

15-3764
Soto v. Gaudett

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 - - - - -

4 August Term, 2016

5 (Argued: October 19, 2016

Decided: July 5, 2017)

6 Docket No. 15-3764

7
8 ORLANDO SOTO, Conservator of the Estate of Israel Soto,

9 *Plaintiff-Appellee,*

10 - v. -

11 Chief of Police JOSEPH GAUDET, individually and in his official capacity; Officer
12 MARTIN HEANUE, individually and in his official capacity; Officer DAMIEN CSECH,
13 individually and in his official capacity; Officer CHRIS ROBINSON, individually and in
14 his official capacity; Sergeant CHRISTOPHER STEPNIIEWSKI, individually and in his
15 official capacity; CITY OF BRIDGEPORT,

16 *Defendants-Appellants,*

17 Officer JANE DOE, individually and in her official capacity; Officer JOHN DOE,
18 individually and in his official capacity,

19 *Defendants.**
20

21 Before: KEARSE, JACOBS, and POOLER, *Circuit Judges.*

* The Clerk of Court is directed to amend the official caption to conform with the above.

1 Appeal by defendants police officers, chief of police, and the City of Bridgeport
2 ("City") from so much of an order of the United States District Court for the District of Connecticut,
3 Warren W. Eginton, *Judge*, as denied their motions for summary judgment dismissing on grounds
4 of qualified immunity, claims brought under 42 U.S.C. § 1983 by plaintiff as conservator of the estate
5 of his brother Israel Soto ("Soto") for use of excessive force by the officers in connection with Soto's
6 flight from police. The district court ruled principally that there were genuine issues of material fact
7 precluding the grant of the motions of three officers who deployed tasers against Soto, including one
8 officer whose police cruiser was involved in a collision with Soto. On appeal, those officers argue
9 that their motions should have been granted because their taser deployments were objectively
10 reasonable and because the collision of the police cruiser with Soto was accidental; the City and the
11 police chief argue that they are entitled to qualified immunity on the ground that Soto's constitutional
12 rights were not violated. We conclude that the court erred in denying summary judgment to one
13 officer for his taser deployment; we dismiss the appeals of the other defendants for lack of appellate
14 jurisdiction. *See Soto v. Gaudette*, 2015 WL 6453083 (D. Conn. Oct. 23, 2015).

15 Reversed in part and dismissed in part.

16 MICHAEL P. FOLEY, Jr., Cheshire, Connecticut (David K. Jaffe,
17 Brown Paindiris & Scott, Hartford, Connecticut, on the brief),
18 *for Plaintiff-Appellee*.

19
20 JOHN JERRY GLAS, New Orleans, Louisiana (Deutsch Kerrigan,
21 New Orleans, Louisiana; Richard G. Kascak, Jr., Associate City
22 Attorney for the City of Bridgeport, Bridgeport, Connecticut,
23 on the brief), *for Defendants-Appellants*.

1 KEARSE, *Circuit Judge*:

2 Defendants Joseph Gaudett, Martin Heanue, Damien Csech, Chris Robinson,
3 Christopher Stepniewski, and City of Bridgeport (the "City" or "Bridgeport") (collectively
4 "Defendants") appeal from so much of an order of the United States District Court for the District of
5 Connecticut, Warren W. Eginton, *Judge*, as denied their motions for summary judgment dismissing,
6 on the basis of qualified immunity, claims brought under 42 U.S.C. § 1983 by plaintiff as conservator
7 of the estate of his brother Israel Soto ("Soto") for use of excessive force in the deployment of tasers
8 and in striking Soto with a police cruiser, in connection with Soto's flight from police. Csech,
9 Stepniewski, and Robinson contended that their taser deployments were objectively reasonable;
10 Robinson contended that his vehicle's striking Soto was accidental; and Gaudett and the City sought
11 summary judgment on the ground that Soto's constitutional rights were not violated. Defendants
12 pursue these arguments on appeal. The district court denied these motions on the ground that there
13 are genuine issues of material fact to be tried. For the reasons that follow, we conclude that the court
14 erred in denying summary judgment to Csech and that its other denials of summary judgment are not
15 immediately appealable.

16 I. BACKGROUND

17 The present litigation arises out of events in Bridgeport, Connecticut, beginning shortly
18 after 2 a.m. on January 23, 2008, that commenced as a car-chase, became a foot-chase, and culminated
19 in the capture and arrest of Soto. Heanue, Csech, and Robinson, Bridgeport police officers, and

1 Stepniewski, a police sergeant (collectively the "Officers"), were involved in the pursuit and/or capture
2 of Soto. Gaudett, not alleged to have been personally involved, was Bridgeport's chief of police.

3 The injuries suffered by Soto in the course of those events included a fractured skull
4 and severe traumatic brain damage. The complaint alleges that he lost the ability to speak, walk, or
5 otherwise act as a functional human being, and requires around-the-clock care and life support. The
6 factual evidentiary record in the district court thus consists principally of police records, including
7 reports filed by the Officers, deposition testimony of the Officers, and transcripts of interviews of the
8 Officers by the Bridgeport Police Department's Office of Internal Affairs ("OIA"). The record also
9 includes OIA's interview of Carl Young, one of the other occupants of the pursued vehicle. The
10 general sequence of events is not seriously disputed; the following description, except as indicated,
11 reflects that sequence in the light most favorable to the plaintiff. Various details as to the Officers'
12 reports and sworn statements are added in Part II.C.

13 *A. The Events*

14 At approximately 2:18 a.m. on January 23, 2008, Heanue, driving a marked police car,
15 observed a vehicle--eventually identified as a Toyota Camry (the "Camry")--traveling without
16 headlights, and making a turn without signaling. When Heanue began to follow the Camry and
17 activated his car's siren and flashing lights in an attempt to stop the Camry, the Camry, occupied by
18 three men, accelerated and sped through several red lights. Heanue radioed on a police channel that
19 he was in pursuit, and soon several other police vehicles, with strobe lights and sirens activated, were
20 involved.

1 With Heanue following, the Camry made several turns; sped the wrong way on a one-
2 way street--Fairfield Avenue--nearly colliding with at least one police car coming toward it; and
3 eventually turned south onto Park Avenue, following it to Waldemere Avenue ("Waldemere"), which
4 bordered the north end of Seaside Park ("Seaside"). The Camry went over the curb, onto the grass
5 inside the park, and before it came to a stop the occupants jumped out. Heanue saw the driver fall and
6 be run over by the Camry's left rear tire, and saw one passenger--later identified as Carl Young--exit
7 a rear door and run deeper into the park. The driver of the Camry, after the car rolled over him, got
8 up immediately. Heanue drove into the park to follow Young, whom he captured.

9 In the meantime, Soto--who according to Young was the other passenger in the Camry,
10 not the driver--had exited the car and had run in the opposite direction from that taken by Young.
11 Csech (driving one of the police cars nearly hit by the Camry on Fairfield Avenue) had proceeded
12 down Park Avenue and turned onto Waldemere, where he parked and exited. Csech saw Soto running
13 through the park and yelled at him to stop. Soto continued to run toward the intersection of Park
14 Avenue and Waldemere. Robinson was then slowly driving south on Park Avenue in the northbound
15 lane, scanning the area for suspects. As Soto was running across Park Avenue, Robinson's cruiser
16 struck Soto.

17 Soto was thrown backwards from the collision and hit his head on the ground, but he
18 immediately got up and resumed running. Csech again yelled to Soto to stop; when he did not, Csech,
19 then some 25 feet away, shot Soto with a taser. Soto fell on the pavement, flat on his face, unable to
20 brace himself.

21 Stepniewski did not see Soto's collision with Robinson's cruiser. He had preceded
22 Csech and Robinson down Park Avenue and had turned east on Waldemere; Stepniewski was about

1 1,000 feet east of Park Avenue when he saw Soto running through the park toward Waldemere. When
2 Soto had resumed running after his collision with Robinson's cruiser, Stepniewski and Robinson
3 followed Csech in the foot-chase of Soto; they saw Csech tase Soto, and saw Soto fall. Csech,
4 Stepniewski, and Robinson continued to run toward the fallen Soto. When Soto, entangled in the
5 wires of Csech's taser, appeared to be trying to rise from his prone position, both Robinson and
6 Stepniewski, at or about the same time, shot Soto with their tasers, from a distance of two-to-five feet.

7 After these subsequent taser shots, Soto fell to the ground, did not move again, and was
8 unresponsive. A medical team was summoned and took him to the hospital with serious injuries.

9 In the meantime, the Officers did not catch the third occupant of the Camry, and the
10 vehicle itself had disappeared. It was quickly recovered in a nearby neighborhood, however. It was
11 determined that the Camry had been stolen some weeks earlier, and that its contents on January 23
12 included numerous items of stolen property. Soto was charged with multiple traffic violations and
13 with several crimes, including attempted assault of a police officer. Given his continued physical
14 condition, he has never been convicted, tried, or arraigned on those charges.

15 *B. The Present Action and Defendants' Summary Judgment Motions*

16 In 2010, plaintiff Orlando Soto commenced the present action on behalf of Soto
17 principally under 42 U.S.C. § 1983. The complaint alleged that the Officers violated Soto's Fourth
18 Amendment rights by arresting him without probable cause--apparently on the premise that Soto was
19 not the driver of the Camry (the false arrest claim (count 3))--and by using excessive force in
20 connection with his arrest, to wit, the use of tasers by Csech, Stepniewski, and Robinson, and the
21 collision of Robinson's cruiser with Soto (count 1); it alleged that Gaudett and the City were liable for

1 those violations by reason of maintaining policies, practices, and customs amounting to deliberate
2 indifference to constitutional rights (count 2). The complaint also alleged several state-law claims.

3 Following discovery, Defendants moved in 2015 for summary judgment dismissing
4 the complaint in its entirety. With respect to the § 1983 claims, Defendants principally contended that
5 they were entitled to qualified immunity. Csech, Robinson, and Stepniewski argued that it was not
6 "clearly established" that taser deployments against "fleeing suspects" were unconstitutional
7 (Memorandum in Support of Defendants' Motion for Summary Judgment and Motion for Qualified
8 Immunity ("Defendants' SJ/QI Mem.") at 9) and, alternatively, that their deployments were
9 "objectively reasonable" (*id.* at 19). Robinson also stated that the collision of his cruiser with Soto
10 had been unintentional and argued that he was thus entitled to qualified immunity on the ground that
11 "accidentally striking a fleeing suspect with a police vehicle does not constitute a Fourth Amendment
12 seizure" (*id.* at 27). Gaudett and the City claimed that they were entitled to qualified immunity (*see*
13 *id.* at 36) on the ground that plaintiff had "failed to prove that the (alleged) constitutional violations
14 by the City of Bridgeport Officers were based on a municipal policy, custom or practice" or a
15 "deliberate choice" on the part of policymakers (*id.* at 37-38) and "failed to prove that the (alleged)
16 failure to train was the cause of Mr. Soto's injuries" (*id.* at 38).

17 *C. The Decision of the District Court*

18 The district court granted Defendants' motions to dismiss the claim against Heanue for
19 use of excessive force and the claims against all of the Officers for false arrest. It denied the motions
20 to dismiss (a) the claims that excessive force was used by Csech, Stepniewski, and Robinson in the
21 deployment of their tasers, (b) the excessive force claim based on the collision of Robinson's cruiser

1 with Soto, and (c) the claims against Gaudett and the City. *See Soto v. Gaudette* [sic], No.
2 3:10-cv-106, 2015 WL 6453083 (D. Conn. Oct. 23, 2015).

3 The court discussed the general principles that on a motion for summary judgment, the
4 moving party has the burden of demonstrating the absence of any genuine issue to be tried as to any
5 material fact; that in ruling on such a motion, the court is required to resolve all ambiguities and draw
6 all reasonable inferences against the moving party, viewing the record in the light most favorable to
7 the party against whom summary judgment is sought; and that the court cannot properly resolve a
8 disputed issue of fact by making credibility determinations. *See* 2015 WL 6453083 at *3-*6. The
9 court noted that, in the present case,

10 [d]ue to plaintiff's asserted inability to communicate, the Court has only the
11 defendants' testimony and police reports and records to assess the
12 circumstances of the alleged violations. "[T]he court may not simply accept
13 what may be a self-serving account by the police . . . but must also consider
14 circumstantial evidence that, if believed, would tend to discredit the police
15 officer's story, and consider whether this evidence could convince a rational
16 factfinder that the officer acted unreasonably." *O'Bert ex rel.[.] Estate of*
17 *O'Bert v. Vargo*, 331 F.3d 29, 37 (2d Cir. 2003).

18 2015 WL 6453083, at *3; *see also id.* at *5 (it would be "error if [the court] accepted the officers'
19 version of events without considering any potential factual inferences arising from the described
20 circumstances construed most liberally for plaintiff").

21 Turning to the taser claims, the district court stated as follows:

22 This Court has found no Second Circuit or Supreme Court precedent
23 establishing that a *fleeing suspect* had a right not to be subjected to non-lethal
24 force of a taser as of January 23, 2008. *See Cockrell v. City of Cincinnati*, 468
25 Fed.Appx. 491, 494-97 (6th Cir. 2012) (as of July 3, 2008, *fleeing*
26 misdemeanor did not have "clearly established right" to be free of taser *while*
27 *fleeing*). As of January 23, 2008, Fourth Amendment jurisprudence had "long
28 recognized that the right to make an arrest or investigatory stop necessarily
29 carries with it the right to use some degree of physical coercion or threat

thereof to effect it" and that the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene rather than with the 20/20 vision of hindsight. *Graham* [v. *Connor*], 490 U.S. [386,] 396 [(1989)].

At the same time, according to Second Circuit precedent, it was also clearly established law as of January 23, 2008, that use of significant non-lethal force--such as a taser or pepper spray--against a *compliant or non-threatening* suspect *would* violate the Fourth Amendment. *Tracy v. Freshwater*, 623 F.3d 90, 98-99 (2d Cir. 2010) (considering incident occurring in April 2000)

2015 WL 6453083, at *5 (emphases added). The court concluded that there must therefore be "a factual determination whether each officer's taser deployment represented a response to a non-compliant individual's efforts to resist arrest or a gratuitous use of force against an incapacitated individual who posed no immediate threat" of force or flight. *Id.*

"[M]indful that the officers' testimony and police reports comprise the evidentiary basis" for such a determination, *id.*, thus making the resolution of the factual issue depend on assessments of credibility, the court concluded that "[a] jury will be required to determine whether to accept as credible Officer Csech's depiction of the events leading to his taser deployment," *id.* at *6. The court reached the same conclusion with respect to the taser deployments by Robinson and Stepniewski, stating that

the Court cannot rely without question upon defendant Robinson's and Stepniewski's reports that they deployed their tasers without knowledge of each other's actions when they both observed plaintiff pushing up off the ground. *Questions of fact remain relative to whether plaintiff presented a threat or resistance [sic] when he was lying face down on the ground after having been hit by a car and tased in the back*; and whether either Robinson or Stepniewski perceived one another's conduct prior to resolving to deploy a taser.

Id. (emphasis added).

1 With respect to the claim that the collision between Robinson's cruiser and Soto
2 constituted the use of excessive force, the district court similarly concluded that the matter of whether
3 that collision was accidental or intentional depended on assessment of Robinson's credibility:

4 [Robinson] asserts that he did not commit a constitutional violation of
5 plaintiff's rights because he did not intentionally strike plaintiff. He also
6 contends that he is entitled to qualified immunity. *Consistent with its previous*
7 *discussion, the Court cannot determine credibility or intent on summary*
8 *judgment. The motion for summary judgment will be denied on this basis.*

9 *Id.* (emphasis added).

10 Finally, in denying the summary judgment motions of Gaudett and the City, the court
11 stated as follows:

12 Defendants maintain that Bridgeport's policies concerning the use of
13 force and tasers were consistent with other police departments' comparable
14 policies at the time. Defendants assert further that plaintiff has not raised an
15 inference that Bridgeport, through its policy maker, made a "deliberate choice"
16 not [to] train its police officers or that there was any deficient training that was
17 likely to result in a violation of constitutional rights. Plaintiff has submitted
18 evidence, including an expert report, that raises an inference of *officer*
19 *noncompliance* with Bridgeport police procedures, *deficient police*
20 *investigations, failure to provide additional training or counseling despite*
21 *notice of deficiencies, and inadequate internal investigations.* The Court will
22 leave plaintiff to his proof that such policies or practices resulted in a police
23 department that was deliberately indifferent to excessive force violations.

24 2015 WL 6453083, at *8 (emphases added).

25 II. DISCUSSION

26 On appeal, Defendants contend principally (a) that Csech, Stepniewski, and Robinson
27 should have been granted summary judgment on the basis of qualified immunity because taser

1 deployments against a fleeing or threatening suspect did not violate any clearly established
 2 constitutional right; (b) that Robinson was entitled to such a judgment with respect to his cruiser's
 3 collision with Soto because that collision was accidental; and (c) that Gaudett and the City were
 4 entitled to qualified immunity on the ground that none of Soto's constitutional rights were violated.
 5 Although Heanue also was designated as an appellant in this appeal, the district court had dismissed
 6 all of the § 1983 claims against him, and no arguments are presented on his behalf.

7 For the reasons that follow, we conclude that, given the pertinent allegations in the
 8 complaint, the district court erred in failing to apply the fleeing-suspect principle to Csech and should
 9 have granted his qualified-immunity-based motion for summary judgment. With regard to
 10 Stepniewski and Robinson, we lack jurisdiction to entertain their appeals, because the district court
 11 denied their motions on the ground that there were genuine issues of material fact to be resolved
 12 before their entitlement to qualified immunity could be known, and because the record, when viewed
 13 in the light most favorable to the plaintiff, does not entitle them to qualified immunity as a matter of
 14 law. The appeals by the City and Gaudett in his official capacity--entities to which principles of
 15 qualified immunity are inapposite--are also dismissed for lack of appellate jurisdiction.

16 A. *Qualified Immunity, Summary Judgment, and Appealability*

17 "The doctrine of "[q]ualified immunity shields government officials from civil damages
 18 liability unless the official violated a statutory or constitutional right that was clearly established at
 19 the time of the challenged conduct.'" *Rogoz v. City of Hartford*, 796 F.3d 236, 247 (2d Cir. 2015)
 20 ("*Rogoz*") (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)); see, e.g., *Tracy v. Freshwater*, 623
 21 F.3d 90, 95-96 (2d Cir. 2010) ("*Tracy*"); *Papineau v. Parmley*, 465 F.3d 46, 55 (2d Cir. 2006). When

1 a defendant official seeks summary judgment on the ground that he is entitled to qualified immunity,
2 the motion should be granted if either the evidence, viewed in the light most favorable to the plaintiff,
3 is insufficient to establish the violation of a statutory or constitutional right, or if that right was not
4 clearly established at the time of the alleged violation. *See, e.g., Tracy*, 623 F.3d at 96; *Rogoz*, 796
5 F.3d at 247.

6 A motion for summary judgment may be granted "if the movant shows that there is no
7 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."
8 Fed. R. Civ. P. 56(a). Summary judgment is appropriate when "there can be but one reasonable
9 conclusion as to the verdict," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) ("*Liberty*
10 *Lobby*"), *i.e.*, "it is quite clear what the truth is," *Poller v. Columbia Broadcasting System, Inc.*, 368
11 U.S. 464, 467 (1962) (internal quotation marks omitted), and no rational factfinder could find in favor
12 of the nonmovant. In deciding such a motion, the court cannot properly make credibility
13 determinations or weigh the evidence. "Credibility determinations, the weighing of the evidence, and
14 the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Liberty*
15 *Lobby*, 477 U.S. at 255; *see, e.g., Agosto v. INS*, 436 U.S. 748, 756 (1978) ("a district court generally
16 cannot grant summary judgment based on its assessment of the credibility of the evidence presented").
17 Summary judgment should be denied if, when the party against whom summary judgment is sought
18 is given the benefit of all permissible inferences and all credibility assessments, a rational factfinder
19 could resolve all material factual issues in favor of that party. *See, e.g., Liberty Lobby*, 477 U.S.
20 at 248.

21 In cases in which officers have used deadly force, leaving "the witness most likely to
22 contradict" the officers' version of the events "unable to testify[,] . . . the court may not simply accept

1 what may be a self-serving account by the police officer" but must instead "consider circumstantial
 2 evidence that, if believed, would tend to discredit the police officer's" version and must "undertake
 3 a fairly critical assessment of, *inter alia*, the officer's original reports or statements . . . to decide
 4 whether the officer's testimony could reasonably be rejected at a trial." *O'Bert ex rel. Estate of O'Bert*
 5 *v. Vargo*, 331 F.3d 29, 37 (2d Cir. 2003) ("*O'Bert*") (internal quotation marks omitted). As the district
 6 court here noted, the record should be given the same careful scrutiny where the alleged victim of
 7 excessive force is alive, but the events have left him incapable of communicating.

8 Ordinarily, the denial of summary judgment is not immediately appealable because
 9 such a decision is not a "final" judgment, 28 U.S.C. § 1291. *See generally Cohen v. Beneficial*
 10 *Industrial Loan Corp.*, 337 U.S. 541 (1949). However, where a summary judgment motion is based
 11 on a substantial claim of qualified immunity, the district court's denial of the motion is immediately
 12 appealable under the *Cohen* doctrine to the extent that the denial turned on an issue of law, *see, e.g.*,
 13 *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), although not to the extent that the merits of the defense
 14 depend on the resolution of questions of fact, *see, e.g., id.*; *Behrens v. Pelletier*, 516 U.S. 299, 313
 15 (1996); *Johnson v. Jones*, 515 U.S. 304, 313-18 (1995); *O'Bert*, 331 F.3d at 38; *Salim v. Proulx*, 93
 16 F.3d 86, 89 (2d Cir. 1996) ("*Salim*")); *In re State Police Litigation*, 88 F.3d 111, 124 (2d Cir. 1996).
 17 The "portion of a district court's summary judgment order that, though entered in a 'qualified
 18 immunity' case, determines only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or
 19 may not, be able to prove at trial . . . is not appealable." *Johnson*, 515 U.S. at 313.

20 Thus, "after the denial of the defendants' motions for summary judgment, 'we have
 21 jurisdiction to review a denial of qualified immunity to the extent it can be resolved on stipulated
 22 facts, or on the facts that the plaintiff alleges are true, or on the facts favorable to the plaintiff that the

trial judge concluded the jury might find.'" *Terebesi v. Torres*, 764 F.3d 217, 222 (2d Cir. 2014) (quoting *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004) (emphasis ours)), *cert. denied* 135 S. Ct. 1842 (2015). "What we may not do, after *Johnson* and *Behrens*, is entertain an interlocutory appeal in which a defendant contends that the district court committed an error of law in ruling that the plaintiff's evidence was sufficient to create a jury issue on the facts relevant to the defendant's immunity defense." *Salim*, 93 F.3d at 91.

B. *Claims of Excessive Force*

"Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use *some degree* of physical coercion or threat thereof to effect it." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (emphasis added). However, it is also well established that law enforcement officers violate the Fourth Amendment if the amount of force they used was not "'objectively reasonable' in light of the facts and circumstances confronting them." *Id.* at 397. "[P]roper application" of "[t]he test of reasonableness" in this context

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 resisting arrest or attempting to evade arrest by flight*. See *Tennessee v. Garner*, 471 U.S. [1], 8-9 [(1985)] (the question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure").

Graham, 490 U.S. at 396 (other internal quotation marks omitted) (emphases ours); *see, e.g., Rogoz*, 796 F.3d at 246; *Salim*, 93 F.3d at 91.

Though the use of force may be reasonable against a suspect who is fleeing, it may be objectively unreasonable against that suspect when he has been stopped and no longer poses a risk of

1 flight. *See, e.g., Tracy*, 623 F.3d at 96-98 (officer entitled to qualified-immunity-based summary
 2 judgment with respect to claim that he jumped on a suspect who admittedly was attempting to flee,
 3 but not with respect to claim that--on the plaintiff's version of the events--he sprayed the suspect with
 4 pepper spray from inches away, when the suspect was in handcuffs). Thus, we have not applied the
 5 fleeing-suspect principle to one who is no longer fleeing.

6 The calculus of reasonableness must embody allowance for the fact that police
 7 officers are often forced to make split-second judgments--in circumstances that
 8 are tense, uncertain, and rapidly evolving--about the amount of force that is
 9 necessary in a particular situation.

10 *Graham*, 490 U.S. at 396-97. "The 'reasonableness' of" the amount of force used thus "must be judged
 11 from the perspective of a reasonable officer on the scene . . . at the moment" the force is used. *Id.*
 12 at 396; *see, e.g., Rogoz*, 796 F.3d at 246-47; *Tracy*, 623 F.3d at 96; *O'Bert*, 331 F.3d at 37, 40.

13 *C. The Appeals of the Present Defendants*

14 Within the above framework, we conclude that Csech's appeal from the denial of his
 15 motion for summary judgment on the basis of qualified immunity is properly before us but that the
 16 other appeals are not, and that Csech was entitled to summary judgment.

17 1. *Csech's Deployment of His Taser*

18 The complaint alleges without qualification--and Defendants admit--that Csech "fired
 19 his taser gun, from behind, striking Mr. Soto," "while chasing Mr. Soto." (Complaint ¶ 17; *see*
 20 Answer ¶ 17.) There is thus no dispute as to the fact that when Csech shot Soto with his taser, Soto
 21 was fleeing.

1 As the district court noted, no precedent as of January 23, 2008, established that a
2 suspect who was fleeing had a right not to be stopped by means of a taser. There being no remaining
3 material facts to be determined with respect to the excessive force claim against Csech, the undisputed
4 fact that Soto was fleeing when Csech tased him was therefore dispositive. Csech should have been
5 granted summary judgment on the basis of qualified immunity, dismissing this claim against him.

6 *2. The Taser Deployments by Stepniewski and Robinson*

7 Although Stepniewski and Robinson argue that they too were entitled to summary
8 judgment based on qualified immunity because it was not clearly established that taser deployments
9 against "fleeing" suspects were unconstitutional (*e.g.*, Defendants' brief on appeal at 2, 41-53), there
10 is no allegation in the complaint similar to the ¶ 17 allegation about Csech. Rather than alleging that
11 Stepniewski and Robinson, when they fired their tasers, were chasing Soto or that Soto was still
12 fleeing, the complaint alleges that Soto had fallen to the ground upon being tased by Csech and that
13 Stepniewski and Robinson then tased Soto "[w]hen Mr. Soto, who posed no physical threat to the
14 officers pursuing him, attempted to return to his feet" (Complaint ¶ 18). While denying that Soto
15 posed no threat, Defendants in their answer admitted that Stepniewski and Robinson tased Soto while
16 he was "attempting to return to his feet." (Answer ¶ 18.)

17 Defendants argue that Stepniewski and Robinson tased Soto because he had been
18 fleeing and they believed he might be about to attempt to resume flight or might pose a threat of harm
19 to the Officers. In aid of their argument, Defendants maintain, as they did in the district court, that
20 Soto was the driver of the Camry (*see, e.g.*, Defendants' brief on appeal at 9, 10; Defendants' SJ/QI
21 Mem. at 1, 3, 34), that the driver had sought to flee in the Camry, and that on Fairfield Avenue they

1 believed he had attempted to hit the police cars coming toward him. (*See, e.g.*, Defendants' SJ/QI
2 Mem. at 3 ("For the sake of clarity, Defendants note *Mr. Soto was the driver* of the stolen Camry who
3 committed the felony crime of assaulting a police officer when he swerved the Camry at Officer
4 Csech's vehicle." (emphasis added)).) However, whether Soto was the Camry's driver--which is
5 disputed, and which Defendants' Rule 56.1 Statement, *see* D. Conn. Local Rule 56(a)(1), did not assert
6 was undisputed--is far from clear. Young, the other captured occupant, stated that the driver of the
7 Camry was a man named "Jose," not Israel Soto. (Transcript of Young OIA interview, sworn to April
8 17, 2009 ("Young Aff."), at 2, 9.) Further, any notion that Stepniewski might have assumed that Soto
9 had been the driver of the Camry on the theory that there were no other occupants is dispelled by the
10 fact that during the chase, Stepniewski radioed that he had seen something thrown from the Camry's
11 window by "the front passenger" (Transcript of Stepniewski OIA interview, sworn to July 31, 2008,
12 at 2). Finally, although Heanue--who had once arrested Soto some eight years earlier--told OIA in
13 February 2008 that he had thought the Camry driver might be Soto, he did not mention that thought
14 in his radio transmissions (*see* Deposition of Martin Heanue at 217); he testified that when he saw the
15 Camry, he "did not have enough . . . visual contact to make a positive ID on any of the individuals
16 within that car" (*id.*); and he told OIA that "when we got to Seaside, you couldn't see squat"
17 (Transcript of Heanue OIA interview, sworn to July 17, 2008, at 8).

18 Defendants also suggest that Soto may have posed a threat of injury to the Officers
19 because he may have had a gun. But none of the Officers said they observed any sign of a weapon or
20 any gesture by Soto that suggested a weapon. (*See, e.g.*, Deposition of Chris Robinson, July 31, 2013
21 ("Robinson 7/31 Dep."), at 145 ("I never saw a weapon on him" and never saw him make a movement

1 as if he had a weapon); Deposition of Damien Csech ("Csech Dep."), at 101 (Csech "never saw a
2 weapon on the person who [he] TASERed").)

3 Finally, Defendants, arguing relentlessly that there was no established law against using
4 their tasers on a "fleeing" suspect (*e.g.*, Defendants' brief on appeal at 2, 20, 21, 22, 41, 42, 43, 44, 46,
5 47), have not accepted for purposes of this appeal plaintiff's view that Soto, at the moment
6 Stepniewski and Robinson tased him, was neither threatening nor fleeing, and they do not they
7 describe the record in the light most favorable to the plaintiff. For example, there was testimony from
8 Young that Soto had become both incapacitated and compliant. In his OIA interview, Young stated
9 that at some point after he fled from the Camry he saw that Soto, having run in the opposite direction,
10 had fallen and had not gotten up. (*See* Young Aff. at 10.)

11 The record also includes deposition testimony from Csech, Stepniewski, and Robinson,
12 indicating that when Stepniewski and Robinson tased Soto, they were within arm's reach of him and
13 he was on the ground, in no position to flee. After Csech tased Soto, all three of those Officers ran
14 toward Soto--with Stepniewski and Robinson three-to-five feet from each other (*see, e.g.*, Robinson
15 7/31 Dep. at 40-41, 44) and Csech between them (*see, e.g.*, Csech Dep. at 199, 201)--and Stepniewski
16 and Robinson tased Soto from as close as two feet away. (*See, e.g.*, Deposition of Chris Robinson,
17 July 30, 2013 ("Robinson 7/30 Dep."), at 100 ("Q. And the two of you . . . TASERed Israel Soto from
18 behind? A. No. He was laying on the ground, getting up."); *id.* at 138 ("he hadn't gotten up yet"; "his
19 hands were still on the ground"); Transcript of Robinson OIA interview, sworn to February 19, 2009
20 ("Robinson Aff."), at 13 ("When I tased him, he was down; he was . . . trying to like push up, get
21 up."); Robinson 7/31 Dep. at 128 (when he saw Soto make that movement, Robinson was "three to
22 five feet" away from Soto); *id.* at 39 ("Q. [Stepniewski] . . . and you were both a couple of feet away

1 from the person that was TASERed? A. Yes."); Robinson 7/30 Dep. at 105 ("I know I tased him
2 once," "from about two feet away").)

3 In light of this evidence, a rational juror could find that, when Stepniewski and
4 Robinson fired their tasers, Soto had never given any indication of possessing a weapon and was not
5 fleeing; that Soto was on the ground, completely entangled in taser wires (*see* Robinson Aff. at 5
6 ("there were wires everywhere")), struggling even to get into a push-up position; and that with
7 Stepniewski and Robinson in such close proximity to Soto in those circumstances, the firing of their
8 tasers constituted objectively unreasonable use of force.

9 The district court's ruling that the evidence, taken in the light most favorable to the
10 plaintiff, was sufficient to create triable issues relevant the entitlement of Stepniewski and Robinson
11 to qualified immunity is not immediately appealable.

12 3. *Robinson's Collision with Soto*

13 Defendants argued that Robinson was entitled to qualified immunity and summary
14 judgment "arising out of *his accidental* collision with Mr. Soto because *accidentally striking* a fleeing
15 suspect with a police vehicle does not constitute a Fourth Amendment seizure." (Defendants' SJ/QI
16 Mem. at 26-27 (emphases added).) The district court did not reject the principle that the Fourth
17 Amendment does not encompass a use of force that was not intentional. *See generally Brower v.*
18 *County of Inyo*, 489 U.S. 593, 596-97 (1989) ("a Fourth Amendment seizure [occurs] . . . when there
19 is a governmental termination of freedom of movement *through means intentionally applied*"
20 (emphasis in original)). Rather, the court ruled that there was a genuine issue of fact to be tried as to
21 whether or not Robinson hit Soto intentionally; and the applicability of the accidental-contact principle

1 would depend on an assessment of Robinson's credibility, a matter for a factfinder, not for the court
2 on a motion for summary judgment. (*See* Part I.C. above.)

3 Defendants argue that plaintiff "produced no direct or circumstantial evidence that
4 Robinson intentionally struck Soto" (Defendants' brief on appeal at 24); but a factfinder's assessment
5 of a party's credibility may be influenced by internal inconsistencies in his factual presentation, and
6 there are several here in the defense descriptions of the collision. Robinson's OIA interview with
7 respect to the collision between his car and Soto contained apparent inconsistencies, as Robinson
8 described what happened after Soto "got hit by" the cruiser (Robinson Aff. at 13) but also stated that
9 Soto instead ran into the cruiser. Robinson's statements to OIA included the following:

10 ■ "[OIA Question:] [W]hen you struck the suspect, he fell backwards, hitting
11 his head, is that your conclusion? ROBINSON: Yes." (Robinson Aff. at 13);

12 ■ Soto fell backwards "after he got hit by the vehicle" (*id.* at 13);

13 ■ "[OIA Question:] When you hit him, you said he fell back? ROBINSON: He fell
14 back" (*id.* at 15);

15 ■ "When I hit him, he went back" (*id.* at 17).

16 But then Robinson also stated:

17 ■ "[OIA Question:] You ran into him? ROBINSON: The vehicle...he ran into
18 me actually" (*id.*);

19 ■ "He ran into me. I was coming to a stop" (*id.*);

20 ■ "I come to a stop" (*id.*);

21 ■ "He . . . hit[] the car" (*id.* at 17-18);

22 ■ "[H]e ran into me. I didn't run into him" (*id.* at 18).

23 Robinson's deposition testimony underwent a similar revision. He at first testified that "as soon as I

1 basically hit him, the car stopped" (Robinson 7/30 Dep. at 184); but he thereafter testified that "Soto
2 ran into [my] cruiser" (Robinson 7/31 Dep. at 26).

3 In sum, with respect to the moment of the collision, Robinson testified that his car was
4 stopped, or was coming to a stop, or stopped as soon as it hit Soto; and that the cruiser hit Soto, or
5 Soto ran into the cruiser.

6 Csech was a witness to the collision, and the path of his description resembled that of
7 Robinson, beginning with statements that Soto was struck by Robinson's cruiser and ending with
8 statements that Soto had not in fact been struck but instead had run into the cruiser. In his 2008 OIA
9 interview, Csech testified that Soto ran in front of Robinson's car and "got hit by the car" (Transcript
10 of Csech OIA interview, sworn to February 23, 2009, at 3). He said, "I observed the male run in front
11 of the Police vehicle" and "[g]et hit. Get knocked to the ground." (*Id.* at 6.) And in his 2013
12 deposition, Csech initially testified similarly:

13 ■ Soto "ran in front of the police vehicle and was struck and knocked to the ground"
14 (Csech Dep. at 161);

15 ■ Csech "saw [Soto] get hit by the car, knocked to the ground," knocked back "a
16 couple feet" (*id.* at 181).

17 However, Csech later maintained instead that

18 ■ Soto "didn't get hit by the police car"; "he ran into the police car" (*id.* at 213);

19 ■ "he ran into it" (*id.* at 214);

20 ■ "Soto ran into the police vehicle" (*id.* at 227).

21 Lieutenant Thomas Lula, a supervisor of the Officers, testified in his OIA interview
22 that, shortly after the final tasing of Soto, Lula was informed by a sergeant other than Stepniewski that
23 Robinson had "struck this individual with his patrol car" (Transcript of Lula OIA interview, sworn to

1 June 25, 2009, at 4). When Lula inquired of Stepniewski, the response was that "Robinson came up
2 to Stepniewski and told him listen, you know[,] I hit the guy." (*Id.*)

3 As noted in *Graham*, "police officers are often forced to make split-second judgments--
4 in circumstances that are tense, uncertain, and rapidly evolving." 490 U.S. at 397. Robinson, driving
5 down Park Avenue looking for suspects, faced the need to make just such a judgment when he saw
6 a fleeing suspect suddenly appear in front of his car. Did he brake and swerve in an effort to avoid
7 hitting the suspect and strike him accidentally? Or did he stop the cruiser, only to have Soto run into
8 it? Or did he decide to take advantage of the opportunity to stop the suspect by hitting him with the
9 cruiser?

10 Robinson's own statements support an inference that his cruiser struck Soto. And the
11 revisions of that aspect of his earliest statements may cast doubt on the credibility of his assertions that
12 his collision with Soto was accidental. The district court's ruling that the record evidence is sufficient
13 to require a trial on these issues affecting the applicability of the accidental-contact principle is not
14 immediately appealable.

15 4. *The Qualified Immunity Contentions of Gaudett and the City*

16 Both Gaudett--who was not alleged to have had any personal involvement in the events
17 concerning Soto--and the City also sought summary judgment dismissing the claims alleging
18 deliberate municipal indifference enabling the Officers' alleged constitutional violations. The district
19 court denied their motions because of the presence of genuine issues of material fact to be tried. On
20 appeal the City and Gaudett argue that they should have been granted summary judgment on the
21 ground of qualified immunity. We dismiss their appeals for lack of appellate jurisdiction.

1 The defense of qualified immunity protects a government official, sued for actions he
2 took under color of state law, from claims for damages against him in his individual capacity. That
3 defense does not belong to the governmental entity; the entity itself is not allowed to assert that
4 defense. *See Owen v. City of Independence*, 445 U.S. 622, 638 (1980); *id.* at 657 ("municipalities
5 have no immunity from damages liability flowing from their constitutional violations"); *Morris v.*
6 *Lindau*, 196 F.3d 102, 111 (2d Cir. 1999) ("municipalities have no immunity defense, either qualified
7 or absolute, in a suit under § 1983"). And since a suit against a government official in his official
8 capacity is the equivalent of a suit against the government entity, *see generally Kentucky v. Graham*,
9 473 U.S. 159, 165-66 (1985), the defense of qualified immunity is also unavailable to the individual
10 sued in his official capacity, *see, e.g., Lore v. City of Syracuse*, 670 F.3d 127, 164 (2d Cir. 2012); *Ying*
11 *Jing Gan v. City of New York*, 996 F.2d 522, 529 (2d Cir. 1993).

12 An immediate appeal from the denial of a qualified-immunity-based motion for
13 summary judgment is permitted only if the defendant's claim of qualified immunity is "substantial."
14 *E.g., In re State Police Litigation*, 88 F.3d at 124; *see Mitchell*, 472 U.S. at 525-27 (principles
15 allowing immediate appeal of the denial of a "substantial" defense of absolute immunity are applicable
16 to the defense of qualified immunity). The claims of Gaudett and the City of entitlement to qualified
17 immunity, a defense that is doctrinally inapplicable to them, are not "substantial." Their appeals are
18 dismissed for lack of appellate jurisdiction.

CONCLUSION

We have considered all of Defendants' arguments on this appeal and, except as indicated above, have found in them no basis for appellate jurisdiction. To the extent that the order of the district court denied summary judgment to Csech, it is appealable and is reversed. In all other respects, the appeal is dismissed.