Circuit Court for Prince George's County
Case No. CAL20-12021

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND**

No. 1266

September Term, 2022

ESTATE OF LEONARD SHAND

v.

CITY OF HYATTSVILLE, MARYLAND, et al.

Leahy,
Beachley,
Moylan, Charles E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: May 31, 2023

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

In this case involving the alleged excessive use of police force, the Estate of Leonard Shand ("Estate") appeals the Circuit Court for Prince George's County's grant of summary judgment in favor of appellees City of Hyattsville and two of its police officers, Lieutenant Zachary Nemser and Private First Class ("PFC") Scott Hall. In granting summary judgment, the court found that the tactics used by the Hyattsville police officers did not violate the decedent's rights under Article 26 of the Maryland Declaration of Rights. We have reduced the Estate's submission of error to a single question:[1]

> Did the circuit court err in granting summary judgment in favor of appellees on the Estate's claim of excessive use of police force pursuant to Article 26 of the Maryland Declaration of Rights?

For the reasons that follow, we reverse and remand.

FACTS AND PROCEEDINGS[2]

On September 26, 2019, a transmission on the police radio announced that a man, who had apparently assaulted a Starbucks barista a few days earlier, was back at the

[1] The Estate presents the following assignments of error:

1. The court misapplied City & Cty. of S.F. v. Sheehan, 575 U.S. 600 (2015) caselaw when it determined merely bad police tactics do not amount to a Fourth Amendment constitutional violation.

2. The Circuit Court abused its discretion when it determined the facts in dispute and determined that the Defendants' actions were reasonable at the Summary Judgment Hearing, imposing the Circuit Court as the fact finder instead of the jury.

[2] Because this appeal is from the grant of a motion for summary judgment, we recite the facts in a light most favorable to the Estate as the non-moving party.

Starbucks. Officer Evans[3] responded and encountered Leonard Shand on the street. Officer Evans advised other officers by radio that Mr. Shand was armed with a knife. Police officers from multiple police departments responded to Officer Evans' radio transmission. Among those responding to the scene were Lieutenant Zachary Nemser and PFC Scott Hall of the Hyattsville Police Department.

When PFC Hall arrived on the scene, "Shand was being confronted with at least 10 to 12 police officers." Mr. Shand was screaming at officers about "an altercation he [previously] had with a New Carrollton officer" during which he had been stabbed. After learning that officers had unsuccessfully attempted to subdue Mr. Shand with tasers and pepper spray, PFC Hall arranged for another officer to charge and kick Mr. Shand to the ground, but that effort also failed. Next, officers attempted a vehicle takedown,[4] but Mr. Shand was able to avoid contact with the police vehicle. Throughout the encounter with Mr. Shand, officers pleaded with him to drop the knife, to no avail. Instead, Mr. Shand ignored police commands, and ultimately drew a second knife.

When Lieutenant Nemser arrived on the scene, Mr. Shand was holding a small knife in each hand and was "standing in the center of [an] intersection with kind of a semicircle of officers around him." At this point, Mr. Shand was "contained and standing still" and

[3] Officer Evans' first name does not appear in the record.

[4] PFC Hall described the vehicle takedown as a plan "to bump [Shand] and knock him over and hopefully get him to drop the knives" but "the vehicle never made contact with him."

approximately 15 to 25 feet away from officers.[5] As the officer in command, Lieutenant Nemser immediately went to the patrol supervisor, Corporal Tulio Quevedo of the Hyattsville Police Department, and PFC Hall to devise a plan to resolve the situation. Although Corporal Quevedo wanted to send his police dog to subdue Mr. Shand, he declined to do so because he feared that Mr. Shand would stab the dog. Corporal Quevedo offered that, "If we can just get him to drop one of the knives, I can send in the dog." Accordingly, after a "very brief conversation," the three officers decided to contemporaneously deploy PFC Hall's department-issued distraction device—a flash bang grenade[6]—and Lieutenant Nemser's bean bag shotgun[7] as part of their plan to subdue Mr. Shand. Specifically, the officers hoped that "the discomfort from the [bean bag] rounds and the disorientation and distraction from the device" would cause Mr. Shand to drop at least one of his knives. PFC Hall proceeded to roll the flash bang grenade toward Mr. Shand, followed by Lieutenant Nemser firing the bean bag shotgun.[8] Mr. Shand immediately began running in the opposite direction of the flash bang grenade and toward

[5] Lieutenant Nemser testified about the "21-foot principle," meaning that an average person can close a 21-foot gap before an officer is able to draw a weapon.

[6] PFC Hall described a flash bang grenade as a device that "creates a very bright flash of light and a very loud boom."

[7] Lieutenant Nemser described a bean bag shotgun as a "[l]ess lethal shotgun" and the only difference between a shotgun and a bean bag shotgun "is the round that's, that's fired from it." PFC Hall described a person being hit with a bean ban shotgun "akin to a major league pitcher throwing a baseball and hitting a person."

[8] PFC Hall testified that he did not "announce" the flash bang grenade to Mr. Shand, but also stated that he yelled "bang out" prior to deployment.

Lieutenant Nemser.[9] Lieutenant Nemser continued firing his bean bag shotgun, discharging four rounds while Mr. Shand continued toward him with a knife in each hand. In response, multiple officers fired their service weapons, killing Mr. Shand. The entire altercation with Mr. Shand lasted roughly thirty minutes, during which Mr. Shand meandered a quarter of a mile on public streets.

On May 11, 2020, the Estate of Leonard Shand filed a complaint against the City of Hyattsville, Prince George's County, and the City of Mount Rainier for use of excessive force in violation of Article 26 of the Maryland Declaration of Rights. On September 28, 2020, the Estate amended its complaint to add counts of excessive force and assault and battery against Lieutenant Nemser and PFC Hall. The amended complaint also included a survival action asserted by the Estate against each defendant.[10] Prince George's County, Mt. Rainier, the City of Hyattsville, Lieutenant Nemser, and PFC Hall all moved for summary judgment. At the motions hearing on August 24, 2022, the court first granted summary judgment in favor of Prince George's County and Mt. Rainier, finding that their officers' use of deadly force against Mr. Shand was reasonable. The court then granted summary judgment in favor of the City of Hyattsville, Lieutenant Nemser, and PFC Hall.

[9] We recognize that both Lieutenant Nemser and PFC Hall testified that Mr. Shand started running before the flash bang grenade detonated, but we adhere to viewing the evidence in a light most favorable to the Estate.

[10] The amended complaint also included a wrongful death claim by Sonia Barnett, Mr. Shand's mother, against each defendant. Ms. Barnett is not a party to this appeal.

The Estate timely appealed only the grant of summary judgment in favor of the City of Hyattsville, Lieutenant Nemser, and PFC Hall.[11] As noted, we shall reverse and remand.

STANDARD OF REVIEW

"We review a grant of summary judgment *de novo*." *Smith v. Bortner*, 193 Md. App. 534, 543 (2010) (citing *Beyer v. Morgan State Univ.*, 369 Md. 335, 359 (2002)). "Maryland Rule 2-501 authorizes a grant of summary judgment where 'there is no genuine dispute as to any material fact and . . . the party is entitled to judgment as a matter of law.'" *Id.* (alteration in original). "When reviewing the grant or denial of a motion for summary judgment we must determine whether a material factual issue exists, and all inferences are resolved against the moving party." *Id.* (quoting *Olde Severna Park Improvement Ass'n v. Gunby*, 402 Md. 317, 328 (2007)). "If we find that there is a genuine dispute of a material fact, then we must reverse the circuit court's grant of summary judgment. If we find that there is no genuine dispute of a material fact, we must then determine whether the moving party was entitled to judgment as a matter of law." *Piscatelli v. Smith*, 197 Md. App. 23, 36 (2011) (citing *Myers v. Kayhoe*, 391 Md. 188, 203 (2006)). "Furthermore, 'it is a settled principle of Maryland appellate procedure that ordinarily an appellate court will review a grant of summary judgment only upon the grounds relied upon by the trial court.'"

[11] Because the Estate does not discuss the survival action and assault and battery counts in its brief, we will not consider whether the circuit court erred in granting summary judgment on these counts. *See Klauenberg v. State*, 355 Md. 528, 552 (1999) (stating that "arguments not presented in a brief or not presented with particularity will not be considered on appeal").

Hamilton v. Kirson, 439 Md. 501, 523 (2014) (quoting *Bishop v. State Farm*, 360 Md. 225, 234 (2000)).

DISCUSSION

The Estate alleged that the City of Hyattsville, Lieutenant Nemser, and PFC Hall violated Article 26 of the Maryland Declaration of Rights by using excessive force against Mr. Shand. Article 26 of the Maryland Declaration of Rights provides:

> That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

"We have stated that Art. 26 is considered *in pari materia* with the Fourth Amendment" of the U.S. Constitution. *Ford v. Balt. City Sheriff's Off.*, 149 Md. App. 107, 136 (2002) (quoting *Carter v. State*, 367 Md. 447, 458 (2002)); *see also Cunningham v. Baltimore County*, 246 Md. App. 630, 690 (2020). Thus, "[w]hether a police officer has used excessive force in violation of the Maryland Declaration of Rights is judged under the standard of objective reasonableness established by the United States Supreme Court to analyze analogous claims made under the Fourth Amendment to the federal Constitution." *Estate of Blair by Blair v. Austin*, 469 Md. 1, 22 (2020) (alteration in original) (quoting *Austin v. Estate of Blair by Blair*, No. 580, Sept. Term 2017, slip op. at 2 (filed Apr. 25, 2019)). "Determining whether the force used to effect a particular seizure is reasonable . . . requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake."

Id. (alteration in original) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). "This 'reasonableness' determination, therefore, is incapable 'of precise definition or mechanical application.'" *Id.* at 22-23 (quoting *Graham*, 490 U.S. at 396). The proper application of the reasonableness test "requires careful attention to the facts and circumstances of each particular case," including application of the factors enunciated in *Graham*: "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*, 490 U.S. at 396. *Graham* made clear 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[.]"[12] *Id.* at 395.

In light of its brevity and centrality to our analysis, we reprint the court's bench ruling verbatim:

[12] We note the General Assembly's adoption of PS 3-524(d)(1) effective July 1, 2022, which provides:

> A police officer may not use force against a person unless, under the totality of the circumstances, the force is necessary and proportional to:
>
> (i) prevent an imminent threat of physical injury to a person; or
>
> (ii) effectuate a legitimate law enforcement objective.

This "statute provides only for *criminal* liability" and there is no "civil liability for violation of [this] new standard." 33 Md. Op. Att'y Gen. 33, 72-73 (2022). Thus, "[t]he Supreme Court's *Graham* standard . . . continue[s] to serve as the test for determining whether a police officer's use of force violates the Fourth Amendment." *Id.* at 72.

No. All right. So again, I have read the filings with the attachments and the record. The claim against Hyattsville and Officers Nems[e]r and Hall basically boils down to as [Estate's] expert -- the use of the bean bag and flash bang together was what caused his death and I am looking at page 48 of Mr. Perez's deposition.

And the essence of the claim is that this -- by doing so, by deploying this [sic] two objects that created an emergency which resulted in the shooting and I don't find that that is the law. Obviously all of these cases are factually distinct in some manner. The cases cited by either side. Because every circumstance is factually different. But the Supreme Court in San Francisco versus Sheehan was pretty clear that there is no Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.

And that is what we have here today. The claim of the [Estate] boils down to that the Hyattsville officers used bad tactics in deploying the flash bang grenade and the bean bag. And that was what resulted in this deadly confrontation. That does not amount to a Fourth Amendment violation and because the Article 26 of the Declaration of Rights is (indiscernible) it doesn't amount to a violation of the Maryland Constitution.

And so -- and also not a wrongful act -- so for all of those reasons, I am going to grant Hyattsville the motion for summary judgment filed by Hyattsville, Nems[e]r and Hall. Moreover, there is no evidence -- well Hyattsville City is entitled to Governmental immunity with regard to the common law claims against it and the police officers are entitled to Public Officials immunity for any negligence claims or any claims. And in this case, there is no evidence of malice.

Perhaps they were negligent, used bad tactics but I don't know if that is true or not. Certainly that is the claim by [Estate's] expert in applying what the Supreme Court has told us we shouldn't apply, is 20/20 hindsight. But so I find that their immune. That the County or the City of Hyattsville is immune to the Governmental immunity and -- but ultimately I find that there is no valid claim based on the theory here that bad tactics in deploying those two -- the flash bang and the bean bag created the emergency or deadly confrontation.

So I am going to grant the motion for summary judgment. So I think that resolves all the claims, right?

First, to the extent that the Estate relies on what is known as the "provocation rule"

to support its excessive force claim, we see no error in the court's reliance on *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600 (2015) in rejecting that argument. The provocation rule states that, where there has been a separate, prior constitutional violation, it may "render the officer's otherwise *reasonable* defensive use of force *unreasonable* as a matter of law." *Cnty. of L.A. v. Mendez*, 581 U.S. 420, 427 (2017) (quoting *Billington v. Smith*, 292 F.3d 1177, 1190-91 (9th Cir. 2022)). In a footnote in *Sheehan*, the Supreme Court noted that "[t]he Ninth Circuit's 'provocation rule' . . . has been sharply questioned elsewhere." 575 U.S. at 615 n.4. Two years later in *Mendez*, the Supreme Court rejected the provocation rule as "incompatible with our excessive force jurisprudence." 581 U.S. at 427. Instead, the Supreme Court held that the analysis of excessive force under *Graham* "is dispositive: When an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim." *Id.* at 428. Although the Estate did not expressly invoke the provocation rule, its Amended Complaint and Opposition to the Motion for Summary Judgment suggested that it was doing so. In any event, in light of the Supreme Court's unequivocal disapproval of the provocation rule, the circuit court did not err in determining that existing precedent would not support that theory of liability.[13]

[13] The court's statement that "there is no Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided" appears to be nearly verbatim from *Sheehan*. 575 U.S. at 615. We note that the *Sheehan* Court's statement appears to be in the context of its qualified immunity analysis. "Qualified immunity does not apply to Maryland state constitutional claims[.]" *Cunningham*, 246 Md. App. at 672-73.

Although the court correctly rejected any claim based upon a "provocation rule" theory, the court failed to address the Estate's corollary claim—that the officers' simultaneous use of the flash bang grenade and bean bag shotgun constituted unreasonable force under *Graham*. In its Opposition, the Estate pointed to specific facts and used expert reports[14] to argue that Lieutenant Nemser and PFC Hall's actions were unreasonable. As to perhaps the most important *Graham* factor – "whether the suspect poses an immediate threat to the safety of the officers or others" – there was evidence that Mr. Shand was stationary and surrounded by a semicircle of "at least 10 to 12 police officers" when Lieutenant Nemser and PFC Hall deployed their devices. Similarly, although civilians were in the general area, there is conflicting evidence whether Mr. Shand presented an immediate threat to any civilian. Officer Evans' body-worn camera footage depicted Mr. Shand in a highly emotional state where he expressed his concern that the police would kill him. Moreover, Tyrone Powers, Ph.D., produced an expert report that questioned the officers' use of the flash bang grenade and bean bag shotgun. Powers' report stated:

> It must be noted that the deployment of the Flashbang Grenade was inconsistent with the purpose of said device. The combination of the firing of the less than lethal shotgun beanbag and then the Flashbang Grenade -

[14] The Estate's Opposition to the Motion for Summary Judgment and their expert reports were not included in their record extract. Maryland Rule 8-501 is clear that "[t]he record extract shall contain all parts of the record that are reasonably necessary for the determination of the questions presented by the appeal and any cross-appeal." Here, we used our discretionary authority and reviewed "part of the record [that was] not included in the record extract[.]" Md. Rule 8-501. In the future, we may choose not to "permit counsel to impose upon us the burden of work, which should have been done by them." *Strohecker v. Schumacher & Seiler*, 185 Md. 144, 146-47 (1945) (warning counsel that the court may choose to not examine matters outside the record extract).

> may have hastened Mr. Shand's charge towards officers. Mr. Shand had indicated that he would charge if the beanbag shotgun were fired.
>
> The use of the Flashbang Grenade was inconsistent with tactics and techniques that the officers were employing at the time – maintaining distance – communicating with Mr. Shand – giving commands/demands – strategically blocking off the streets and keeping citizens out of the area in preparation for extended engagement. The Flashbang Grenade gave the officers no advantage. Officers were not going to charge Mr. Leonard Lancelot Shand and thus did not require a distraction. This was not a raid on a building or residence.
>
> ***
>
> There needed to be a lead communicator to and for Mr. Shand and to officers from the various departments. Instructions needed to be consistent and uniformed. Despite the chaotic communications – most officers demonstrated a patience that denoted an acknowledgement that time was on their side; that they had the numbers, weaponry, and advantage. However, the combination of the firing of the beanbag and the Flashbang Grenade deployment led to the exact opposite action/reaction. It was an aggressive action that condensed time and may have instigated or hurried the actions by Mr. Leonard Lancelot Shand. The Flashbang Grenade may have also disoriented officers and upon seeing Mr. Shand charge – created a scenario where most of the officers responded by discharging their weapons – to defend life – but also because of the heightened and disorienting environment enhanced by said beanbag Flashbang Grenade combination – timing – that appears to have come without planning – signal or notification to any of the officers.
>
> ***
>
> Clearly the officers were not or were inadequately advised and seemingly, were shocked or/and disoriented themselves from the deployment of the Flashbang Grenade, and after the deployment of the beanbag shotgun. In such a situation, even the response from the officers is unpredictable. This might explain why so many officers fired simultaneously.

Additionally, the Estate argues that the officers should have waited until a negotiator arrived on the scene. Both Lieutenant Nemser and Corporal Quevedo testified that a negotiator had been called, but apparently had not arrived at the time the devices were

deployed. Related to the possible intervention by a mental health professional, the Powers' report stated:

> Based on the facts presented, apparently, a Mental Health Mobile Crisis Team was not radioed by officers present, nor was a Mobile Crisis Team contacted and directed to the scene by police dispatch operations.
>
> ***
>
> The intervention of the Mobile Crises Team (MCT) and its experts may have allowed for further de-escalation or at the very least – from a safe distance – the Mobile Crises Unit members could have advised of the likely action/reaction of the deployment of the shotgun beanbag in combination with the Flashbang Grenade at this point of engagement.[15]

The circuit court did not address any of this evidence as it pertains to the reasonableness of Lieutenant Nemser and PFC Hall's use of force under the circumstances. In fact, the court did not even allude to the *Graham* factors in its bench ruling. As previously noted, "ordinarily an appellate court will review a grant of summary judgment only upon the grounds relied on by the trial court." *Hamilton*, 439 Md. at 523 (quoting *Bishop*, 360 Md. at 234). Moreover, pursuant to Rule 8-131, "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." Here, we shall not exercise our discretion "to consider a matter that was raised in, but not

[15] The Estate also failed to include in the record extract the report and deposition of its other expert, Joseph Perez, although his opinion was discussed during the summary judgment hearing. We have not been able to locate Mr. Perez's report, but his deposition testimony indicates that the simultaneous use of the flash bang grenade and bean bag shotgun was inappropriate under the totality of the circumstances.

decided by, the trial court[,]" because, on this record, it would "not [be] desirable to address an issue without the benefit of its having been examined and first resolved by the lower court." *Md. Transp. Auth. Police Lodge No. 34 of Fraternal Ord. of Police, Inc. v. Md. Transp. Auth.*, 195 Md. App. 124, 221 (2010) (quoting *Carrier v. Crestar Bank, N.A.*, 316 Md. 700, 725 (1989)), *rev'd on other grounds*, 420 Md. 141 (2011); *see also Henley v. Prince George's County*, 305 Md. 320, 333 (1986) (stating that using our discretion to affirm a motion for summary judgment on a ground not relied upon by the trial court would "deprive the trial judge of discretion to deny or to defer until trial on the merits the entry of judgment on such issues."); *CoreCivic, Inc. v. Candide Grp., LLC*, 46 F.4th 1136, 1145-46 (9th Cir. 2022) (remanding because although the court was correct to dismiss on one theory of liability, the court failed to address plaintiff's other theory of liability). The court's bench opinion spanning two pages in the transcript fails to satisfy *Graham*'s admonition that proper application of the reasonableness test in excessive force cases "requires careful attention to the facts and circumstances of each particular case[.]" 490 U.S. at 396. In light of the highly factual inquiry required by the "objective reasonableness" test in excessive force jurisprudence, it is appropriate that the circuit court first address the issue. *Md. Transp. Auth.*, 195 Md. App. at 221 (stating that it is not usually desirable for an appellate court to resolve an issue that was not first resolved by the lower court and "[t]his is particularly true of matters that involve contested questions of fact").

Therefore, we reverse the grant of summary judgment and remand for the circuit court to decide whether the City of Hyattsville, Lieutenant Nemser, and PFC Hall are

entitled to summary judgment pursuant to the principles enunciated in *Graham* and its progeny.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.