# APPENDIX

# APPENDIX

## TABLE OF CONTENTS

Appendix A Opinion and Dissenting Opinion in the United States Court of Appeals for the Sixth Circuit (April 3, 2018) . . . . . App. 1

Appendix B Memorandum Opinion in the United States District Court, Eastern District of Tennessee (March 31, 2017) . . . . . App. 19

Appendix C Order Denying Petition for Rehearing En Banc in the United States Court of Appeals for the Sixth Circuit (June 11, 2018) . . . . . App. 36

Appendix D Affidavit of Morgan Evans in the United States District Court for the Eastern District of Tennessee, Knoxville Division (September 2, 2016) . . . . . App. 38

Appendix E Affidavit of Suzan Evans in the United States District Court for the Eastern District of Tennessee, Knoxville Division (September 2, 2016) . . . . . App. 41

## APPENDIX A

**NOT RECOMMENDED FOR PUBLICATION**
**File Name: 18a0172n.06**

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**No. 17-5622**

**[File April 3, 2018]**

SUZAN EVANS, Individually, and as Wife and Next of kin of SCOTT EVANS, deceased, Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; FEDERAL BUREAU OF INVESTIGATION, Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

BEFORE: MERRITT and SUTTON, Circuit Judges; CLELAND, District Judge.*

CLELAND, District Judge. FBI agents and other officers approached Scott Evans's home early in the

* The Honorable Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation.

morning of March 6, 2013. They had a warrant for his arrest charging receipt and distribution of child pornography, and a search warrant for his residence focused on locating further evidence of those crimes.

When the agents forced an entry into the residence, Evans emerged from the bathroom, entered the bedroom, and before agents could do much more than watch, he retrieved a holstered .357 magnum revolver. Agents uniformly aver that they yelled at Evans, loudly and repeatedly demanding that he drop the gun; Plaintiff, Evans's wife, just outside the bedroom, disputes those claims, and says she heard no demands, no yelling, no words of any kind. No one disputes, however, while Evans held the gun to his head—and in so doing pointed it in the same direction as one or more agents—he began to withdraw it from the holster. Upon seeing that action, one of the agents fired three quick shots. Evans died at the scene.

Plaintiff argues that the agents' actions were objectively unreasonable under the circumstances and that she is therefore entitled to relief under Tennessee law, Tenn. Code Ann. § 20-5-106(a), as authorized by the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671–80. The district court disagreed, and entered summary judgment in defendant United States'[1] favor. For the reasons that follow, we affirm.

---

[1] Because "a federal agency cannot be sued under the FTCA," *Chomic v. United States*, 377 F.3d 607, 608 (6th Cir. 2004), the district court properly dismissed the Federal Bureau of Investigation as a defendant in this case. That ruling is not challenged on appeal.

I.

During a wide ranging investigation, FBI agents learned that Scott Evans had sent and received numerous emails containing images and videos depicting child pornography. (R. 21-1, ID 95–96). On the basis of these emails, the United States Attorney's office filed a criminal complaint alleging distribution and receipt of child pornography, 18 U.S.C. § 2252A(a)(2), against Evans, and applications for arrest and search warrants. (ID 90–96). A magistrate judge signed warrants, to be executed at the Evans' home in New Market, Tennessee. (ID 96–98).

Two days later, FBI Special Agent Bianca Pearson led a team of agents to execute the warrants at Evans's residence, which was a "double wide" manufactured home. (R. 24, ID 176). Evans lived there with his wife and their two daughters; his relatives lived in neighboring homes, and Evans held a concealed carry permit. (ID 175–76). Given these facts, Pearson determined multiple agents would be required to secure the location, and briefed all agents on the FBI deadly force policy. (ID 175). The parties dispute some aspects of the FBI's search that followed.[2]

---

[2] The various factual accounts are provided by competing affidavits of the agents, plaintiff, and plaintiff's daughters. Depositions of the agents or a review of the agents' field reports may have held some evidentiary value in this case as the only living witnesses to the final, critical events were defendant agents, but no discovery was conducted and the motion for summary judgment was decided on the strength of sworn affidavits. Plaintiff filed a motion for discovery pursuant to Federal Rule of Civil Procedure 56(d), but plaintiff's counsel failed to specify in the supporting 56(d) affidavit what discovery was needed or how discovery would "enable

According to defendants' account, Special Agent Casey Helm shouted something to the effect of, "FBI, search warrant come to the door!," as he knocked on Evans's front door. (R. 24, ID 176; R. 25, ID 182; R. 28, ID 201). After waiting "a reasonable amount of time" with no response to the knock and announce, Special Agent Jeffrey Blanton used a "breaching tool" (battering ram) to force open the door. (R. 24, ID 176; R. 28, ID 201). The door did not open fully, and Helm later determined that plaintiff was in the door's path during the breach. (R. 25, ID 182). Special Agent Gregory Smith pushed the door fully open, and ordered plaintiff to get down on the floor. (*Id.*; R. 27, ID 195; R. 31, ID 219). Helm and Special Agents Lane Rushing and Paul Scown followed closely thereafter. (R. 25, ID 182; R. 27, ID 195; R. 31, ID 219).

Smith and Helm cleared the side rooms of the home, encountering plaintiff's and Evans's two daughters, before returning to the room at the main entrance. (R. 25, ID 182; R. 27, ID 196). Special Agent Letitia Jones attended to plaintiff and the two daughters in the main room. (R. 30, ID 213). She averred that there was a television on in the main room, but despite the fact that "it was noisy in the trailer, the bedroom was not far away, and [agents'] shouts were loud enough to be heard distinctly." (R. 30, ID 213). Several agents

---

[plaintiff] to rebut the movant's showing of the absence of a genuine issue of fact." *F.T.C. v. E.M.A. Nationwide, Inc*., 767 F.3d 611, 623 (6th Cir. 2014) (quoting *Willmar Poultry Co. v. Morton-Norwich Prods., Inc*., 520 F.2d 289, 297 (6th Cir. 1975)). Consequently, the district court denied the motion. (*See* R. 39-11; R. 54, ID 383).

attested that the scene in the house was very noisy in general. (*See* R. 30, ID 213; R. 31-1; R. 31-2; R. 31-3).

Scown and Rushing headed toward the master bedroom in the back of the home and, upon reaching the doorway to the bedroom, Rushing saw Evans, naked and armed with a revolver, move quickly from the adjoining bathroom to the master bedroom. (R. 29, ID 207; R. 31, ID 220). Rushing attested he began to "repeatedly issue commands," shouting "FBI! FBI!", "Get your hands up!", and "Drop the gun!" (R. 29, ID 207; R. 31, ID 219). Other agents who were in the bedroom or in neighboring rooms confirmed that an agent repeatedly directed Evans to drop his weapon. (R. 26, ID 188; R. 30, ID 213; R. 31, ID 219).

In his right hand Evans held the gun, which was in a dark-colored holster and pointed at his own head. (R. 29, ID 207; R. 31, ID 220). Rushing entered the room, took cover by a corner of the bed, and determined that Evans's gun, being holstered, prevented Evans from accessing the trigger. (R. 29, ID 207). Scown also entered the room and noticed that the holster blocked Evans's access to the trigger. (R. 31, ID 220). Once Scown and Rushing were at the foot of the bed, Evans slid backwards off the bed and onto the floor, near the open door to the adjoining bathroom. (*Id.*; R. 29, ID 207). Special Agents David Bishop, Helm, and Smith then all entered the bedroom. (R. 25, ID 182; R. 26, ID 188; R. 27, ID 196).

While kneeling on the floor, Scown saw a "glint of metal"; Evans had removed the holster from the gun with his left hand. (R. 31, ID 221). Scown fired his weapon, striking Evans three times. (*Id.*). Evans then fell forward, slumped on top of his arms and legs. (*Id.*).

As Scown walked around the bed to inspect Evans, he observed that Evans was holding the revolver, completely unholstered, in his right hand. (*Id.*). Bishop removed the silver handgun from Evans's hand and proceeded to handcuff him. (R. 26, ID 189). Blanton entered the room as Bishop was handcuffing Evans and observed "what appeared to be a cocked, silver .357 revolver tucked under Evans'[s] right side." (R. 28, ID 202). Evans died soon thereafter. (R. 31, ID 221).

Plaintiff disputes parts of this narrative. She averred that she heard a loud banging on the front door, but no accompanying yelling or announcement. (R. 39-1, ID 255). She immediately ran to the door and looked into the peephole, through which she saw individuals in all black clothing with no identifying markings standing outside the door. (*Id.*). Before she could open the door, these individuals smashed it in, breaking her nose and knocking her back about five feet. (*Id.*). Plaintiff attested that an agent grabbed her, "threw" her facedown on the ground, and handcuffed her, without showing her a warrant or even identifying the individuals as FBI agents. (ID 255–56). While handcuffed, plaintiff heard no "shouting, talking, commands, or anything like that coming from the bedroom," despite the fact that she was "so close to the bedroom" that she "definitely would have heard" such communications. (ID 256). Then she heard two gunshots ring out from the bedroom, after which an agent exited the bedroom and yelled for someone to call an ambulance. (*Id.*). Plaintiff's two daughters attested to a similar version of events. (R. 39-2, ID 257–58; R. 39-3, ID 259–60). Neither plaintiff nor her daughters claimed that they were in the bedroom or near enough

to its entrance to observe the agents' encounter with Evans.

Following these events, plaintiff filed an administrative claim with the Department of Justice, which the Department denied by letter on April 16, 2015. (R. 21-5, ID 114). Having exhausted her administrative remedies as required by the FTCA prior to filing suit, 28 U.S.C. § 2675(a), plaintiff filed a complaint on behalf of her husband in the district court, alleging claims under Tennessee's wrongful death statute, Tenn. Code Ann. § 20-5-106 (2011), in accordance with the FTCA. (R. 1-1). The district court granted summary judgment in defendants' favor, holding the totality of the circumstances at the moment Scown shot Evans justified the use of deadly force. (R. 54, ID 371–85). The court reasoned Evans was soon to be arrested for a severe crime (child pornography), was actively resisting arrest at the time he was shot, and posed an imminent threat of serious physical harm to the agents. (ID 379–80). The court also held that, even accepting the account in plaintiff's affidavit—claiming that no agents commanded Evans to drop the gun or otherwise warned him before shooting him—this absence of commands was not sufficient to create a genuine dispute of material fact or render the agents' conduct unlawful. (ID 380–81).

Plaintiff now appeals.

## II.

We review a trial court's grant of summary judgment de novo. *Sumpter v. Wayne Cty.*, 868 F.3d 473, 480 (6th Cir. 2017). Summary judgment is proper "if 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). "To prevail, the nonmovant must show sufficient evidence to create a genuine issue of material fact, which is to say, there must be evidence on which the jury could reasonably find for the nonmovant." *Sumpter*, 868 F.3d at 480 (internal quotation marks and brackets omitted). All evidence and inferences therefrom must be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

III.

Pursuant to the Eleventh Amendment of the United States Constitution, the federal and state governments are immune from liability; however, the government may waive its immunity and consent to suit in federal court. U.S. Const. Amend. XI; *see Green v. Mansour*, 474 U.S. 64, 68 (1985). Congress waived the federal government's sovereign immunity through enactment of the FTCA, which provides subject matter jurisdiction "for plaintiffs to pursue state law tort claims against the United States." *Milligan v. United States*, 670 F.3d 686, 692 (6th Cir. 2012) (citing 28 U.S.C. § 1346(b)(1)). The FTCA "is the exclusive remedy for suits against the United States or its agencies sounding in tort." *Himes v. United States*, 645 F.3d 771, 776 (6th Cir. 2011) (citing 28 U.S.C. § 2679(a)). Under the statute, the United States waives its sovereign immunity and consents to liability

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or

> employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C.A. § 1346 (b)(1). Thus, the United States is liable for the payment of money damages to the extent afforded by the law of the place—here, Tennessee—where the alleged tortious act or omission occurred. *See Himes*, 645 F.3d at 776–77.

Tennessee provides a cause of action to the surviving spouse of any "person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another." Tenn. Code Ann. § 20-5-106(a) (2011). The Tennessee Supreme Court has interpreted this cause of action to encompass acts of negligence resulting in death. *See Spires v. Simpson*, No. E201500697SCR11CV, 2017 WL 6602434, at *4 (Tenn. Dec. 27, 2017) (stating that a person's right of action for negligence "does not abate upon his death," but instead passes to the surviving spouse under Tennessee's wrongful death statute). A negligence claim requires evidence establishing "(1) a duty of care owed by the defendant to the plaintiff, (2) conduct falling below the applicable standard of care that amounts to a breach of that duty, (3) an injury or loss, (4) cause in fact, and (5) proximate cause." *Haynes v. Wayne Cty.*, No. M201601252COAR3CV, 2017 WL 1421220, at *5 (Tenn. Ct. App. Apr. 19, 2017). The applicable standard of care is dependent upon the facts supporting the negligence claim. *See Atkinson v. State*, 337 S.W.3d 199, 205 (Tenn. Ct. App. 2010) (holding that a wrongful death claim based on a prison's failure to properly treat

a suicidal prisoner required evidence of the standard of care owed to the prisoner under the circumstances).

According to Tennessee courts, when the alleged negligence is committed by a police officer "during a legitimate confrontation with an armed person . . . the normal definition of negligence" is altered. *Johnson v. Metro. Gov't of Nashville & Davidson Cty.*, No. M200800551COAR3CV, 2008 WL 5206303, at *5 (Tenn. Ct. App. Dec. 12, 2008).[3] In particular, the standard of care owed to the claimant under said circumstances is the "reasonableness" standard applicable to claims of excessive force brought pursuant to the Fourth Amendment of the United States Constitution. *Id.* at *6–8, (citing and quoting *Smith v. Freland*, 954 F.2d 343, 346–47 (6th Cir.1992) (holding that the officer's use of deadly force was reasonable and did not constitute excessive force in violation of the Fourth Amendment). As the Tennessee Court of Appeals explained, "Whether a police shooting case is brought as a 'civil rights' case or a negligence case, both come down to determining if the officer's actions were 'reasonable' under the circumstances." *Id.* at *9 n.6. Therefore, we turn to the Fourth Amendment.

The Fourth Amendment prohibits the government from conducting "unreasonable searches and seizures." U.S. Const. Amend. IV. The Supreme Court has held

---

[3] *Johnson* addressed a negligence claim brought pursuant to the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101—the state equivalent to the FTCA in the sense that the Act waives the state and local government's sovereign immunity with respect to liability for negligent acts or omissions. *See* Tenn. Code Ann. § 29-20-205.

that "apprehension by the use of deadly force is a seizure," *Tennessee v. Garner*, 471 U.S. 1, 7 (1985), "properly analyzed under the Fourth Amendment's objective reasonableness standard." *Scott v. Harris*, 550 U.S. 372, 381 (2007) (internal quotation marks and alterations omitted). Courts "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." *Id.* at 383 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). This analysis is fluid and "not capable of precise definition or mechanical application," *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)), but amounts to a determination of whether the totality of the circumstances justifies the seizure, *Garner*, 471 U.S. at 8–9. The determination is an objective one, "considered from the perspective of a hypothetical reasonable officer in the defendant's position and with his knowledge at the time, but without regard to the actual defendant's subjective intent when taking his actions." *Latits v. Phillips*, 878 F.3d 541, 547 (6th Cir. 2017).

In particular, the Supreme Court has directed us to consider "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. This is not an exhaustive list, and the ultimate inquiry remains "whether the totality of the circumstances justifies a particular sort of seizure." *St. John v. Hickey*, 411 F.3d 762, 771 (6th Cir. 2005) (quoting *Graham*, 490 U.S. at 396). "It is the reasonableness of the 'seizure' that is the issue, not the reasonableness of the detectives'

conduct in time segments leading up to the seizure." *Chappell v. City Of Cleveland*, 585 F.3d 901, 909 (6th Cir. 2009).

Ultimately, the *Graham* factors are intended to help determine whether "the officer ha[d] probable cause to believe that the suspect pose[d] a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U.S. at 11; *see also Foster v. Patrick*, 806 F.3d 883, 887 (6th Cir. 2015). If he did, then the use of deadly force was "not constitutionally unreasonable." *Garner*, 471 U.S. at 11. The touchstone of "probable cause" is a "reasonable ground" for the belief. *See Harris v. Bornhorst*, 513 F.3d 503, 511 (6th Cir. 2008) (emphasis in original) (quoting *United States v. Romero*, 452 F.3d 610, 615–16 (6th Cir.2006)). Reasonableness is evaluated based on an "objective assessment of the danger a suspect poses *at that moment*." *Mullins v. Cyranek*, 805 F.3d 766, 769 (6th Cir. 2015) (quoting *Bouggess v. Mattingly*, 482 F.3d 886, 889 (6th Cir. 2007)).

In evaluating the use of deadly force in this case, therefore, we must determine whether "a hypothetical reasonable officer in [Scown]'s position and with his knowledge at the time," *Latits*, 878 F.3d at 547, would have had "probable cause to believe that [Evans] pose[d] a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U.S. at 11.

Viewing the evidence in the light most favorable to plaintiff, and considering the totality of the circumstances, an objectively reasonable officer armed with Scown's knowledge and in his position would have had probable cause to believe that Evans posed a

threat of serious physical harm to the officers.[4] Agents encountered Evans in an enclosed space holding a revolver to his head. (R. 29, ID 207; R. 31, ID 219). Rather than submit to the agents' show of force, Evans reached with his other hand and began to remove the revolver from its holster. (R. 27, ID 197; R. 31, ID 221). Three agents, including Scown, saw a glint of light or silver indicating Evans had at least partially succeeded. (R. 31, ID 221; R. 29, ID 207; R. 27, ID 197). At this point, Scown "was afraid for [his] life and the lives of those around" him and shot Evans. (R. 31, ID 221). It bears mention that when agents recovered the gun from Evans's hand after he was shot, it was completely unholstered, loaded, and cocked, confirming the agents' impression that Evans was in the process of releasing the revolver from the holster just before the shots were fired. (R. 26, ID 189; R. 28, ID 202; R. 31, ID 221).

---

[4] Plaintiff claims that the facts are not only viewed in her favor, but are established in her favor because her unanswered requests for admission must be deemed admitted as a matter of law. (Pl. Br. at 5). However, plaintiff failed to raise this issue in her statement of the issues. (Pl. Br. at 1). Therefore, plaintiff failed to preserve this issue for appeal under the mandate of Federal Rule of Appellate Procedure 28(a)(5), and it is forfeited. *McCarthy v. Ameritech Publ'g, Inc.*, 763 F.3d 488, 494 (6th Cir. 2014). Moreover, plaintiff wholly fails to note that the district court actually addressed this issue below and decided against her. (R. 54, ID 384). She does not address, or even mention, the district court's ruling, nor does she explain how the court abused its discretion on that evidentiary issue. Having presented a skeletal argument, *United States v. Hendrickson*, 822 F.3d 812, 829 n.10 (6th Cir. 2016), we consider it abandoned. *See Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1063 (6th Cir. 2014).

The agents avowed that they feared for their lives during the encounter and believed that "Evans either intended to take his own life or to threaten us with the gun." (R. 29, ID 208; R. 31, ID 221). "Because of the general angle at which Evans was holding the gun, even if his intention was to shoot himself, he still would have been firing in [the] direction" of an agent. (R. 27, ID 197). Additionally one agent considered that "a subject holding a gun to his head could very quickly point the gun at law enforcement officers and fire." (R. 29, ID 207). Scown and the other agents were objectively reasonable in their belief that Evans posed an imminent threat of serious physical harm to them. *St. John*, 411 F.3d at 771. Plaintiff has presented no genuine issue of material fact on this point that could prevent summary judgment. *Anderson*, 477 U.S. at 247–48.

Plaintiff argues that summary judgment is inappropriate where "virtually all of the essential facts" are disputed, *Jackson v. Hoylman*, 933 F.2d 401, 403 (6th Cir. 1991), and their resolution "turn[s] on credibility" *Bass v. Robinson*, 167 F.3d 1041, 1046 (6th Cir. 1999). As defendants correctly note, plaintiff can survive summary judgment only if she shows a genuine issue of *material* fact related to her claim. *Anderson*, 477 U.S. at 247–48. And the substantive claim serves to identify which facts are material. *Id.* at 248. Contrary to plaintiff's argument, the district court was not confronted with conflicting *material* facts.

Plaintiff alleges that defendants acted negligently in shooting Evans. The conduct relevant to the substantive claim, then, is Scown's discharge of his firearm in the bedroom, and the moments immediately

preceding, not what may have occurred in the adjoining room or at the front door. *See Mullins*, 805 F.3d at 769 (holding that the reasonableness of an officer's use of deadly force is based on "an objective assessment of the danger a suspect poses *at that moment*"); *accord Livermore v. Lubelan*, 476 F.3d 397, 406–407 (6th Cir. 2007). Defendants presented uncontroverted evidence as to the events in the bedroom immediately before the shooting. The affidavits of plaintiff and her two daughters are devoid of facts regarding what occurred in the bedroom when Scown shot Evans, except that none of them heard agents give any commands to Evans before the shooting. (R. 39-1, ID 255–56; R. 39-2, ID 257-58; R. 39-3, ID 259–60). As the district court recognized, this is not a material fact sufficient to withstand summary judgment. (R. 54, ID 381.) It does not affect the outcome of the court's critical inquiry—whether "a hypothetical reasonable officer in [Scown]'s position and with his knowledge at the time," *Latits*, 878 F.3d at 547, would have had "probable cause to believe that [Evans] pose[d] a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U.S. at 11.

Even assuming the agents issued no verbal commands or warnings to Evans, the sudden and immediate nature of the serious threat remains the same. The moment Evans began to unholster the revolver, the agents were faced with a life-threatening situation. It was objectively reasonable for Scown to conclude at that moment that Evans presented a serious physical threat to the agents in the bedroom, given their close proximity and his erratic behavior. *Livermore*, 476 F.3d at 405; *see also Rucinski v. Cty. of Oakland*, 655 F. App'x 338, 342 (6th Cir. 2016) (holding

officers were entitled to qualified immunity because their use of deadly force was objectively reasonable) (citing *Chappell v. City Of Cleveland*, 585 F.3d 901, 911 (6th Cir. 2009) (holding that the detectives' use of deadly force was reasonable as a matter of law where detectives shot and killed a suspect after he moved to within seven feet of them while holding a steak knife over his head)).

While plaintiff contends that Evans was "the victim of unreasonable police tactics and split-second decision-making on the part of the officers involved," (Pl. Br. at 7), it is exactly these kinds of "split second" decision-making pressures officers so often face (and faced here, in fact) that undermines her case. As the Supreme Court has long emphasized:

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

*Graham*, 490 U.S. at 396–97. In a small bedroom occupied by numerous agents, and presented with an armed individual behaving erratically, the "calculus of reasonableness" allows for the split-second determination made here. The district court correctly held that Scown's actions were objectively reasonable.

Because Scown's actions were reasonable, he is not negligent under Tennessee law. As discussed, the Fourth Amendment reasonableness assessment supplants the negligence inquiry in cases concerning law enforcement's use of deadly force under Tennessee tort law, Tenn. Code Ann. § 20-5-106(a). *See Johnson*, No. M200800551COAR3CV, 2008 WL 5206303, at *9 n.9 (Tenn. Ct. App. Dec. 12, 2008) ("Whether a police shooting case is brought as a 'civil rights' case or a negligence case, both come down to determining if the officer's actions were 'reasonable' under the circumstances."). The district court was proper in holding that defendants are entitled to summary judgment on plaintiff's negligence claim brought pursuant to the FTCA.

IV.

The judgment of the district court is AFFIRMED.

**MERRITT, Circuit Judge, dissenting.** The Seventh Amendment requires that "the right to a trial by jury shall be preserved . . . according to the rules of the common law." In other similar police shooting cases of this type in which there are disputes of fact, the court has insisted upon a jury trial. *Withers v. City of Cleveland*, 640 F. App'x 416 (6th Cir. 2016).

There is a dispute of fact here. First, plaintiff alleges that she only heard a loud banging on the front door of her mobile home. She did not hear any accompanying announcement. When she ran to the door and peered into the peephole, she saw individuals dressed in black and devoid of identifying markings. Those individuals kicked the door in with such force

that they broke her nose and knocked her backwards. Then, an agent threw her facedown on the ground in the main room and handcuffed her. She attests that the agents still did not identify themselves at this point or provide her with a warrant. Second, plaintiff remained handcuffed close to the bedroom, but heard no talking, yelling, warnings, or commands coming from the bedroom. She asserts that she would have heard any such communications due to her proximity to the bedroom. However, she only heard two gunshots. Plaintiff's two daughters, also present with her in the main room, corroborate her version of events. These alleged facts are pertinent and indicate an attitude and pattern of behavior on the agents' behalf that a jury may find extreme and unwarranted. The dispute of fact may convince the jury that the officers' alleged violent behavior caused the decedent to try to protect himself with a pistol in self-defense before he was killed. We have a long-standing tradition of trial by jury in these kind of cases. We should continue to honor that tradition.

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF TENNESSEE**

**No. 3:15-cv-00464**
**REEVES/GUYTON**

**[Filed March 31, 2017]**

SUZAN EVANS, Individually, and as Wife and Next of kin of SCOTT EVANS, deceased,
Plaintiff,

v.

UNITED STATES OF AMERICA, and the FEDERAL BUREAU OF INVESTIGATION,
Defendants.

## MEMORANDUM OPINION

Plaintiff Suzan Evans brings this civil action pursuant to the Federal Torts Claims Act (FTCA) for the wrongful death of her husband Scott Evans during the execution of search and arrest warrants by agents of the Federal Bureau of Investigation (FBI).

## I. Statement of Facts

After an investigation into distribution of child pornography, a criminal complaint, arrest, and search warrants were issued for Scott Evans on March 4, 2013. Special Agent (SA) Bianca Pearson worked on a

plan to arrest Evans at his residence at 2332 Stapleton Road in New Market, Tennessee. SA Pearson was concerned about recent cases involving child pornography suspects who shot themselves or fired at officers and wanted to ensure enough agents were on hand to control the area surrounding the residence when the arrest warrant was executed. SA Pearson and SA Gregory Smith led a pre-briefing on March 5, 2013, for agents participating in the arrest. SA Pearson reviewed the FBI's deadly force policy, and advised agents that, while Evans had no criminal history, he had a concealed weapon permit and likely would have weapons at the residence. She also explained that Evans' 15-year old and 7-year old daughters could be home during the arrest.

A second briefing occurred at a market near the Evans home early on March 6, 2013. Local law enforcement officers supporting the FBI operation were present. SA Pearson again covered the FBI's deadly force policy and reiterated that the Evans children likely would be home. Following the briefing, the team set out to execute the arrest and search warrants.

The arrest team traveled to the Evans' residence in a caravan of vehicles, arriving after 7:00 a.m. Members of the arrest team wore clothing identifying them as law enforcement. Officers in marked police vehicles turned on their blue lights when approaching the residence, which was a trailer. FBI team members walked to the Evans' trailer with weapons drawn, and lined up at the front door.

SA Casey Helm announced the FBI's presence by knocking and shouting words to the effect of "FBI! Search Warrant! Come to the door!" After several

seconds without a response, SA Jeffrey Blanton struck the door with a breaching tool, forcing it open a few inches. SA Smith then kicked the door open.

SA Smith and SA Helm entered first and encountered Suzan Evans and her daughters. SA Smith ordered Mrs. Evans to get down on the floor and she complied. SA Lane Rushing and SA Paul Scrown entered next and headed toward a bedroom on the left. SA Letitia Jones told Mrs. Evans that the FBI had a warrant, asked where Mr. Evans was, and asked if there were guns in the house. Mrs. Evans told her there was a gun in the bedroom where agents had gone. SA Jones tried to get the two girls down as low to the floor as possible. SA Jones stated there was a TV on and that it was loud in the house. SA Pearson was in the family room with Mrs. Evans and the children. She recalled hearing a great deal of shouting inside the house.

SA Rushing entered the bedroom first, followed by SA Scrown. SA Rushing observed Mr. Evans, who was nude, move quickly from a bathroom into the bedroom, and move up onto the bed. SA Rushing shouted "FBI! FBI!" and Evans raised his right hand, which held a gun inside a holster. Mr. Evans pointed the gun at his head and lowered himself down from the bed and appeared to be on his knees. SA Rushing yelled "FBI, get your hands up!" and "Drop the gun!" Evans did not comply with the agent's orders to drop the gun. At one point Evans told SA Rushing, "Get out of my face." SA Rushing thought Evans might commit suicide or threaten the agents, and he yelled "Don't do this!"

SAs Bishop, Helm, and Smith rushed to the bedroom and observed Evans crouching and pointing

the holstered gun at his head while SAs Rushing and Scrown told him to drop the gun. SA Bishop considered lunging over the bed and attempting to subdue Evans. He stepped closer to the bed and Evans turned to face him, and SA Bishop moved back. Evans turned back to SAs Rushing and Scrown, raising his hand. SAs Rushing and Scrown repeatedly commanded Evans to drop the gun and comply with the arrest. SA Bishop considered firing his weapon at that point but he did not have a good angle to shoot Evans. SA Smith made a motion across the bed intending to tackle Evans, but Evans looked in his direction, and SA Smith abandoned the idea as too risky because Evans was holding a gun. He moved back, and Evans returned his attention to SAs Scrown and Rushing.

SA Rushing saw a flash or reflection of light coming from the holster. SA Smith saw the gun emerge from the holster and noted it was a large caliber revolver. SAs Helm, Bishop, and Rushing saw Evans move his left hand in a manner consistent with unholstering the gun. SA Scrown stated he saw a glint of metal as Evans removed the gun from its holster using his left hand and SA Scrown fired his rifle three times, striking Evans in the side of his torso.

Evans fell forward. None of the agents could see his hands or the gun. Agents approached and saw that Evans held his handgun, now out of its holster. SA Scrown stepped on Evans' hand and the gun; SA Bishop grabbed the gun and moved it away from Evans. SAs Bishop and Blanton handcuffed Evans and SA Smith called for officers stationed outside to call an ambulance. Evans died at the scene.

Mrs. Evans states she heard a loud banging on the front door. She looked through the peephole while unlocking the deadbolt. She saw people dressed in black with no markings on their clothes. Agents "smashed" in her door, breaking her nose, and knocking her back about five feet. None of the agents identified themselves or showed her a warrant. She was thrown face-down on the floor and handcuffed. She heard no shouting, talking, commands, or anything from the bedroom until she heard the gunshots. Evans' two daughters state they did not hear anyone say or shout anything in the bedroom prior to hearing the gunshots.

Agents later obtained a second search warrant authorizing a search of the trailer for evidence relating to the shooting. The search recovered Evans' Ruger handgun which was cocked and loaded. Additional weapons were also recovered from the residence.

On March 14, 2013, District Attorney General James Dunn of the Fourth Judicial District of Tennessee declined prosecution, stating SA Scrown's actions were justified. On April 9, 2013, the Department of Justice's Civil Rights Division notified the FBI and the United States Attorney's Office there was no evidence to support an investigation to determine whether the federal criminal or civil rights statutes were violated.

Mrs. Evans submitted an administrative FTCA claim on March 4, 2014, which was denied on April 16, 2015. Mrs. Evans filed the instant civil action on October 15, 2015.

## II. Motion for Hearing

The parties have filed extensive briefs pertaining to the motion for summary judgment in which they have fully briefed all of the issues and submitted record evidence in support of the parties' positions. The court has reviewed the briefs and evidence submitted, and does not feel that oral argument is necessary. Therefore, plaintiffs' motion for oral argument [R. 40] is **DENIED**.

## III. Summary Judgment Standard

In their motion for summary judgment, defendants assert that no genuine dispute exists over the objective reasonableness of the actions of the FBI agents. Summary judgment under Rule 56 of the Federal Rules of Civil Procedure is proper "if 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). The moving party bears the burden of establishing that no genuine issues of material fact exist. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 330 n. 2 (1986); *Moore v. Philip Morris Co., Inc.,* 8 F.3d 335, 339 (6th Cir. 1993). All facts and inferences to be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. Ltd v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Burchett v. Keifer*, 301 F.3d 937, 942 (6th Cir. 2002).

Once the moving party presents evidence sufficient to support a motion under Rule 56, the nonmoving party is not entitled to a trial merely on the basis of allegations. *Celotex*, 477 U.S. at 317. To establish a genuine issue as to the existence of a particular element, the nonmoving party must point to evidence

in the record upon which a reasonable finder of fact could find in its favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). The genuine issue must also be material; that is, it must involve facts that might affect the outcome of the suit under the governing law. *Id.*

The court's function at the point of summary judgment is limited to determining whether sufficient evidence has been presented to make the issue of fact a proper question for the factfinder. *Id.* at 250. The court does not weigh the evidence or determine the truth of the matter. *Id.* at 249. Nor does the court search the record "to establish that it is bereft of a genuine issue of fact." *Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1479 (6th Cir. 1989). Thus, "the inquiry performed is the threshold inquiry of determining whether there is a need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson,* 477 U.S. at 250.

## IV. Analysis

### A. FBI

The complaint names both the United States and the FBI as defendants. The FBI is a federal agency that cannot be sued under the FTCA. Evans' exclusive remedy is an action against the United States. *See* 28 U.S.C. § 2679(a) and (b)(1); *Chomic v. United States*, 377 F.3d 607, 608 (6th Cir. 2004). Accordingly, the court will grant defendants' motion to dismiss the FBI as a party defendant.

**B. Federal Tort Claims Act**

Mrs. Evans brings this action against the United States pursuant to the FTCA for the wrongful death of Mr. Evans. The United States is immune from suit except to the extent that it has waived such sovereign immunity. *FDIC v. Myers*, 510 U.S. 471, 475 (1994). The FTCA is a limited waiver of sovereign immunity and, subject to some specific exceptions, the FTCA gives federal district courts jurisdiction over claims against the United States for money damages for loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. *Sheridan v. United States*, 487 U.S. 392, 398 (1988). When law enforcement functions are involved, the inquiry into governmental liability must include an examination of the liability of state entities under like circumstances. *Crider v. United States*, 885 F.2d 294, 296 (1989). Thus, Tennessee law applies to determine whether defendant may be held liable for Evans' death.

Tennessee law provides a wrongful death action to the surviving spouse of a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another. Tenn. Code Ann. § 20-5-106; *Johnson v. Metropolitan Gov't of Nashville,* 2009 WL 2868757 at *9 (Tenn.Ct.App. Oct. 16, 2008) (whether a police shooting case is brought as a civil rights case or a negligence case, both come down to determining if the officer's actions were "reasonable

under the circumstances). This standard has been adopted by other federal courts under similar situations. *See e.g., Priah v. United States*, 590 F.Supp.2d 920, 930 (N.D. Ohio 2008) (applying objective reasonableness to wrongful death FTCA claim involving FBI agent's use of deadly force); *Maravilla v. United States*, 867 F.Supp. 1363, 1380 (N.D.Ind. 1994) (evaluating FTCA claim under objective reasonableness); *Smith v. United States*, 741 F.Supp. 647, 649 (E.D.Mich. 1990) (analyzing wrongful death FTCA claim under objective reasonableness). Therefore, the court will use the objective reasonableness standard to determine whether the officers used excessive force.

**C. Excessive Force**

The Supreme Court has held "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tenn. v. Garner*, 471 U.S. 1, 7 (1985). Courts employ a list of three non-exhaustive factors to determine whether an officer's actions were reasonable including the severity of the crime at issue, whether the suspect was actively resisting arrest or attempting to evade arrest by flight, and whether the suspect posed an immediate threat to the safety of the officers or others. *Sigley v. City of Parma Heights*, 437 F.3d 527, 534 (6th Cir. 2006). If the suspect threatens the officer with a weapon, that risk has been established. *See Bell v. Irwin*, 321 F.3d 637, 639 (7th Cir. 2003); *see also Cooper v. City of Rockford*, 2010 WL 3034181 at *6 ("The law does not require that a police officer wait until a gun is pointed directly at him to defend himself"). However, the ultimate inquiry

must always be whether the totality of the circumstances justified the use of force. *Mullins v. Cyranek*, 805 F.3d 760 (6th Cir. 2015). The court must judge the reasonableness of the use of force "from the perspective of a reasonable officer on the scene and not through the lens of 20/20 hindsight." *Id.* at 765. This objective reasonableness analysis contains a "built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances." *Burchett v. Kiefer*, 310 F.3d 937, 944 (6th Cir. 2002).

Turning to the reasonableness factors, the court finds that the severity of the crime weighs against plaintiff. An arrest warrant had been issued for Mr. Evans for distribution of child pornography, a felony offense. Next, the court finds that Evans was actively resisting arrest at the time he was shot by SA Scrown. Evans disobeyed law enforcement commands and unholstered a cocked and loaded weapon. This factor weighs against Evans.

Finally, the court finds there was probable cause to believe that Evans posed an imminent threat of serious physical harm to the officers and to others in the trailer. Deadly force may be used if the officer has probable cause to believe that the suspect poses a threat of severe physical harm. *Mullins*, 805 F.3d at 766. The reasonableness of the use of deadly force is measured based on an "objective assessment of the danger a suspect poses at that moment." *Id.*

Here, based on the totality of the circumstances known to SA Scrown at the time of the shooting, the use of deadly force was objectively reasonable. Agents ordered Evans to show his hands numerous times.

Evans did not immediately comply with their orders. Agents ordered Evans to drop his weapon multiple times. Evans did not do as he was ordered. The officers were in a confined space with Evans. Evans manifested his intention to harm himself, or the agents, in raising the gun to his own temple and then moving his left hand to unholster the gun. While Evans could have only intended to shoot himself, precedent does not require an officer to correctly interpret a suspect's state of mind. *See Cooper v. City of Rockford*, 2010 WL 3034181 at *9 (N.D.Ill. Aug. 3, 2010) (It is impermissible to expect an officer to correctly interpret a suspect's undisclosed state of mind within seconds and under a great deal of stress). When SA Scrown fired his rifle, he had reason to believe that Evans posed an imminent threat of serious harm to the agents and others in the trailer. Accordingly, the court finds his use of deadly force was objectively reasonable and did not violate the Fourth Amendment.

Mrs. Evans and her daughters state they heard no shouting, talking, commands or anything from the bedroom until they heard the gunshots. However, Mrs. Evans and her daughters were in the family room with SA Jones and SA Pearson. SA Jones stated there was a TV on and that it was loud in the house. Multiple witnesses who were actually in the bedroom and standing close outside the bedroom, heard the agents issue multiple compliance orders to Mr. Evans before deadly force was used. *See Maravilla*, 867 F.Supp. at 1377 (N.D.Ind. 1994) (holding that plaintiffs' account that they did not hear officers identify themselves and order subject to halt did not create a genuine dispute of fact with the officers' account that they issued such warnings). Even if no commands were issued to Mr.

Evans to drop his weapon, this fact would not make the use of deadly force unconstitutional in this case. Mr. Evans' actions alone, without more, render the officer's belief that Evans posed a danger to the officers in the room sufficient to justify the use of deadly force.

Mrs. Evans next argues that the agents provided inconsistent statements about the circumstances of the shooting, but the mere existence of some alleged factual discrepancies between the agents' statements will not defeat an otherwise properly supported motion for summary judgment – the requirement is that there can be no "genuine" issue of "material" fact. *Scott v. Harris,* 550 U.S. 372, 380 (2007). None of the alleged discrepancies are material to the totality of the circumstances discussed above. This is a prototypical case where the agents were "forced to make a split-second judgment," and even if SA Scrown's assessment of the threat was mistaken, it was not objectively unreasonable.

Even construing the evidence in plaintiff's favor, Mrs. Evans has failed to show that SA Scrown's use of deadly force was objectively unreasonable. Mrs. Evans and her daughters were not present in the bedroom and could not observe the actions of Mr. Evans and the officers. There is no evidence that contradicts the statements of the officers who were in the bedroom with Mr. Evans. Accordingly, the court finds that plaintiff cannot show a genuine issue of material fact and defendants are entitled to summary judgment.

**D. Creation of Situation Requiring Use of Deadly Force**

Mrs. Evans claims that the agents' actions just prior to the shooting were reckless and created the situation where the use of deadly force was required. The Sixth Circuit has rejected such a broad approach in analyzing excessive force claims. *See Whitlow v. City of Louisville*, 39 Fed. Appx. 297, 303 (6th Cir. 2002). In an excessive force action involving the use of deadly force, review is limited to officers' action in the moments preceding the shooting; other actions leading up to that moment are irrelevant. *Id.* Moreover, claims regarding excessive force and claims regarding violations of the "Knock and Announce Rule" must be analyzed separately. *Id.* at 304. Thus, whether the agents may have violated the Knock and Announce Rule is an inquiry separate and distinct from, whether in the moments preceding the shooting deadly force was justified. *See Dickerson v. McClellan*, 101 F3d 1151, 1160 (6th Cir. 1996) (rejecting plaintiff's argument that in analyzing excessive force claims, the officers should be held accountable for creating the need to use excessive force by their unreasonable unannounced entry).

Focusing only on the moments preceding the shooting, the only reasonable inference that can be drawn from the facts is that when Evans unholstered his gun after repeated commands to drop it, a reasonable officer would have probable cause to think that there was a threat of serious physical harm to himself or others. In these circumstances, SA Scrown's use of deadly force was not excessive or reckless.

Last, Mrs. Evans argues that defendants could have chosen to serve the arrest warrant on Mr. Evans at

some public place rather than at his home. However, the Fourth Amendment does not require officers "to use the best technique available as long as their method is reasonable under the circumstances." *Dickerson*, 101 F.3d at 1160. "Where deadly force is otherwise justified under the Constitution, there is no constitutional duty to use non-deadly alternatives first." *Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir. 1994).

## V. Motion for Discovery

Plaintiff asks the court to stay ruling on the pending motion until the parties have had an opportunity to complete discovery. When a summary judgment motion is filed, the party opposing the motion may, by affidavit under Federal Rule of Civil Procedure 56(d), explain why she is unable to present facts essential to justify the party's opposition to the motion. *Wallin v. Norman*, 317 F.3d 558, 564 (6th Cir. 2003). The burden is on the party seeking discovery to demonstrate why such discovery is necessary. *Summers v. Leis*, 368 F.3d 881, 887 (6th Cir. 2004). Bare allegations or vague assertions of the need for discovery are not enough. *United States v. Cantrell*, 92 F.Supp.2d 704, 717 (S.D.Ohio 2000). A party must state with "some precision the materials she hopes to obtain with further discovery, and exactly how she expects those materials would help her in opposing summary judgment." *Summers*, 368 F.3d at 887. Courts do not permit a "fishing expedition" in which the nonmovant simply hopes to uncover some evidence that may help her case. *Duff v. Oak Ridge*, 2011 WL 4373929 (E.D.Tenn. Sept. 19, 2011).

Here, the court finds counsel's affidavit fails to make a sufficient showing to warrant the relief

requested. The affidavit merely states "it is essential to our opposition that we be allowed to conduct discovery such that more facts can be developed to rebut the instant motion for summary judgment." [R. 39-11]. The affidavit fails to identify what information Evans could learn in discovery that would create a genuine issue of material fact on any of her claims. The only individuals in the bedroom with Mr. Evans – and thus the only witnesses to the events that transpired there – are the FBI agents, who have provided affidavits. Given the agents' testimony that Mr. Evans was armed and ignored commands to drop his weapon, plaintiff cannot create a genuine issue of fact. *See Klein v. Ryan*, 847 F.2d 368, 373 (7th Cir. 1988) (witnesses' testimony that they did not hear police warnings insufficient to create fact dispute in shooting case). Accordingly, plaintiff's request for discovery is denied.

## VI. Requests for Admission

On February 24, 2016, plaintiff propounded Requests for Admissions to defendant, which have not been answered. Evans argues, by operation of law, these requests should be deemed admitted and used as a basis to refute defendants' summary judgment motion. Defense counsel responds that upon receipt of the Requests for Admissions, along with a set of Interrogatories, he spoke with plaintiff's counsel and advised that no discovery would be answered until the court held a case management conference and/or issued a case management order. Defense counsel had several telephone discussions with plaintiff's counsel between February and May 2016 and believed the parties had an understanding that a protective order was needed before discovery was answered [R. 43]. On June 21,

2016, plaintiff's counsel agreed to a protective order and on June 23, 2016, plaintiff's counsel filed a motion for a protective order [R. 13]. After revisions requested by the court, the protective order was entered on July 22, 2016 [R. 19].

On July 25, 2016, defendants filed their motion for summary judgment, as well as a motion to stay discovery. On August 18, 2016, Magistrate Judge Guyton granted the motion to stay discovery. In light of these facts, the court cannot find that defendants have conceded the matters stated in the Requests for Admissions.

## VII. Conclusion

The shooting of Mr. Evans was an unfortunate tragedy. Yet, as the court views the undisputed facts of the case in light of binding precedent, the court is compelled to conclude that SA Scrown's split-second decision to use deadly force was not objectively unreasonable. Accordingly, defendants' motion for summary judgment [R. 20] is **GRANTED,** and this action is **DISMISSED in its entirety.**

**ENTERED:**

/s/ Pamela Reeves
**UNITED STATES DISTRICT JUDGE**

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF TENNESSEE**
**AT KNOXVILLE**

**No. 3:15-cv-00464**
**REEVES/GUYTON**

**[Filed March 31, 2017]**

| | |
|---|---|
| SUZAN EVANS, Individually, and as Wife and Next of kin of SCOTT EVANS, deceased, Plaintiff, | ) |
| v. | ) |
| UNITED STATES OF AMERICA, and the FEDERAL BUREAU OF INVESTIGATION, Defendants. | ) |

**JUDGMENT**

In accordance with the Memorandum Opinion filed contemporaneously herewith, it is **ORDERED** that Defendants' motion for summary judgment is **GRANTED**, and Plaintiff's claims against Defendants are **DISMISSED**, **with prejudice.**

The Clerk is **DIRECTED** to remove the trial scheduled for July 11, 2017, from the court's docket**.**

Enter:

/s/ Pamela Reeves
**UNITED STATES DISTRICT JUDGE**

## APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**No. 17-5622**

**[Filed June 11, 2018]**

SUZAN EVANS, INDIVIDUALLY, AND AS WIFE AND NEXT OF KIN OF SCOTT EVANS, DECEASED, Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; FEDERAL BUREAU OF INVESTIGATION, Defendants-Appellees.

O R D E R

**BEFORE:** MERRITT and SUTTON, Circuit Judges; CLELAND, District Judge.*

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then

* The Honorable Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation.

was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Merritt would grant rehearing for the reasons stated in his dissent.

**ENTERED BY ORDER OF THE COURT**

/s/ Deborah S. Hunt
**Deborah S. Hunt, Clerk**

## APPENDIX D

**IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE KNOXVILLE DIVISION**

**Civil Case No. 3:15-CV-464**

**[Dated September 2, 2016]**

| | |
|---|---|
| Suzan Evans, Individually and as Wife and next of kin of Scott Evans, deceased, Plaintiff, | ) |
| vs. | ) |
| United States of America and The Federal Bureau of Investigation, Defendants. | ) |

### AFFIDAVIT OF MORGAN EVANS

I, Morgan Evans, being duly sworn, depose and state:

1. On the morning of March 6, 2013, I was with my mom, my dad, and my little sister at our home at 2332 Stapleton Road, New Market, Tennessee.

2. I heard cars come flying in on our gravel driveway. It got quiet for a bit. There was a big bang on the front door, like someone beating and banging on the door. I never heard anyone say or shout anything.

3. Me and my mom and my little sister met at the door. While Mom was unlocking the door, they smashed the door in, and the door hit Mom in the face. It was about two seconds between the banging on the door and the door being smashed in.

4. The agents came rushing into the house, yelling "get down!" They never identified themselves. I got down on my knees and pulled my little sister down beside me. Mom was holding her nose because it was busted. They threw her down on her stomach and put handcuffs on her. I never heard any of the agents order anyone to show their hands.

5. All of the agents were in pure black clothes with no writing or markings. I was terrified. I thought they were breaking in our house to rob us. The agents never showed a warrant or identification.

6. A female agent sat beside me with her hand on my shoulder. The other female agent had her hand on my mom's back.

7. I saw a male agent standing just outside the master bedroom doorway looking into the master bedroom. I never heard anyone say or shout anything in the bedroom.

8. I heard two or three gun shots from the master bedroom. The agent just outside the master bedroom doorway was the shooter. He said "It's clear" and walked out the front door. He did not speak to me, my mom, or my sister, and we did not speak to him.

Sworn this 2 day of September, 2016.

/s/ Morgan Evans
Morgan Evans

Subscribed to and sworn to before me this the 2 day of September, 2016.

/s/_____
NOTARY PUBLIC

My Commission Expires:
5-6-18

## APPENDIX E

**IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE KNOXVILLE DIVISION**

**Civil Case No. 3:15-CV-464**

**[Dated September 2, 2016]**

| | |
|---|---|
| Suzan Evans, Individually and as Wife and next of kin of Scott Evans, deceased, Plaintiff, | ) |
| vs. | ) |
| United States of America and The Federal Bureau of Investigation, Defendants. | ) |

### AFFIDAVIT OF SUZAN EVANS

I, Suzan Evans, being duly sworn, depose and state:

1. On the morning of March 6, 2013, I was with my family at our home at 2332 Stapleton Road, New Market, Tennessee. My 15-year-old daughter and my 7-year-old daughter were in their bedrooms. My husband, Scott Evans, was still in bed.

2. I heard a loud banging on the front door. I ran to the door immediately. I did not hear anyone say or yell anything, just a loud banging.

3. I looked through the front door peephole while I unlocked the deadbolt. All I could see was people in black with no markings on their clothes. I was unlocking the doorknob lock when they smashed the door in and broke my nose, knocking me back about five feet. The time between the banging and the door being smashed in was about two or three seconds.

4. Agents swarmed into the house, carrying rifles and pistols. Their clothes were all black. They had no markings identifying them as FBI or law enforcement. None of them identified themselves or showed me a warrant.

5. An agent grabbed me, threw me face down on the floor, and handcuffed me. I was never ordered to get down or to show my hands or anything else. The agents never asked me where my husband was or whether there were guns in the house.

6. I heard no shouting, talking, commands, or anything like that coming from the bedroom. I definitely would have heard it because I was so close to the bedroom.

7. I heard two gun shots from the bedroom. An agent came out of the bedroom and yelled outside for someone to call an ambulance. I did not speak to that agent and he did not speak to me.

8. After the paramedics left, the agents finally took the handcuffs off of me. I was handcuffed for about 30-45 minutes. I was never violent or combative.

9. Later that day I was interviewed by two agents at my father's house. During the interview, I never made any statement to the effect of "it all makes sense now"

after learning more about the nature of the allegations against my husband.

Sworn this 2 day of September, 2016.

/s/ Suzan S. Evans
Suzan Stanton Evans

Subscribed to and sworn to before me this the 2 day of September, 2016.

/s/_____
NOTARY PUBLIC

My Commission Expires:
5-6-18