UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

HUNTLY DANTZLER and SUSAN DANTZLER,	§	No. 1:15-CV-1084-DAE
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
JOE HINDMAN and HUNTER WESTBROOK,	§	
	§	
Defendants.	§	

ORDER: (1) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; AND (2) DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Before the Court are two motions: (1) a Motion for Summary Judgment filed by Deputy Sgt. Joe Hindman and Deputy Hunter Westbrook (collectively, "Defendants" or "the Deputies") on January 16, 2017 (Dkt. # 21); and (2) a Motion for Leave to File Amended Complaint filed by Huntly Dantzler ("Huntly Sr.") and Susan Dantzler ("Mrs. Dantzler") (collectively, "Plaintiffs" or "the Dantzlers") on February 13, 2017 (Dkt. # 25).

On **August 29, 2017**, the Court held a hearing on the motions. **Jerri Lynn Ward, Esq.** appeared on behalf of Plaintiffs, and **Charles Straith Frigerio, Esq.** appeared on behalf of Defendants. After careful consideration of the memoranda filed in support of and in opposition to the motions, as well as the

arguments advanced at the hearing, the Court—for the reasons that follow—(1) **GRANTS IN PART AND DENIES IN PART** Defendants' Motion for Summary Judgment (Dkt. # 21); and (2) **DENIES** Plaintiffs' Motion for Leave to File Amended Complaint (Dkt. # 25).

BACKGROUND

In the early morning hours of May 3, 2015, an unidentified male called the Gillespie County Sheriff's Office (the "Sheriff's Office") reporting that a couple of hours earlier he had seen Huntly Dantzler, Jr. ("Huntly Jr.") drinking in a bar in Fredericksburg, Texas, with an unidentified woman. (Dkt. # 1 ¶¶ 11–12; Dkt. # 21 at 2.) The anonymous caller reported that he saw Huntley Jr. place pills into the woman's drink, she became highly intoxicated, and that Huntly Jr. left the bar with her. (Dkt. # 1 ¶¶ 11–12.) The caller further reported that he has witnessed Huntly Jr. place pills in women's drinks before and was concerned for the woman's safety. (Id.) When asked by the dispatcher to identify himself, the caller refused to provide his name. (Id.)

At approximately 6:00 a.m., the Sheriff's Office relayed the report to Deputy Hunter Westbrook ("Deputy Westbrook"). (Id. ¶ 10; Dkt. # 21 at 2.) Deputy Westbrook met Deputy Sgt. Joe Hindman ("Deputy Hindman") at the

Dantzler residence in Harper, Texas,[1] at approximately 6:30 a.m. to conduct a welfare check on the unidentified woman. (Dkt. # 1 ¶ 15.)

Dash cam footage from Deputy Westbrook's patrol vehicle and video footage from Mrs. Dantzler's cell phone document the following chain of events. (See "Dash Cam Video," Dkt. # 21-2 at 45:00–1600:00; "Cell Phone Video," Dkt. # 24-3 at 0:00–9:43.) After arriving at the home, the Deputies walked along the side of the home and knocked on the home's side door. (Dash Cam Video at 70:00–190:00.) After knocking several times, Huntly Sr. and Mrs. Dantzler answered the front door and greeted the Deputies. (Id. at 190:00–263:00.)

The Deputies walked over to the front porch, greeted the Dantzlers, and explained that they needed to speak to Huntly Jr., their son. (Id. at 263:00–280:00.) Huntly Sr. informed the Deputies that his son was not present and that he did not know where he was. (Id.) The Deputies, nonetheless, asked to conduct a welfare check in the home to make sure Huntly Jr. was not home with another woman who might be in danger. (Id. at 280:00–451:00.) Plaintiffs again informed the Deputies that Huntly Jr. was not home and that they should check elsewhere if they wanted with speak to Huntly Jr. or check on the woman. (Id.) In response,

[1] The Court takes notice that Harper, Texas is located 23 miles west of Fredericksburg, Texas on U.S. Highway 290, in Gillespie County, Texas. See Fed. R. Evid. 201(b) ("The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.").

the Deputies reasserted their need to conduct a welfare check citing the exigent circumstances, which they claimed permitted them to enter the home without a warrant. (Dash Cam Video at 280:00–451:00.) The back and forth between the Deputies and Plaintiffs continued for several minutes with the Deputies reasserting their need to enter the home to conduct a welfare check given the exigent circumstances, and Plaintiffs firmly refusing the Deputies entry into their home without a warrant. (Id. at 451:00–945:00.)

After several minutes of the Deputies asserting their need and right to enter the home, Huntly Sr. attempted to return back inside, citing his need to use the restroom. (Id. at 945:00–950:00.) The Deputies told Huntly Sr. that he could not return inside, and after Huntly Sr. told the Deputies to get off his porch, Deputy Hindman placed Huntly Sr.'s hands behind his back and handcuffed him. (Id. at 950:00–1010:00; "Hindman Depo.," Dkt. # 21-3 at 55:7–23.) According to Deputy Hindman, he told Huntly Sr. that he was not under arrest, but merely being detained. (Hindman Depo. at 55:15–17.) Then, Deputy Westbrook escorted the now handcuffed Huntly Sr. off the porch and stood next to him while Deputy Hindman continued to speak to Mrs. Dantzler, who remained on the porch and continued to refuse the Deputies access to the home. (Dash Cam Video at 1010:00–1045:00.)

Deputy Westbrook walked with Huntly Sr. away from the porch area and ordered Huntly Sr. to stand "right here" in front of Deputy Hindman's patrol car in the driveway. (Id.) As Deputy Westbrook and Huntly Sr. walked towards the patrol car, Huntly Sr. began walking away from the patrol car and into the yard with Deputy Westbrook following close behind. (Id. at 1045:00–1050:00.) Deputy Westbrook walked towards him, placed his hand on one of Huntly Sr.'s arms, and calmly commanded him to return to the area in front of the vehicle. (Id. at 1050:00–1055:00.) After initially taking a couple steps towards the patrol car as Deputy Westbrook commanded, Huntly Sr. suddenly spun away from Deputy Westbrook and lurched towards the yard. (Id. at 1055:00–1058:00.) With Huntly Sr. pulling away, Deputy Westbrook took Huntly Sr. to the ground to control him. (Id. at 1058:00–1063:00.) Deputy Westbrook kneeled next to Huntly Sr., now on his back, and admonished him for resisting. (Dash Cam Video at 1063:00–1073:00.) Deputy Westbrook commanded Huntly Sr. to roll over and proceeded to roll Huntly Sr. over on his stomach. (Id. at 1073:00–1076:00.) After Deputy Westbrook rolled Huntly Sr. over, he assisted Huntly Sr. back on to his feet, walked him back to area near the porch, and told him to stay put. (Id. at 1076:00–1100:00.)

The Deputies continued to plead with Mrs. Dantzler for several more minutes asserting that they had the right to enter the home given the exigent

circumstances. (Cell Phone Video at 1:40–2:45.). Mrs. Dantzler offered to allow the Deputies to look into Huntly Jr.'s room through the bedroom window from outside the home. (Id. at 2:45–2:52.) Deputy Hindman declined such an accommodation and continued to assert that the Deputies needed to actually enter the home. (Id. at 2:52–3:35.) Finally, Mrs. Dantzler stated that she would allow one deputy to enter the home, but stated that such an entry was "against [her] will," an objection which both Deputies acknowledged. (Id. at 3:35–3:50.)

Deputy Hindman entered the home with Mrs. Dantzler and conducted a brief search of the rooms. (Id. at 3:50–5:50.) The search was futile as Deputy Hindman did not find any other persons in the home nor any indication of a person in need of assistance.

Following the brief search, Deputy Westbrook removed the handcuffs from Huntly Sr., who remained standing in front of the home's porch. (Id. at 5:50–6:15.) In the cell phone video, Huntly Sr.'s right wrist appears to be bleeding and there are streaks of blood along his lower back. (Cell Phone Video at 6:15–6:30.) Deputy Hindman stated that he would call an ambulance to treat Huntly Sr.'s injuries, but both Huntly Sr. and Mrs. Dantzler stated that they did not want paramedics to respond. (Id. at 6:30–6:45.) After Deputy Hindman spoke briefly to the Dantzlers about the search and their reasons for it, the Dantzlers expressed their dissatisfaction with the Deputies and their actions. (Id. at 6:45–9:36; Dash Cam

Video at 1400:00–1600:00.) The Deputies left the property at the Dantzlers' request at approximately 7:00 a.m. (Id.)

Defendants allege that later the same day a woman named Nina Lewis called and spoke to Deputy Westbrook stating that she had been in the camper trailer behind the home with Huntly Jr. (Dkt. # 21 at 4.) Additionally, she informed Deputy Westbrook that the Dantzlers' evicted her from the property because of the incident with the Deputies. (Id.)

On December 2, 2015, Plaintiffs filed suit in this Court against Deputy Hindman and Deputy Westbrook. ("Compl.," Dkt. # 1.) Plaintiffs' complaint alleges the three causes of action against Defendants: (1) claims under 42 U.S.C. § 1983 ("Section 1983") for unreasonable search, unreasonable seizure, and excessive force; (2) a false arrest claim under Texas law; and (3) an assault and battery claim under Texas law. (Compl. ¶¶ 42–55.) Plaintiffs seek pecuniary, compensatory, and punitive damages, as well as attorneys' fees and costs. (Id. at 10.)

While this case was originally assigned to the docket of United States District Judge Lee Yeakel, the case was transferred to the docket of the undersigned on January 4, 2017. (Dkt. # 19.) On January 16, 2017, Defendants filed a Motion for Summary Judgment. (Dkt. # 21.) After an extension of time to

respond was granted, Plaintiffs filed a response in opposition on February 10, 2017. (Dkt. # 24.) Defendants did not file a reply.

Additionally, Plaintiffs filed a Motion for Leave to File an Amended Complaint on February 13, 2017. (Dkt. # 25.) Defendants filed a response in opposition on February 21, 2017. (Dkt. # 26.) On February 28, 2017, Plaintiffs filed a reply. (Dkt. # 27.)

LEGAL STANDARDS

I. Summary Judgment under Rule 56

A court must grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Meadaa v. K.A.P. Enterprises, L.L.C., 756 F.3d 875, 880 (5th Cir. 2014). "Substantive law will identify which facts are material." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is only genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

In seeking summary judgment, the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party meets this burden, the nonmoving party must come forward with specific facts that establish the existence of a genuine issue for trial. Distribuidora Mari Jose, S.A. de C.V. v.

Transmaritime, Inc., 738 F.3d 703, 706 (5th Cir. 2013) (quoting Allen v. Rapides Parish Sch. Bd., 204 F.3d 619, 621 (5th Cir. 2000)). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Hillman v. Loga, 697 F.3d 299, 302 (5th Cir. 2012).

In deciding whether a fact issue has been created, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." Kevin M. Ehringer Enters. v. McData Servs. Corp., 646 F.3d 321, 326 (5th Cir. 2011) (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000)). However, "[u]nsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." United States v. Renda Marine, Inc., 667 F.3d 651, 655 (5th Cir. 2012) (quoting Brown v. City of Hous., 337 F.3d 539, 541 (5th Cir. 2003)).

"Although we review evidence in the light most favorable to the non-moving party, [the Fifth Circuit] assign[s] greater weight, even at the summary judgment stage, to the facts evident from the video recordings taken at the scene." Carnaby v. City of Hous., 636 F.3d 183, 187 (5th Cir. 2011). "A [court] need not rely on plaintiff's description of the facts where the record discredits that description but should instead consider 'the facts in the light depicted by the video.'" Id. (quoting Scott v. Harris, 550 U.S. 372, 381 (2007)).

II. Motion for Leave to Amend

Federal Rule of Civil Procedure 15 allows a party to "amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). The Rule directs the court to "freely give leave when justice so requires." Id. "The policy of the Federal Rules is to permit liberal amendment." Carroll v. Fort James Corp., 470 F.3d 1171, 1174 (5th Cir. 2006) (quoting Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 597–98 (5th Cir. 1981)); Lyn-Lea Travel Corp. v. Am. Airlines, Inc., 283 F.3d 282 (5th Cir. 2002). Despite the policy of liberal amendment, the "decision to grant [or deny] leave is within the discretion of the trial court," and the trial court should deny leave where it can articulate "a substantial reason" for doing so. Matter of Southmark Corp., 88 F.3d 311, 314–15 (5th Cir. 1996). Accordingly, when determining whether to grant leave to amend pleadings, a court should deny leave if there exist "such factors as undue delay . . . undue prejudice to the opposing party, and futility of amendment." Id.

ANALYSIS

I. Defendants' Motion for Summary Judgment (Dkt. # 21)

Defendants move for summary judgment on Plaintiffs' Section 1983 claims for (1) unreasonable search, (2) unreasonable seizure, and (3) excessive force, as well as on Plaintiffs' state law claims. (Dkt. # 21.) Defendants assert the affirmative defense of qualified immunity against the Section 1983 claims,

claiming that they are entitled to qualified immunity for the alleged conduct. (Id. at 6.)

A. Section 1983 Claims

Plaintiffs' complaint alleges claims against Defendants under Section 1983 for (1) unreasonable search, (2) unreasonable seizure, and (3) excessive force. (Compl. ¶¶ 42–48.)

Section 1983 "provides a private right of action for redressing violations of federal law committed by persons acting under the color of state law." Estrada v. City of San Benito, Tex., Civil Action No. B-08-116, 2009 WL 54895, at *3 (S.D. Tex. Jan. 8, 2009) (citations omitted). "To prevail on a claim under [Section 1983], a plaintiff must show that a defendant amenable to suit under the statute deprived plaintiff of a constitutional right." Id. (citing, inter alia, Casanova v. City of Brookshire, 199 F. Supp. 2d 639, 649 (S.D. Tex. 2000)); see also Doe v. Rains Cty. Indep. Sch. Dist., 66 F.3d 1402, 1406 (5th Cir. 1995). Additionally, the alleged constitutional deprivation must have been due to deliberate indifference; "[t]he negligent deprivation of life, liberty, or property is not a constitutional violation." Campbell v. City of San Antonio, 43 F.3d 973, 977 (5th Cir. 1995).

Defendants move for summary judgment on Plaintiffs' Section 1983 claims of (1) unreasonable search, (2) unreasonable seizure, and (3) excessive force. (Dkt. # 21.) In response, Plaintiffs argue that Defendants had no reasonable

basis to search their home, no reasonable basis to detain Huntly Sr., and that excessive force was used against Huntly Sr. (See generally Dkt. # 24.)

1. Qualified Immunity

The doctrine of qualified immunity "protects government officials '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.'" Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); Bush v. Strain, 513 F.3d 492, 500 (5th Cir. 2008); Bazan ex rel. Bazan v. Hidalgo Cty., 246 F.3d 481, 488 (5th Cir. 2001). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." Thompson v. Mercer, 762 F.3d 433, 436–37 (5th Cir. 2014).

"A qualified immunity defense alters the usual summary judgment burden of proof." Brown v. Callahan, 623 F.3d 249, 253 (5th Cir. 2010). Once an official pleads the defense of qualified immunity, "the burden then shifts to the plaintiff, who must rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established law." Id.; see also Harris v. Serpas, 745 F.3d 767, 771 (5th Cir. 2014). Thus, "[t]he plaintiff bears the burden of negating qualified immunity . . . but all inferences are

drawn in his favor." Brown, 623 F.3d at 253. A plaintiff cannot meet this burden by resting on the pleadings; instead, a plaintiff must demonstrate genuine issues of material fact regarding the reasonableness of a defendant's conduct. Bazan, 246 F.3d at 490.

There are two well-established steps in the qualified immunity analysis: a court must decide (1) "whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right" and (2) "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." Pearson, 555 U.S. at 232; see also Rivera v. Bonner, No. 16-10675, 2017 WL 2872291, at *2 (5th Cir. July 6, 2017) (setting out the same two steps). The court applies "current law to the first step and the law at the time of the incident to the second step." Bush, 513 F.3d at 500 (internal quotations and citation omitted). Nonetheless, a government official's acts are not objectively unreasonable unless all reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the plaintiff's rights. Carroll, 800 F.3d at 169. Finally, a district court has discretion to address the prongs of qualified immunity in any order. Pearson, 555 U.S. at 236; Brown, 623 F.3d at 253 ("A court may rely on either prong of the defense in its analysis.").

While each defendant's actions must be considered separately, a court is not required to conduct a separate analysis for each officer in cases where their

actions are materially indistinguishable. Meadours v. Ermel, 483 F.3d 417, 421–22 & n.3 (5th Cir. 2007). A court, however, must "*consider* each officer's actions." Id. at 422 n.3 (emphasis in original). Accordingly, the Court engages in the two-step qualified immunity analysis and proceeds to consider the Deputies' role in the entry into and search of the home, the detention of Huntly Sr., and any excessive use of force.

2. Unreasonable Search Claim

Plaintiffs bring an unreasonable search claim against Defendants for "conducting a search of the Plaintiffs' residence without probable cause and that was otherwise unreasonable, thereby depriving the Plaintiffs' of their rights under the Fourth Amendment to the United States Constitution." (Compl. ¶ 43.) In response, Defendants "assert that their actions were reasonable under the exigent circumstances exception to determine whether or not the female was injured or threatened by injury." (Dkt. # 21 at 9.)

i. Whether Plaintiffs' Have Stated a Constitutional Violation

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend IV. In assessing the reasonableness of a search, a court "must balance 'the nature and quality of the intrusion on the individual's Fourth

Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" Wernecke v. Garcia, 591 F.3d 386, 393 (5th Cir. 2009) (quoting Wooley v. City of Baton Rouge, 211 F.3d 913, 925 (5th Cir. 2000)). The Supreme Court has stated that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States Dist. Ct. for Eastern Dist. of Mich., Southern Div., 407 U.S. 297, 313 (1972) (citing, *inter alia*, Katz v. United States, 389 U.S. 347 (1967)). Accordingly, "[i]t is a 'basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.'" Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006).

Nonetheless, the warrant requirement is subject to certain exceptions. One established exception to the warrant requirement is where a homeowner consents to a search. United States v. Mendez, 479 F.3d 420, 429 (5th Cir. 2005). However, for the search to be valid under this exception, "a person must freely and voluntarily consent." Id. Courts determine whether consent was given "based on the totality of the circumstances." Gates v. Tex. Dept. of Protective and Regulatory Servs., 537 F.3d 404, 420 (5th Cir. 2008) (citing United States v. Freeman, 482 F.3d 829, 831–32 (5th Cir. 2007)). As the Supreme Court has explained: "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical

reasonable person have understood by the exchange between the officer and the suspect?" Florida v. Jimeno, 500 U.S. 248, 251 (1991).

Another exception to the warrant requirement is where "'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." Brigham City, 547 U.S. at 403 (quoting Mincey v. Arizona, 437 U.S. 385, 393–94 (1978)). One such exigency is "the need to assist persons who are seriously injured or threatened with such injury." Id. Under this exception, "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." Id. (citing Mincey, 437 U.S. at 392).

"Because it is essentially a factual determination, there is no set formula for determining when exigent circumstances may justify a warrantless entry." United States v. Blount, 123 F.3d 831, 837 (5th Cir. 1997). Under such a determination, the court must view the circumstances objectively, and not on the basis of the officers' subjective motivations. See Brigham City, 547 U.S. at 404. "An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively, justify the action.'" Id. at 404 (quoting Scott v. United States, 436 U.S. 128, 138 (1978)). However, "the police bear a heavy burden when attempting

to demonstrate an urgent need that might justify warrantless searches or arrests." Welsh v. Wisconsin, 466 U.S. 740, 749–50 (1984).

Here, Plaintiffs allege that Defendants conducted an unreasonable warrantless search of their home without probable cause. (Compl. ¶ 43.) While Defendants assert that Mrs. Dantzler ultimately consented to the search, and that the search was reasonable given the exigent circumstances and the need to render emergency aid (Dkt. # 21 at 9), Plaintiffs respond that no reliable information supported Defendants' search of the home because they relied solely upon an uncorroborated anonymous tip to justify their entry under the exigent circumstances exception. (Dkt. # 24 at 8.)

The Court first briefly addresses whether Mrs. Dantzler consented to the search. If so, the need to consider whether exigent circumstances justified the search is therefore obviated. The videos documenting the incident show Plaintiffs repeatedly and firmly refusing to give consent to a search prior to Deputy Westbrook's search of the home. (See Cell Phone Video at 0:00–3:50; Dash Cam Video at 280:00–1240:00.) Only after the Deputies assert their right to enter the home for over 16 minutes and detain Huntly Sr. with handcuffs, does Mrs. Dantzler state that she will permit one deputy into the home, but she makes it equally clear that she does not consent to the search—an objection both Deputies appear to acknowledge in the video footage. (Cell Phone Video at 3:35–3:50.)

Here, construing all facts in favor of Plaintiffs, given the repeated pleading and assertions of the Deputies' right to enter the home as well as the clear and repeated statements from Plaintiffs that they did not consent to the Deputies entering their home, no reasonable juror could find that Plaintiffs consented to the search. As evidenced by the Deputies' acknowledgement that Mrs. Dantzler did not consent to their entry, a reasonable person would have understood that Plaintiffs did not consent to the search in light of the exchange between the Deputies and Plaintiffs. See Jimeno, 500 U.S. at 251.

Accordingly, setting the issue of consent aside—under the first prong of the qualified immunity analysis—the Court considers whether Plaintiffs have alleged that the Deputies violated Plaintiffs' Fourth Amendment rights by conducting an unlawful warrantless search of their home under the exigent circumstances exception.

As a preliminary matter, the Court need only consider the actions of Deputy Hindman in conducting the search. It is uncontested and clearly shown in the video footage that Deputy Westbrook did not enter Plaintiff's home or conduct any kind of search of the home. (See Cell Phone Video at 3:50–6:15.) Accordingly, Plaintiffs have failed to state an unlawful search claim with respect to Deputy Westbrook because he did not search or enter Plaintiffs' home. See Creamer v. Porter, 754 F.2d 1311, 1316 (5th Cir. 1985) (affirming the dismissal of

an unlawful search claim against an officer who was on the premises during a search, but who did not actively participate in the search or enter the home). Therefore, Deputy Westbrook is entitled to qualified immunity on Plaintiffs' unlawful search claim and the Court **DISMISSES WITH PREJUDICE** Plaintiffs' Section 1983 unreasonable search claim against Deputy Westbrook.

As to Deputy Hindman, drawing all inferences and construing evidence in favor of Plaintiffs as the non-moving party, the Court finds that Plaintiffs have alleged an unlawful search claim against Deputy Hindman. According to Defendants, Deputy Hindman possessed the following information to justify his entry into the Dantzler home on the basis of exigent circumstances: (1) "an anonymous caller made a call to the Gillespie County Dispatch fearing for the safety of an unknown female," (2) "the caller stated that Huntly Dantzler, Jr. was at a bar in Fredericksburg with a female and the caller had seen Huntly Dantzler, Jr. place two pills in the female's drink," (3) "[t]he female accompanying Huntly Dantzler, Jr. became extremely intoxicated subsequent to having the two pills placed in her drink," (4) "[t]he female, accompanying Huntly Dantzler, Jr. left the bar with him in an extremely intoxicated state," (5) "[t]he caller informed dispatch that he had seen Huntly Dantzler, Jr. do this on other occasions to women," and (6) "[t]he caller feared for the safety of the unidentified woman and informed the Gillespie County Sheriff's Department." (Dkt. # 21 at 8.) Further, as

alleged by Plaintiffs, the anonymous caller indicated that he witnessed the incident with Huntly Jr. "two hours before calling." (Compl. ¶ 12.)

While the Fifth Circuit has not considered a case directly on point, other circuit courts have disapproved of warrantless searches conducted under the exigent circumstances exception where they are based solely on anonymous or uncorroborated tips. For instance, in Kerman v. City of New York, the Second Circuit considered whether police officers violated the Fourth Amendment when they entered a home without a warrant, citing exigent circumstances based solely on an anonymous 911 call from a woman reporting that a mentally ill man was off his medication, acting crazy, and possibly had a gun. Kerman v. City of New York, 261 F.3d 229, 232 (2d Cir. 2001). While the caller did not identify herself or the name of the man acting crazy, she provided police with the man's address and phone number. Id. Reasoning that the anonymous 911 call was entirely uncorroborated and in light of the heightened Fourth Amendment protection afforded to private dwellings, the Second Circuit held that the officers' warrantless entry into the home violated the Fourth Amendment. Id. at 236.

Similarly, in Lundstrom v. Romero, the Tenth Circuit also considered whether exigent circumstances based on an uncorroborated 911 call justified a warrantless search of a home. Lundstrom v. Romero, 616 F.3d 1108 (10th Cir. 2010). There, police received a 911 call from a neighbor, who was a former police

officer, reporting that she heard a woman at plaintiff's home beating and screaming at a child. Id. at 1115. While the neighbor reported that she did not see the beating, based on the "'child's high pitched baby scream,' the neighbor estimated . . . that the child was a 'toddler or younger.'" Id. After the neighbor left her phone number with the operator, an officer was dispatched to the home and as she approached the home she heard a high-pitched voice, but she could not tell whether it was the voice of an adult or child. Id. at 1115–16. The officer rung the doorbell, plaintiff answered, and the officer told her that she was there to check on a child's welfare, to which plaintiff denied that there were any children at the home. Id. During an extended confrontation, whereupon more officers arrived and plaintiff was detained, the officers entered and searched plaintiff's home. Id. at 1116–18. No child was found. Id. at 1118. The Tenth Circuit, reversing the district court, held that the officers violated the Fourth Amendment in conducting a search of the home. Id. at 1129. Despite the fact that the 911 call was not anonymous and made by a former police officer, the court held that the search was unreasonable under the exigent circumstances exception because the officers never encountered anything corroborating the report or suggesting that someone inside the home was actually in immediate danger or seriously injured. Id. at 1128–29.

By contrast, in cases where warrantless searches based on exigent circumstances are found to be constitutional, officers either encounter evidence

corroborating the anonymous report or indicating that someone at the home was in immediate danger or seriously injured. For instance, in Brigham City, police responded to a report of a loud party at 3 a.m. at a home. Brigham City, 547 U.S. at 406. Upon approaching the home, police could hear a "loud and . . . tumultuous" fight and upon investigating further observed a person striking another in the kitchen of the home. Id. Upon observing this scuffle, police entered the home. Id. The Supreme Court held that the officers' warrantless entry into home was reasonable under the exigent circumstances because in actually hearing and observing a fight take place, they "had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning." Id.

Similarly, in Ryburn v. Huff, a case relied on by Defendants, the Supreme Court considered the Ninth Circuit's denial of qualified immunity to officers based on a warrantless entry of a home under the exigent circumstances exception. 565 U.S. 469, 470–477 (2012). In that case, officers began investigating a high school student after receiving a report from the student's principal that the student was rumored to have written a letter threatening to "shoot up" the school. Id. at 470. After interviewing the student's classmates, who confirmed that he was frequently bullied and possibly capable of carrying out such a threat, the officers sought to interview the student at his home. Id. Police

knocked at the door and called the home for several minutes before the student and his mother answered the door. Id. at 470–71. The officers stated that they sought to discuss the threats with the student and asked the student's mother if they could continue the discussion inside. Id. at 471. After the mother declined, an officer asked her if there were any guns in the home, to which the mother responded by immediately and suddenly turning around and running into the home. Id. at 471–72. Scared and alarmed by this evolving situation, the officers quickly followed the mother into the home, and eventually were able to briefly interview her and her son about the threats, ultimately concluding that the rumors about the student were false. Id. at 472. The Supreme Court held that the officers were entitled to qualified immunity because reasonable police officers at the scene could have believed that entry into the home was "necessary to avoid injury to themselves or others was imminently reasonable" in light of the mother's sudden reaction after refusing to answer a question about guns. Id. at 477.

In the instant case, other than the receipt of an anonymous 911 call about Huntly Jr., Defendants can point to *no evidence or circumstances* Deputy Hindman encountered at Plaintiffs' home suggesting that someone was "seriously injured or threatened with such injury." Brigham City, 547 U.S. at 403. While Defendants assert that they were able to verify that Huntly Jr.'s vehicle was parked on the Dantzler property through a license plate check, this information fails to

provide any corroboration of the anonymous 911 call's report that a woman was possibly in danger. Accordingly, it is essentially undisputed that the Deputies sought to enter the Dantzler home and conduct a welfare check based solely on an anonymous 911 call reporting that several hours earlier the caller had seen Huntly Jr. put pills in a woman's drink, she became highly intoxicated, she left with Huntly Jr., and that the caller had seen Huntly Jr. do this before. Furthermore, other than the fact that Huntly Jr. was identified, the caller failed to provide any other connection to Plaintiffs' home or suggestion that a woman in danger was actually inside Plaintiffs' home.

As discussed above, courts have found searches based on exigent circumstances to be unreasonable even with far more evidence suggesting that someone might be in danger. In the Kerman search held by the Second Circuit to be unreasonable, officers had a report that someone was at a particular address, with a gun, and was acting crazy. See Kerman, 261 F.3d at 232. Similarly, in the Lundstrom search held by the Eleventh Circuit to be unreasonable, officers had a report from an identified caller—a former police officer—that someone was beating a child at a particular address. See Lundstrom, 616 F.3d at 1115–18.

By contrast here, the anonymous 911 caller here gave no information about the woman or Huntly Jr.'s location. While the Deputies may have surmised that the woman or Huntly Jr. would be at the Dantzler home, unlike the officers in

Brigham City and Ryburn, the Deputies encountered nothing at the home or in their interactions with Plaintiffs suggesting that the report was true or that a person was injured or in danger. See Brigham City, 547 U.S. at 406; Ryburn, 565 U.S. at 471–72. Given the heightened Fourth Amendment protections afforded to persons' homes and the low value given to uncorroborated and anonymous tips in the Fourth Amendment context, the Court finds that Plaintiffs have alleged that Deputy Hindman violated Plaintiffs' Fourth Amendment rights by conducting an unlawful warrantless search of their home under the exigent circumstances exception.

ii. Whether the Right to Be Free from Unreasonable Searches Was Clearly Established at the Time of Deputy Westbrook's Search

Having found that Plaintiffs have alleged a constitutional violation, the Court must next consider "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." Pearson, 555 U.S. at 232. In light of the case law above, the Court finds that the right to be free from a warrantless entry and search was clearly established at the time of Deputy Hindman's search of Plaintiffs' home. Additionally, that same case law clearly shows that the exigent-circumstances exception did not apply in the circumstances Deputy Hindman faced.

"For a right to be clearly established under the second step of the qualified immunity analysis, 'the contours of that right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Bishop v. Arcudi, 674 F.3d 456, 466 (5th Cir. 2012) (quoting Flores v. City of Palacios, 381 F.3d 391, 399–400 (5th Cir. 2004)).

At the time of the search, as provided by the Fourth Amendment and Supreme Court decisions interpreting it, it was well-established that "that searches and seizures inside a home without a warrant are presumptively unreasonable." Brigham City, 547 U.S. at 403. However, it was also well-established law that enforcement officers could enter a home without a warrant "to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." Id. (citing Mincey, 437 U.S. at 392). While no set formula determines this factual determination, the Supreme Court has made clear that "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." Welsh, 466 U.S. at 749–50.

As to the circumstances Deputy Hindman encountered discussed above, Deputy Hindman neither had nor encountered any corroborating information or evidence at the Dantzler home indicating that a person was injured or in imminent danger of injury in Plaintiffs' home. Accordingly, in invoking the exigent circumstances exception to enter Plaintiffs' home, Deputy Hindman was

solely equipped with a report that a few hours earlier an anonymous caller saw a woman with Plaintiffs' son in possible danger. Accordingly, based on the information which Deputy Hindman possessed, in light of the well-established Fourth Amendment law establishing that warrantless searches of homes are presumed unreasonable and that police bear a heavy burden in demonstrating an urgent need to conduct a warrantless search, the Court finds that the right at issue here was "clearly established" at the time of Deputy Hindman's alleged misconduct. See Pearson, 555 U.S. at 232.

Having found that Plaintiffs have alleged that Deputy Hindman violated Plaintiffs' Fourth Amendment rights by conducting an unlawful warrantless search of their home under the exigent circumstances exception and that the right to be free from a warrantless entry and search was clearly established at the time of Deputy Hindman's search, Deputy Hindman is not entitled to qualified immunity on Plaintiffs' unreasonable search claim and the Court **DENIES** summary judgment to Deputy Hindman on that claim.

3. Unreasonable Seizure Claim

Plaintiffs bring an unreasonable seizure claim against the Deputies alleging that they "effected a seizure of the Plaintiff Huntly Dantzler which was without probable or other sufficient cause and was otherwise unreasonable, thereby depriving Plaintiff Huntly Dantzler of his rights under the Fourth Amendment to

the Constitution." (Compl. ¶ 44.) While Defendants largely fail to address Plaintiffs' unreasonable seizure claim and instead focus on Plaintiffs' excessive force claim, they assert that "Deputy Sgt. Hindman detained Plaintiff Huntly Dantzler Sr., at such time as he was attempting to go back inside the house, for officer safety." (Dkt. # 21 at 11 (citing Deputy Hindman's deposition testimony).)

i. Whether Plaintiffs' Have Stated a Constitutional Violation

"An arrest is unlawful unless it is supported by probable cause." Flores, 381 F.3d at 402 (citing Hinshaw v. Doffer, 785 F.2d 1260, 1266 (5th Cir. 1986)). Probable cause exists "when the totality of the facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." Deville v. Marcantel, 567 F.3d 156, 164 (5th Cir. 2009) (quoting Resendiz v. Miller, 203 F.3d 902, 903 (5th Cir. 2000)) (internal quotation marks omitted); see also Flores, 381 F.3d at 402 (quoting same). The probable cause "may be for any crime and is not limited to the crime that the officers subjectively considered at the time they perform an arrest." Davidson v. City of Stafford, Tex., 848 F.3d 384, 392 (5th Cir. 2017) (citing Club Retro, L.L.C. v. Hilton, 568 F.3d 181, 204 (5th Cir. 2009)); see also United States v. Bain, 135 F. App'x 695, 696 (5th Cir. 2005) ("An arrest does not violate the Fourth Amendment if the officer making the arrest has probable cause to arrest the defendant for any crime,

regardless of whether the defendant can be lawfully arrested for the crime for which the officer states or believes he is making the arrest.")

However, under the Supreme Court's decision in Terry v. Ohio, 392 U.S. 1 (1968), "if a law enforcement officer can point to specific and articulable facts that lead him to reasonably suspect that a particular person is committing, or is about to commit, a crime, the officer may briefly detain—that is, 'seize'—the person to investigate." United States v. Hill, 754 F.2d 1029, 1033 (5th Cir. 2014) (citing United States v. Johnson, 232 F.3d 447, 448 (5th Cir. 2000)). To state a claim for unlawful detention pursuant to a Terry-stop, "a plaintiff must allege: (1) a detention occurred; and (2) the detention was not based on reasonable suspicion supported by articulable facts that criminal activity was occurring." Coons v. Lain, 277 F. App'x 467, 470 (5th Cir. 2008) (citing Terry, 392 U.S. at 30).

Here, it is undisputed that Huntly Sr. was detained for approximately six minutes while Deputy Hindman searched Plaintiffs' home. (See Cell Phone Video 0:00–6:15.) Furthermore, regardless of whether Huntly Sr. was briefly detained pursuant to Terry v. Ohio or formally arrested, the Deputies admit that they had neither specific and articulable facts leading them to reasonably suspect that Huntly Sr. was committing, or was about to commit, a crime, nor probable cause that Huntly Sr. had committed or was committing a crime. Deputy Hindman testified that he did not believe Huntly Sr. had committed a crime before Deputy

Hindman detained him. (Hindman Depo. at 55:1–6.) Similarly, Deputy Westbrook testified that Huntly Sr. had not committed a crime before he was handcuffed. ("Westbrook Depo.," Dkt. # 24-1 at 49:23–25.)

Instead, the Deputies assert that they detained Huntly Sr. after he attempted to reenter his home "for officer safety." (Dkt. # 21 at 3.) Deputy Westbrook testified that during their encounter, Huntly Sr. became "very aggressive and upset" and began arguing with Deputy Hindman. (Westbrook Depo. at 44:20–25.) Deputy Westbrook testified that at a certain point it became clear that Plaintiffs would not consent to their entry, and accordingly, Deputy Hindman "felt that he was given no other option than to go ahead and detain [Huntly Sr.], get him off that front porch, so that . . . further contact could be made with Mrs. Dantzler and explain what's going on and try to reason, or if we had to, we were just going to have to make entry." (Hindman Depo. at 54:20–25.) Accordingly, in their respective depositions, Deputy Westbrook and Deputy Hindman state that Huntly Sr. was detained to permit them to make entry and conduct the welfare check. (Hindman Depo. at 54:13–25; Westbrook Depo. at 46:1–4.)

While the Supreme Court has recognized that a valid search warrant supported by probable cause "carries with it the limited authority to detain the occupants of the premises while a proper search is conducted," Michigan v.

Summers, 452 U.S. 692, 705 (1981), the Fifth Circuit has recognized that the holding in Summers was "narrow." See Heitschmidt v. City of Hous., 161 F.3d 834, 837 (5th Cir. 1998). As explained by the Fifth Circuit, "Summers merely holds that the police have limited authority to detain the occupant of a house without probable cause while the premises is searched, when the detention is neither prolonged nor unduly intrusive, and when police are executing a validly executed search warrant for contraband." Id. at 838. Accordingly, because Defendants were not executing a valid search warrant, the Summers exception does not apply to Defendants' six-minute detention of Huntly Sr. during the search of Plaintiffs' home.

Regardless of whether the Deputies informally detained or formally arrested Huntly Sr., Plaintiffs have alleged an unlawful seizure claim against both Deputies. It is uncontested that Deputy Hindman placed handcuffs on Huntly Sr. after a protracted confrontation wherein Huntly Sr. refused to allow the Deputies to enter his home. Furthermore, Deputy Westbrook participated in the seizure of Huntly Sr. by escorting him off the porch and maintaining control over Huntly Sr., while Deputy Hindman continued to plead with Mrs. Dantzler. Finally, as explained above, the Deputies neither had probable cause that Huntly Sr. had committed or was committing a crime, nor did they have specific and articulable facts leading them to reasonably suspect that Huntly Sr. was committing, or was

about to commit, a crime. Accordingly, the Court finds that Plaintiffs have alleged that Deputy Westbrook and Deputy Hindman violated Plaintiffs' Fourth Amendment rights by unlawfully seizing Huntly Sr. without probable cause or reasonable suspicion that Huntly Sr. was committing or was about to commit a crime.

ii. Whether the Right to Be Free from Unreasonable Seizures Was Clearly Established at the Time of the Deputies' Seizure of Huntly Sr.

Having found that Huntly Sr. has alleged a constitutional violation against the Deputies, the Court must next consider "whether the right at issue was 'clearly established' at the time" of the Deputies' alleged misconduct. Pearson, 555 U.S. at 232. At the time of the Deputies' seizure of Huntly Sr., the Fourth Amendment right to be free from false arrest—that is, arrest without probable cause, was clearly established. See Club Retro, 568 F.3d at 205. As discussed above, neither Deputy Hindman nor Deputy Westbrook believed they had probable cause that Huntly Sr. had committed or was committing a crime, nor did they have specific and articulable facts leading them to reasonably suspect that Huntly Sr. was committing, or was about to commit, a crime. Therefore, it was clearly established that absent such probable cause or suspicion, the Deputies had no basis on which to formally arrest Huntly Sr. or informally detain him under Terry. To the extent that the Deputies could have relied upon the Summers-rule, as discussed

above, Summers established a narrow exception for brief detentions during the execution of a valid search warrant. See Heitschmidt, 161 F.3d at 837–38. Here, the Deputies did not have a valid search warrant and the exigent-circumstances exception on which Deputy Hindman relied on to search Plaintiffs' home did not apply in the circumstances the Deputies faced. (See supra at 19–25.) Accordingly, the Court finds that the right to be free from unlawful detention was "clearly established" at the time of the Deputies alleged misconduct. See Pearson, 555 U.S. at 232.

Having found that Plaintiffs have alleged that the Deputies violated Plaintiffs' Fourth Amendment rights by detaining him without probable cause or reasonable suspicion that he was committing, or was about to commit, a crime, and that the right to be free from unlawful detention was clearly established at the time of Huntly Sr.'s detention, Deputies Hindman and Westbrook are not entitled to qualified immunity on Plaintiffs' unreasonable seizure claim and the Court **DENIES** summary judgment to Deputies Hindman and Westbrook on those claims.

4. Excessive Force Claim

Finally, Plaintiffs bring an excessive force claim against the Deputies alleging that "in the course of executing a seizure of Plaintiff Huntly Dantzler, the [Deputies] used excessive and unreasonable force which resulted in severe

physical and emotional injuries to Plaintiff Huntly Dantzler and Susan Dantzler, thereby depriving the Plaintiffs of their rights under the Fourth Amendment to the United States Constitution." (Compl. ¶ 45.) In response, the Deputies raise the qualified immunity defense and argue that they used only the necessary amount of reasonable force. (Dkt. # 21 at 11.)

i. Whether Plaintiffs Have Stated a Constitutional Violation

"When a plaintiff alleges excessive force during an investigation or arrest, the federal right at issue is the Fourth Amendment right against unreasonable seizures." Tolan v. Cotton, 134 S. Ct. 1861, 1865 (2014) (citing Graham v. Connor, 490 U.S. 386, 396–97 (1989)) (per curiam). It is well-established in the Fifth Circuit that, to state a claim for excessive force, a plaintiff must allege: "(1) an injury, (2) which resulted directly and only from the use of force that was clearly excessive; and (3) the excessiveness of which was clearly unreasonable." Ramirez v. Knoulton, 542 F.3d 124, 128 (5th Cir. 2008).

The "[u]se of deadly force is not unreasonable when an officer would have reason to believe the suspect poses a threat of serious harm to the officer or others." Mace v. City of Palestine, 333 F.3d 621, 624 (5th Cir. 2003). The inquiry is fact-specific and "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham, 490 U.S. at 396–97. The following non-exclusive factors are also pertinent to the inquiry:

"(1) whether the suspect was armed; (2) whether the suspect posed an immediate threat to the safety of the officers or the public; (3) whether the suspect resisted arrest; (4) whether a warrant was employed and the severity of the crime for which the suspect was to be arrested; (5) whether more than one suspect or police officer was involved; and (6) whether other dangerous or exigent circumstances existed at the time of arrest." Goldman v. Williams, 101 F. Supp. 3d 620, 648 (S.D. Tex. 2015) (citing, *inter alia*, Graham, 490 U.S. at 396; Brown v. Glossip, 878 F.2d 871, 874 (5th Cir. 1989)).

Where the Deputies' actions are distinguishable, the Court must assess qualified immunity individually and has come to its conclusion for each of them as follows. See Meadours v. Ermel, 483 F.3d 417, 422 (5th Cir. 2007) (noting that the Fifth Circuit requires that the actions of defendants be examined individually in the qualified immunity context (internal citations omitted)).

With respect to Deputy Hindman, the Court finds that Plaintiffs have failed to allege an excessive force claim against him. The video footage shows that the only physical contact Deputy Hindman had with the Plaintiffs was when he placed handcuffs on Huntly Sr. before Huntly Sr. was escorted off the porch by Deputy Westbrook. (See Dash Cam Video at 945:00–1045:00.) At no time during the incident did Huntly Sr. complain that the handcuffs were placed on his hands too tightly or with excessive force. However, even if Huntly Sr. was slightly

injured by Deputy Hindman placing handcuffs on him, the Fifth Circuit has held that "minor, incidental injuries that occur in connection with the use of handcuffs to effectuate an arrest do not give rise to a constitutional claim for excessive force." Freeman v. Gore, 483 F.3d 404, 417 (5th Cir. 2007) (citing Glenn v. City of Tyler 242 F.3d 307, 314 (5th Cir. 2001)).

Furthermore, to the extent that Plaintiffs assert that Mrs. Dantzler was emotionally injured by her observation of excessive force used on Huntly Sr., courts have rejected such claims holding that "a bystander who is not the object of police action cannot recover for resulting emotional injuries under § 1983." Khansari v. City of Hous., 14 F. Supp. 3d 842, 863 (S.D. Tex. 2014) (citing Grandstaff v. City of Borger, Tex., 767 F.2d 161, 172 (5th Cir. 1985) and Coon v. Ledbetter, 780 F.2d 1158, 1160 (5th Cir. 1986)). Accordingly, because Plaintiffs have failed to state an excessive force claim against him, Deputy Hindman is entitled to qualified immunity and the Court **DISMISSES WITH PREJUDICE** Plaintiffs' Section 1983 excessive force against Deputy Hindman.

With respect to Deputy Westbrook, Plaintiffs allege that Deputy Westbrook used excessive force against Huntly Sr. by grabbing and throwing him to the ground as he was "walking away from the officers and the front door to his home." (Dkt. # 24 at 16.) However, as the Fifth Circuit has explained, courts "should place greater weight, even at the summary judgment stage, to the facts

evident from video recordings taken at the scene." Carnaby, 636 F.3d at 187.

The Dash Cam video footage shows the following chain of events. After Huntly Sr. was placed in handcuffs, Deputy Westbrook and Huntly Sr. walked towards Deputy Hindman's patrol car parked in Plaintiffs' driveway. (Dash Cam Video at 1045:00–1050:00.) As they walked, Huntly Sr. began walking away from the patrol car and into the yard with Deputy Westbrook following close behind. (Id.) Deputy Westbrook walked towards Huntly Sr., placed his hand on one of Huntly Sr.'s arms, and calmly commanded him to return to the area in front of the vehicle. (Id. at 1050:00–1055:00.) After initially taking a couple steps towards the patrol car as Deputy Westbrook requested, Huntly Sr. suddenly spun away from Deputy Westbrook and lurched towards the yard. (Id. at 1055:00–1058:00.) With Huntly Sr. pulling away, Deputy Westbrook took Huntly Sr. to the ground to control him. (Id. at 1058:00–1063:00.) Deputy Westbrook kneeled next to Huntly Sr., now on his back, and verbally admonished him for resisting. (Id. at 1063–1073.) Deputy Westbrook commanded Huntly Sr. to roll over and proceeded to roll Huntly Sr. over on his stomach. (Dash Cam Video at 1073:00–1076:00.) After Deputy Westbrook rolled Huntly Sr. over, he assisted Huntly Sr. back on to his feet, walked him back to area near the porch, and told him to stay put. (Id. at 1076:00–1100:00.)

Even viewing the facts in the light most favorable to the Plaintiffs, they have failed to allege that Deputy Westbrook used clearly unreasonable force. As seen from the video footage, in what is otherwise a very calm situation, Huntly Sr. suddenly lurches away from Deputy Westbrook. In response to this sudden movement away from him, Deputy Westbrook took Huntly Sr. to the ground with his body to subdue and control him. (See Dash Cam Video at 1058:00–1063:00.)

In determining that an officer's use of force in arresting a plaintiff was not clearly unreasonable, the Fifth Circuit has taken into consideration a plaintiff's non-compliance and resistance to officer's instructions. See Poole v. City of Shreveport, 691 F.3d 624, 628 (5th Cir. 2012); see also Graham, 490 U.S. at 396 (holding that among the factors for courts to consider in determining whether an officer's use of force is reasonable is whether the plaintiff "is actively resisting arrest or attempting to evade arrest by flight."). Here, an otherwise compliant Huntly Sr. suddenly disobeyed Deputy Westbrook's calm and reasonable commands to return to the driveway. In light of this non-compliance and sudden resistance, Deputy Westbrook's split-second reaction to take Huntly Sr. to the ground to stop his flight and control him is not clearly unreasonable, but rather a objectively reasonable response and use of force.

Further supporting the reasonableness of Deputy Westbrook's takedown of Huntly Sr. is his use of verbal commands to direct Huntly Sr. prior to

resorting to physical force. Before taking Huntly Sr. down, Deputy Westbrook calmly commanded Huntly Sr. to return to the driveway after he began wandering away from Deputy Westbrook. Only when Huntly Sr. disregarded those commands and suddenly spun and lurched away did Deputy Westbrook react by taking Huntly Sr. to the ground. Given Deputy Westbrook's measured and ascending response to Huntly Sr.'s non-compliance and active resistance to Deputy Westbrook's commands, Deputy's Westbrook's takedown of Huntly Sr. was not clearly unreasonable. See Poole, 691 F.3d at 628 (considering an officer's measured and ascending responses to a plaintiff's noncompliance in finding that the officer's use of force was not clearly excessive).

Accordingly, in light of the clear video footage showing that Deputy Westbrook's use of force was reasonable and measured in light of Huntly Sr.'s sudden resistance to verbal commands and lurching away from Deputy Westbrook, the Court finds that Plaintiffs have failed to allege an excessive force claim against Deputy Westbrook because his use of force was not clearly excessive. This situation was "tense, uncertain, and rapidly evolving," and Deputy Westbrook's decision to use force to subdue Huntly Sr. was objectively reasonable. See Graham, 490 U.S. at 396. Accordingly, because Plaintiffs have failed to state an excessive force claim against him, Deputy Westbrook is entitled to qualified immunity and the Court **DISMISSES WITH PREJUDICE** Plaintiffs' Section

1983 excessive force against Deputy Westbrook.

B. State Law Claims

Plaintiffs also bring two state law claims against the Deputies: (1) a false arrest claim under Texas law; and (2) an assault and battery claim under Texas law. (Compl. ¶¶ 49–55.) The Deputies move for summary judgment on these claims, arguing that the claims are legally barred by the Texas Tort Claims Act's ("TTCA") Election of Remedies provision, which states in pertinent part that:

> If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

Tex. Civ. Prac. & Rem. Code § 101.106(f) ("Section 101.106(f)").

In response, Plaintiffs concede that the state law claims against the Deputies "are subject to dismissal." (Dkt. # 24 at 2.) Accordingly, because Plaintiffs' state law claims against the Deputies are based on conduct within the general scope of the Deputies' employment and could have been brought under the TTCA against Gillespie County, on the Deputies' motion, the Court **GRANTS**

summary judgment in favor of Defendants and **DISMISSES** Plaintiffs' state law claims **WITH PREJUDICE**. See Tex. Civ. Prac. & Rem. Code § 101.106(f).

II. Plaintiffs' Motion for Leave to Amend Complaint (Dkt. # 25)

In light of their concession that Plaintiffs' state law claims against the Deputies are subject to dismissal, Plaintiffs seek leave to amend their complaint to add Gillespie County, Texas as a defendant. (Dkt. # 25 at 1–3.) In response, Defendants assert that Plaintiffs have failed to show good cause for such late amendment in light of the Court's Scheduling Order which provided an October 30, 2016 deadline for motions to amend pleadings and a February 17, 2017 dispositive motions deadline. (Dkt. # 26 at 1–2.)

While it is true that courts should "freely grant" leave to amend when justice so requires, see Fed. R. Civ. P. 15(a)(2), the Fifth Circuit has on multiple occasions upheld a district court's denial of a motion to amend where the movant has delayed until after the non-movant has filed a dispositive motion for summary judgment, as is the case here. See In the Matter of Southmark Corp., 88 F.3d 311, 315–16 (5th Cir. 1996); Overseas Inns S.A. P.A. v. United States, 911 F.2d 1146, 1151–52 (5th Cir. 1990); see also Alexander v. Metrocare Servs., No. 3:08-CV-1398-D, 2009 WL 3378625, at *2 n.2 (N.D. Tex. Oct. 21, 2009) ("When leave to amend is sought *after* the summary judgment motion is filed, courts routinely deny leave to amend." (emphasis in original)).

Here, not only do Plaintiffs seek to amend their complaint almost four months after the amended or supplemental pleadings deadline (see Dkt. # 10 (Scheduling Order)), but Plaintiffs seek to amend their complaint after the dispositive motions deadline has passed and after Defendants have filed a dispositive motion. (Id.; Dkt. # 21.) Furthermore, Plaintiffs have failed to provide any explanation, much less good cause, as to why they did not seek to amend their complaint sooner, especially in light of the TTCA's well-established Election of Remedies provision. See S&W Enters., L.L.C. v. SouthTrust Bank of Alabama, NA, 315 F.3d 533, 536 (5th Cir. 2003) ("Only upon the movant's demonstration of good cause to modify the scheduling order will the more liberal standard of Rule 15(a) apply to the district court's decision to grant or deny leave [to amend].") Accordingly, the Court **DENIES** Plaintiffs' Motion for Leave to Amend (Dkt. # 25).

CONCLUSION

For the reasons set forth, the Court: (1) **GRANTS IN PART AND DENIES IN PART** Defendants' Motion for Summary Judgment (Dkt. # 21); and (2) **DENIES** Plaintiffs' Motion for Leave to Amend Complaint (Dkt. # 25).

In summary: (1) Deputy Westbrook is entitled to qualified immunity on Plaintiffs' unreasonable search claim, which the Court **DISMISSES WITH PREJUDICE** against him; (2) Deputy Hindman is not entitled to qualified

immunity on Plaintiffs' unreasonable search claim; (3) Deputy Westbrook is not entitled to qualified immunity on Plaintiffs' unreasonable seizure claim; (4) Deputy Hindman is not entitled to qualified immunity on Plaintiffs' unreasonable seizure claim; (5) Deputy Hindman is entitled to qualified immunity on Plaintiffs' excessive force claim, which the Court **DISMISSES WITH PREJUDICE** against him; (6) Deputy Westbrook is entitled to qualified immunity on Plaintiffs' excessive force claim, which the Court **DISMISSES WITH PREJUDICE** against him. Additionally, the Court **GRANTS** summary judgment in favor of Defendants and **DISMISSES** Plaintiffs' state law claims **WITH PREJUDICE**.

Plaintiffs' remaining claims include: (1) an unreasonable search claim against Deputy Hindman; (2) an unreasonable seizure claim against Deputy Westbrook; (3) and an unreasonable seizure claim against Deputy Hindman. The Court will set a trial date by separate order.

IT IS SO ORDERED.

DATED: Austin, Texas, September 1, 2017.

DAVID ALAN EZRA
UNITED STATES DISTRICT JUDGE