. 2020); *see also Hale v. King*, 642 F.3d 492, 499

(5th Cir. 2011) Nor should courts "strain to find inferences favorable to the plaintiff. *Barilla v. City of Houston, Tex.*, 4:20-CV-0145, 2020 WL 6054939, at *2 (S.D. Tex. June 15, 2020), reconsideration denied, 4:20-CV-00145, 2020 WL 6054940 (S.D. Tex. Sept. 11, 2020). Furthermore, a court may consider public records and documents attached to the rule 12(b)(6) motion that are referred to in the plaintiff's complaint and are central to the plaintiff's claim without converting the motion to dismiss into a motion for summary judgment. *See e.g., Allen v. Hays*, 812 Fed. Appx. 185, 189 (5th Cir. 2020); *Maryland Manor Associates v. City of Houston*, 816 F. Supp. 2d 394, 404 n.5 (S.D. Tex. 2011) ("Because the documents the City attached to its amended motion to dismiss are public records, this court may consider them without converting the motion to dismiss into a motion for summary judgment.").

5. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations…a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 544. Thus, dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief. *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.*, 300 F.3d 620, 624 (5th Cir. 2001)); *see also Hale*, 642 F.3d at 499. Conclusory allegations or legal conclusions masquerading as factual conclusions are not adequate to prevent dismissal. *Taylor*, 296 F.3d at 378.

Summary of the Argument

6. First, Plaintiff's state law tort claims against Moving Officers must be dismissed pursuant to the TTCA's election of remedies scheme. Second, Plaintiff's Fourteenth Amendment claims must be dismissed because Plaintiff's claim is also framed pursuant to the Fourth Amendment. Third, Plaintiff's claims against moving Officers must be dismissed because the allegations are conclusory and do not overcome their qualified immunity. More specifically, as to

Chief Finner, Plaintiff pleads no facts to suggest he was involved in this incident in any way. As to the other officers, as Plaintiff's First Amended Complaint implicitly acknowledges that Charion Lockett fired upon officers, Plaintiff cannot establish a violation of clearly-established law.

Argument and Authorities

I. Plaintiff's assault claim against the individual officers—including Chief Finner—must be dismissed pursuant to the Texas Tort Claims Act election of remedies scheme.

7. Plaintiff appears to assert the same assault claim against the individual officers as against the City of Houston. [Doc. #13 at ¶71]. The TTCA's election of remedies scheme requires a plaintiff to make an irrevocable election at the time suit is filed between suing the governmental unit under the TTCA or proceeding against the employee alone. *Univ. of Tex. Health Sci. Ctr. at Houston v. Rios*, 542 S.W.3d 530, 532 (Tex. 2017). If the plaintiff nevertheless asserts tort claims against both employer and employee, section 101.106(e) requires that the employee be immediately dismissed on the employer's motion. Tex. Civ. Prac. & Rem. § 101.106(e). City of Houston already moved to dismiss the claims against all the individual officers [Doc. #10]. Accordingly, Plaintiff's assault claims against Moving Officers must be dismissed with prejudice.

I. Plaintiff's Fourteenth Amendment claims must be dismissed because Plaintiff also frames her claim under the Fourth Amendment.

8. Plaintiff asserts that "The force used by the individually named defendants against Mr. Lockett was in great excess to the need to use such force, and the method of searching Mr. Lockett was an excessive and unreasonable method of search, which constituted both an unreasonable seizure and unreasonable search of Mr. Lockett and violated his due process rights under the 14th Amendment including to bodily integrity." [Doc. #13 at ¶63]. Because the Fourth Amendment covers excessive force and unreasonable searches and seizures, Plaintiff cannot seek

relief under the Fourteenth Amendment. *Gone v. Smith*, 4:16-CV-00684, 2017 WL 978703, at *3 (S.D. Tex. Mar. 14, 2017), aff'd sub nom. *Hernandez v. Smith*, 793 Fed. Appx. 261 (5th Cir. 2019).[1]

III. Plaintiffs' claims against Moving Officers are conclusory and insufficient to overcome their qualified immunity.

9. One of the few differences between the Original Complaint [Doc. #1] and First Amended Complaint [Doc. #13] is the addition of this sentence in paragraph 24:

> Mr. Lockett did not assault anyone and if he did point his gun or fire at anyone it was because he was in fear of his life from armed stranger(s) coming to kill him which they did.

[Doc. #13 at ¶24]. Thus, Plaintiff implicitly acknowledges that Mr. Lockett aimed and fired upon officers attempting to execute the arrest warrant. This is the most salient fact in the complaint in the evaluation of Moving Officers' qualified immunity.

A. Moving Officers are entitled to qualified immunity.

10. Governmental officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011) (en banc). Qualified immunity is justified unless no reasonable officer could have acted as the defendant officer did, or every reasonable officer faced with the same facts would not have acted as the defendant officer did. *Kokesh v. Curlee*, 14 F.4th 382 (5th Cir. 2021). In other words, if officers of reasonable competence could disagree as to whether the plaintiff's rights were violated, the officer's qualified immunity remains intact. *Tucker v City of Shreveport*, 998 F3d 165, 172 (5th Cir 2021). Qualified immunity is an "immunity from suit rather than a mere defense to liability." *Pearson v. Callahan*, 555 U.S. 223, 237 (2009). As such, one of

[1] Plaintiff appears to have mistakenly copied and pasted allegations from another civil rights suit, *Howard v. City of Houston et al*., civil action No. 21-cv-1179. That case allegedly arose from a roadside search HPD officers conducted after completing a traffic stop that led to plaintiff's arrest. There are no factual allegations here to suggest Lockett was searched (disrobed or otherwise).

the most important benefits of the qualified immunity defense is protection from costly, time-consuming, and intrusive pretrial discovery. *Carswell v. Camp*, 37 F.4th 1062, 1065 (5th Cir. 2022).

11. Once a defendant has invoked the defense of qualified immunity, the plaintiff carries the burden of demonstrating its inapplicability. *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009). The threshold inquiry in resolving an issue of qualified immunity is whether, taking the facts in the light most favorable to the plaintiff, the officer's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Next, the Court considers whether the allegedly violated right is "clearly established" in that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 201. "Answering in the affirmative requires the court to be able to point to controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity." *Wyatt v. Fletcher*, 718 F.3d 496, 503 (5th Cir. 2013). Courts have discretion to decide which prong of the qualified-immunity analysis to address first. *Morgan*, 659 F.3d at 371.

12. Where public officials assert qualified immunity in a motion to dismiss, a district court must rule on the immunity question at that stage. *Carswell*, 37 F.4th at 1065. It cannot defer that question until summary judgment. *Id.* Nor can it permit discovery against the immunity-asserting defendants before it rules on their defense. *Id.*

B. Plaintiff does not plead sufficient facts to infer Chief Finner was personally involved in violating any of Lockett's constitutional rights.

13. A §1983 claim must be based on a defendant's actual participation in an event that causes a violation of civil rights. *Mesa v. Prejean*, 543 F.3d 264, 274 (5th Cir. 2008); *Thompson v. Crnkovich*, 788 Fed. App'x. 258, 259 (5th Cir. 2019). Plaintiff names Chief Finner in his individual capacity (Doc. #13 at ¶4) but does not connect Chief Finner to the events at the heart of

this suit. Plaintiff does not allege that Chief Finner procured the warrant, used any force with respect to Lockett or was even present as the arrest warrant was executed. To the extent Chief Finner is named in this matter based solely on his status as Chief of Police, such allegations would be based on his official, rather than individual capacity, and should be dismissed as redundant. *See Chavez v. Alvarado*, 550 F. Supp. 3d 439, 450 (S.D. Tex. 2021).

C. Plaintiff pleads no facts to infer that any officer used force that was clearly excessive to the need.

14. To state a claim for the use of excessive force under the Fourth Amendment, Plaintiff must allege an "(1) injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Trammell v. Fruge*, 868 F.3d 332, 340 (5th Cir. 2017). The test used to determine whether a use of force was reasonable under the Fourth Amendment "is not capable of precise definition or mechanical application." *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Rather, "its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396.

15. Plaintiff alleges no facts to suggest Lockett posed no threat to the safety of the officers or others. To the contrary, Plaintiff's allegations implicitly acknowledge that Lockett was armed (albeit pursuant to a concealed carry license), and did point his gun or fire at officers [Doc. #13 at 24]. Absent allegations that Lockett posed no threat to officers, Plaintiff has not pled sufficient facts to infer any officer's use of force was clearly excessive to the need.

16. Finally, Plaintiff's First Amended Complaint includes allegations that officers did not identify themselves as officers, or say "hand ups [sic]" or "you're under arrest" [Doc. #13 at

20]. The excessive force inquiry focuses on the officer's decision to use deadly force and therefore any of the officer's actions leading up to the shooting are not relevant. *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014) ("Importantly, the inquiry focuses on the officer's decision to use deadly force. Therefore any of the officer's actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry in this Circuit.") (cleaned up). The Supreme Court confirmed this in 2017 when it rejected the Ninth Circuit's provocation rule:

> When an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim.
>
> The basic problem with the provocation rule is that it fails to stop there. Instead, the rule provides a novel and unsupported path to liability in cases in which the use of force was reasonable. Specifically, it instructs courts to look back in time to see if there was a different Fourth Amendment violation that is somehow tied to the eventual use of force. That distinct violation, rather than the forceful seizure itself, may then serve as the foundation of the plaintiff's excessive force claim.
>
> This approach mistakenly conflates distinct Fourth Amendment claims.

Cnty. of Los Angeles, Calif. v. Mendez, 137 S. Ct. 1539, 1547 (2017). In short, the fact that Lockett fired upon officers first "in fear of his life" because he "likely did not know Officer Inocencio, or others were police officers" does not negate that officer use of deadly force in returning fire was within constitutional bounds.

D. Plaintiff pleads no actual facts that would overcome the independent intermediary doctrine.

17. Plaintiff expressly pleads that there was a warrant for aggravated robbery—deadly weapon that was approved by a District Court judge. [Doc. #13 at ¶16].

18. When an independent intermediary issues a search or arrest warrant, that warrant breaks the causal chain and insulates officers from individual liability. *See e.g.*, *Shaw v.*

Villanueva, 918 F.3d 414, 417–18 (5th Cir. 2019); *Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 554 (5th Cir. 2016). There is an exception to the independent-intermediary doctrine: when the ***defendant*** withholds relevant information or otherwise misdirects the independent intermediary by omission or commission. *McLin v. Ard*, 866 F.3d 682, 689 (5th Cir. 2017) (emphasis added). To survive a motion to dismiss under this "taint" exception, the plaintiff must plead facts supporting the inference that the defendant withheld or misdirected the independent intermediary. *See id.*

19. Plaintiff has not alleged that any individual officer withheld or misdirected the independent intermediary. To the contrary, Plaintiff implies that the false allegations were by Torrey Brown, who "knew Charion Lockett from high school and had animosity towards him" [Doc. #13 at ¶13]. The mere fact that Moving Officers were employees with HPD during the execution of a facially valid arrest warrant—without more—cannot overcome their qualified immunity.

E. Plaintiff pleads no facts to support any claim against Moving Officers for failure to intervene.

20. Bystander liability requires more than mere presence in the vicinity of the violation. *Joseph v. Bartlett*, 981 F.3d 319, 343 (5th Cir. 2020). The facts must show that Moving Officers: 1) knew a fellow officer was violating Lockett's constitutional rights, (2) were present at the scene of the constitutional violation, (3) had a reasonable opportunity to prevent the harm to Lockett but nevertheless, (4) chose not to act. *Id*. Plaintiff's First Amended Complaint is wholly devoid of any such factual allegations. Pursuant to Rule 12(b)(6), the Court should dismiss Plaintiff's bystander liability claim.

F. Plaintiff does not point to robust controlling authority to infer any right was clearly established.

21. Nor has Plaintiff pled that, based upon robust consensus of authority, a reasonable officer would have known that any officer's use of force was unlawful. Indeed, Plaintiff cites not one single case to suggest *any* action by Moving Officers equated to a clearly-established constitutional violation. *City of Tahlequah, Oklahoma v. Bond*, 20-1668, ___ U.S. ___, 2021 WL 4822664, at *3 (U.S. Oct. 18, 2021). To the contrary, the Fifth Circuit has repeatedly held that officers' use of deadly force is not excessive if officers reasonably believe the suspect is reaching for a gun, let alone when the suspect aims or fires at them. *See e.g.*, *Cloud v. Stone*, 993 F.3d 379, 381 (5th Cir. 2021) ("Where the officer 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. Officers use lethal force justifiably if they reasonably believe the individual is reaching for a gun. The appellate court has adhered to that standard even in cases when officers had not yet seen a gun when they fired, or when no gun was ever found at the scene."); *Salazar-Limon v. City of Houston*, 826 F.3d 272, 279 n.6 (5th Cir. 2016), as revised (June 16, 2016) ("[W]e have never required officers to wait until a defendant turns towards them, with weapon in hand, before applying deadly force to ensure their safety.")

22. Accordingly, Plaintiff's Complaint fails to plead facts to overcome Moving Officers' qualified immunity.

Conclusion

For the reasons stated above, Plaintiff has failed to state a claim upon which relief can be granted against Moving Officers. Therefore, Chief Finner, Devin Inocencio, Victor Villarreal, and Shaun Houlihan respectfully requests that this Court dismiss Plaintiff's claims with prejudice.

Respectfully submitted,

ARTURO G. MICHEL
City Attorney

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Date: August 8, 2022

By: */s/ Christy L. Martin*

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CERTIFICATE OF CONFERENCE

I hereby certify that on August 5, 2022, I sent an email to both counsel for Plaintiff identifying the pleading deficiency to see whether plaintiff would be willing to cure the defect by permissible amendment. Counsel did not respond and is presumed opposed to this motion and further amendment.

/s/ Christy L. Martin
CHRISTY L. MARTIN

CERTIFICATE OF SERVICE

I hereby certify that pursuant to the Federal Rules of Civil Procedure, a true and correct copy of the foregoing was filed via CM/ECF and served via electronic filing manager to the following:

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