

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

| | | |
|---------------------------------|---|---|
| WILBERT WESLEY LEWIS, |) | |
| |) | |
| Plaintiff, |) | Civil Action No. 7:00-CV-00566 |
| |) | |
| v. |) | <u>MEMORANDUM OPINION</u> |
| |) | |
| CITY OF ROANOKE, et al., |) | By: Samuel G. Wilson, |
| |) | Chief United States District Judge |
| Defendants. |) | |

This is an action for compensatory damages brought by plaintiff Wilbert Wesley Lewis pursuant to 42 U.S.C. § 1983 against defendants City of Roanoke, Officer W. G. Boucher, and Roanoke City Chief of Police Atlas Gaskins, alleging that Officer Boucher used unreasonable and excessive deadly force during a traffic stop in violation of the Fourth and Fourteenth Amendments. The court has jurisdiction pursuant to 28 U.S.C. § 1331. The matter is before the court on the defendants' motion for summary judgment. Finding that there is a genuine issue of material fact regarding whether Boucher shot Lewis in the front or in the back, the court will deny defendant Boucher's motion for summary judgment. However, because Lewis has failed to marshal evidence demonstrating liability on the part of either defendant City of Roanoke or defendant Gaskins, the court will grant their motions for summary judgment.

I.

On December 31, 1999, Officer Boucher noticed that Lewis was driving his automobile at night without his lights on. Boucher signaled Lewis to pull over, which Lewis did after approximately a block and a half. Boucher interpreted Lewis' failure to immediately pull over as an attempt to escape; however, Lewis indicated that he did not pull over immediately because the

city streets were full of parked cars and, thus, there were no immediately-available places to pull over.

Upon pulling over, Lewis immediately exited his vehicle. Boucher, with his gun drawn and K-9 unit at his side, repeatedly instructed Lewis to get on the ground, but Lewis did not obey or respond in any way. Lewis then alleges that his car began to roll forward, so he reached into the car with his right foot and right hand to “grab[] the steering wheel and put on the brakes and put the car in park.” (Lewis Dep. at 40.) Boucher interpreted Lewis’ actions as an attempt to escape or to retrieve a weapon from his car. During this time frame, Lewis’ right hand was not visible to Boucher.

Boucher alleges that Lewis then got out of his car with his right hand behind his back. (Boucher Aff. at ¶ 7.) After Boucher gave Lewis five commands to show his hands or get on the ground, Lewis allegedly “lunged forward jerking his right arm out and straight towards [Boucher].” (Id. at ¶ 8.) At that time, believing that Lewis was getting ready to point a weapon at him, Boucher fired one shot at Lewis. Boucher and Lewis both indicate that Boucher shot Lewis from the front, hitting him in the abdomen. (Id. at ¶ 7, 8; Lewis Dep. at 42.) However, Bruce A. Long, M.D., the doctor that performed emergency surgery on Lewis, has opined “to a reasonable degree of medical certainty that the entrance was from behind, and the exit from in front” based on the fact that the cone-shaped path of destruction in Lewis’ abdomen increased in size from back to front. (Long Dep. at 6-7, 14.)

Lewis filed suit in this court on July 14, 2000, pursuant to 42 U.S.C. § 1983. He moved for summary judgment on January 8, 2001, which the court denied on January 25, 2001, finding that there were genuine issues of material fact interwoven with the case at that time. The defendants filed their own motion for summary judgment on February 20, 2001. The court heard

oral argument on the motion on March 6, 2001, and granted Lewis leave to take the deposition of Dr. Long. Lewis has submitted Dr. Long's deposition to the court, and the motion is now ripe for disposition.

II.

Under the doctrine of qualified immunity, government officials performing discretionary functions are not liable under § 1983 so long as their conduct does not violate “clearly established statutory or constitutional rights of which a reasonable person would have known.” McLenagan v. Karnes, 27 F.3d 1002, 1006 (4th Cir.) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)), cert. denied, 513 U.S. 1018 (1994). In determining whether a police officer is entitled to qualified immunity in a § 1983 suit, a court must determine (1) the specific right allegedly violated; (2) whether at the time of the incident, the right was clearly established; and (3) whether the officer's actions were objectively reasonable.

The right alleged to have been violated in the case at bar is the right against the use of excessive force, secured by the Fourth and Fourteenth Amendments. See Graham v. Connor, 490 U.S. 386, 396-97 (1989) (finding that “*all* claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard.”). The law clearly establishes that “a police officer's use of deadly force is not excessive where he has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or others.” McLenagan, 27 F.3d at 1006-07 (citing Tennessee v. Garner, 471 U.S. 1, 11 (1985)). Regardless of whether probable cause actually existed, if a reasonable officer possessing the same particularized information as the defendants had, believed that his conduct was lawful in light of Garner, then the defendants are entitled to qualified immunity. See id. at

1007.

To ascertain the objective reasonableness of an officer's actions, the court must consider factors such as "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 resisting arrest or attempting to evade arrest by flight." Graham v. Connor, 490 U.S. 386, 396 (1989); see also Sigman v. Town of Chapel Hill, 161 F.3d 782, 787 (4th Cir. 1998). The Fourth Circuit in Rowland v. Perry, 41 F.3d 167 (4th Cir. 1994), explained that:

[t]o gauge objective reasonableness, a court examines only the actions at issue and measures them against what a reasonable police officer would do under the circumstances. Subjective factors involving the officer's motives, intent or propensities are not relevant. The objective nature of the inquiry is specifically intended to limit examination into an officer's subjective state of mind, and thereby enhance the chances of a speedy disposition of the case. Though it focuses on objective facts, the immunity inquiry must be filtered through the lens of the officer's perceptions at the time of the incident in question. Such a perspective serves two purposes. First, using the officer's perception of the facts at the time limits second-guessing the reasonableness of actions with the benefit of 20/20 hindsight. Second, using this perspective limits the need for decision-makers to sort through conflicting versions of the "actual" facts, and allows them to focus instead on what the police officer reasonably perceived. In sum, the officer's subjective state of mind is not relevant to the qualified immunity inquiry but his perceptions of the objective facts of the incident in question are.

Id. at 172-73 (citations omitted). Thus, the critical determination is whether "a reasonable officer could have believed that the use of force alleged was objectively reasonable in light of the circumstances." Vathekan v. Prince George's County, 154 F.3d 173, 179 (4th Cir. 1998).

Here, the factual determination of whether Boucher shot Lewis in the front or in the back is indispensable in deciding whether a reasonable officer could have believed that the use of force against Lewis was objectively reasonable. Boucher and Lewis both state that Boucher shot Lewis in the front. Boucher further indicates in his account of the events that Lewis lunged forward toward him. However, Bruce A. Long, M.D., the doctor that performed emergency surgery on

Lewis, has opined “to a reasonable degree of medical certainty that the entrance was from behind, and the exit from in front” based on the fact that the cone-shaped path of destruction in Lewis’ abdomen increased in size from back to front. (Long Dep. at 6-7, 14.) Dr. Long’s opinion is inconsistent with Boucher’s account of the events, especially Boucher’s statement that Lewis lunged forward toward him, and creates a genuine issue of material fact for a jury to decide. Consequently, the court denies Boucher’s motion for summary judgment.

III.

Lewis faults Police Chief Gaskins for the events of December 31, 1999, due to his failure to adequately train Boucher, poor supervision, and tacit approval of widespread police misconduct. It is well established that supervisory officials may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates. See Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir.), cert. denied, 513 U.S. 813 (1994); Slakan v. Porter, 737 F.2d 368 (4th Cir. 1984), cert. denied, 470 U.S. 1035 (1985); Orpiano v. Johnson, 632 F.2d 1096 (4th Cir. 1980), cert. denied, 450 U.S. 929 (1981); Withers v. Levine, 615 F.2d 158 (4th Cir.), cert. denied, 449 U.S. 849 (1980). In Slakan, the Fourth Circuit reasoned that liability is not premised upon respondeat superior but upon “a recognition that supervisory indifference or tacit authorization of subordinates’ misconduct may be a causative factor in the constitutional injuries they inflict on those committed to their care.” Slakan, 737 F.2d at 372-73.

Three elements are required in order to establish supervisory liability under § 1983: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed “a pervasive and unreasonable risk” of constitutional injury to citizens like the plaintiff; (2) that the supervisor’s response to that knowledge was so inadequate as to show “deliberate indifference to or tacit authorization of the alleged offensive practices,” and (3) that

there was an “affirmative causal link” between the supervisor’s inaction and the particular constitutional injury suffered by the plaintiff. See Shaw, 13 F.3d at 799 (citing Miltier v. Beorn, 896 F.2d 848, 854 (4th Cir. 1990); Slakan, 737 F.2d at 373; Wellington v. Daniels, 717 F.2d 932, 936 (4th Cir. 1983); City of Canton v. Harris, 489 U.S. 378, 390, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989); Larez v. City of Los Angeles, 946 F.2d 630, 645-46 (9th Cir. 1991); Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 572 (1st Cir. 1991); Meade v. Grubbs, 841 F.2d 1512, 1527-28 (10th Cir. 1988)).

Establishing a “pervasive” and “unreasonable” risk of harm requires evidence that the conduct is widespread, or at least that it has been used on several different occasions, and that the conduct engaged in by the subordinate poses an unreasonable risk of harm of constitutional injury. Slakan, 737 F.2d at 373-74. A plaintiff may establish deliberate indifference on the part of the supervisor by demonstrating “continued inaction in the face of documented widespread abuses.” Id. at 373; see Miltier, 896 F.2d at 848; Withers, 615 F.2d at 158; Vinnedge v. Gibbs, 550 F.2d 926, 928 (4th Cir. 1977). However, the plaintiff assumes a heavy burden of proof in establishing deliberate indifference because:

ordinarily, [the plaintiff] cannot satisfy his burden of proof by pointing to a single incident or isolated incidents, for a supervisor cannot be expected to promulgate rules and procedures covering every conceivable occurrence within the area of his responsibilities. Nor can he reasonably be expected to guard against the deliberate criminal acts of his properly trained employees when he has no basis upon which to anticipate the misconduct. A supervisor’s continued inaction in the face of documented widespread abuses, however, provides an independent basis for finding he either was deliberately indifferent or acquiesced in the constitutionally offensive conduct of his subordinates.

Slakan, 737 F.2d at 372-73 (quoting Orpiano, 632 F.2d at 1101 (citations omitted)); see Lopez v. Robinson, 914 F.2d 486 (4th Cir. 1990). Finally, causation may be proven “where the policy

commands the injury of which the plaintiff complains . . . [or] may be supplied by [the] tort principle that holds a person liable for the natural consequences of his actions.” Slakan, 747 F.2d at 376 (quoting Wellington, 717 F.2d at 936).

Here, Lewis has stated claims that defendant Gaskins was responsible for the alleged excessive use of force during the traffic stop, allegedly through his failure to adequately train Boucher, poor supervision, and tacit approval of widespread police misconduct. However, Lewis’ fails to marshal any evidence demonstrating that Gaskins had any direct involvement with the events of December 31, 1999, or that he promulgated any official policy that caused Lewis’ injuries.¹ Nor has Lewis shown any pattern of reckless conduct on the part of Boucher, or any other officer, that Gaskins should have corrected. Consequently, the court grants defendant Gaskins’ motion for summary judgment.

IV.

Lewis also seeks to hold the City of Roanoke liable for its failure to adequately train and supervise Boucher and its tacit approval of widespread police misconduct. “[A] municipality can

¹Lewis has tendered to the court a “preliminary report” from Carl C. Jackson, Jr., a purported law enforcement expert, in which Jackson opines that Boucher is deficient in certain training and that his “disciplinary record raises a ‘red flag’ in terms of attitude and ethics.” (Jackson Memo.) The court cannot consider that report in deciding this summary judgment motion because the report is not a sworn affidavit, nor attached to one that lays a foundation for the report. “Since 1976, affidavits no longer need to be notarized and will be admissible if they are made under penalties of perjury; only unsworn affidavits will be rejected.” 10B Wright, Miller, & Kane, Federal Practice and Procedure: Civil 3d, § 2738 at 363. Although the document contains a notary’s seal, there is no statement indicating that Jackson swore to the notary that the contents of the report were true, nor has the notary even signed the document. Of course, all that is required is a signed statement from the affiant that he swears under penalty of perjury that the contents of the affidavit are true, but this too is missing. Even if the report was a properly-sworn affidavit, it would be insufficient to create a genuine issue of material fact because it is too conclusory in nature and fails to set forth any facts that support Jackson’s opinions relating to Gaskins or the City of Roanoke.

be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue. *Respondeat superior* or vicarious liability will not attach under § 1983.” City of Canton v. Harris, 489 U.S. 378, 385 (1989) (citing Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978)). Thus, there must be a “direct causal link between a municipal policy or custom and the alleged constitutional deprivation.” Id. Failure to train may form the basis for liability under § 1983, but “[o]nly where a municipality’s failure to train its employees in a relevant respect evidences a ‘deliberate indifference’ to the rights of its inhabitants can such a shortcoming be properly thought of as a city ‘policy or custom’ that is actionable under § 1983.” Id. at 389. Justice Brennan explained in Pembaur v. Cincinnati, 475 U.S. 469 (1986), that “municipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives” by city policymakers. Id. at 483-84 (plurality opinion) (quoted in City of Canton, 436 U.S. at 389).

Here, again, Lewis has made allegations but has failed to marshal any evidence showing that the City of Roanoke adopted a policy amounting to deliberate indifference toward the safety of its citizens that caused the events of December 31, 1999. For that matter, Lewis has failed to point to any City policy at all. Lewis has also failed to provide any factual evidence to support his allegations of poor police training and supervision or his assertion that the City ignored widespread police misconduct. Consequently, the court grants the defendant City of Roanoke’s motion for summary judgment.

V.

For the reasons stated above, the court will deny Boucher’s motion for summary judgment

| | | |
|---------------------------------------|---|---|
| Plaintiff, |) | Civil Action No. 7:00-CV-00566 |
| |) | |
| v. |) | <u>ORDER</u> |
| |) | |
| CITY OF ROANOKE, <i>et al.</i> |) | By: Samuel G. Wilson, |
| |) | Chief United States District Judge |
| Defendants. |) | |

In accordance with the Memorandum Opinion entered this day, it is **ORDERED and ADJUDGED** that:

1. Defendant Boucher’s motion for summary judgment is **DENIED**;
2. Defendant Gaskins’ motion for summary judgment is **GRANTED**; and
3. Defendant City of Roanoke’s motion for summary judgment is **GRANTED**.

ENTER: This _____ day of March, 2001.

CHIEF UNITED STATES DISTRICT JUDGE