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**ORDER ON DEFENDANTS ELDERIDGE AND
CITY OF HARRODSBURG'S MOTION
FOR SUMMARY JUDGMENT
(JANUARY 21, 2015)**

COMMONWEALTH OF KENTUCKY
MERCER CIRCUIT COURT

JAMES THOMAS HURST, II,

Plaintiff,

v.

JASON ELDERIDGE; CITY OF HARRODSBURG,
KENTUCKY; JAMES CALDWELL;
CITY OF BURGIN, KENTUCKY,

Defendants.

Civil Action No. 08-CI-00461

Before: Rob JOHNSON,
Special Judge, Mercer Circuit Court

The parties are before the Court on the Summary Judgment Motion of Defendants Elderidge and City of Harrodsburg. Defendants filed a Memorandum in Support of their Motion and Plaintiff filed a Response. After reviewing the record in this matter and being otherwise sufficiently advised, the Court ORDERS as follows:

The facts of this case have been set out in previous orders of this Court. The short version of the facts are that on November 30, 2007, Aaron Nickles' mother called 911 about a conflict that she believed ensued between Plaintiff and her son. She informed the 911 operator that Plaintiff may have had a gun. Burgin Chief James Caldwell drove to where Nickles was to inquire about the incident. He did not state to 911 that Plaintiff had a gun, but he did inform 911 that he thought Plaintiff was a convicted felon. There was a warrant out for Plaintiff for a child support charge. Officer Jason Elderidge, while on patrol, discovered Plaintiff's vehicle at Plaintiff's cousin's house. Defendant Elderidge's version of the facts is that when he approached Plaintiff, Plaintiff refused to follow his commands, started to approach Defendant Elderidge with his hands in his pockets, and then shouted for Elderidge to shoot him. Plaintiff's version of the facts is that he obeyed the commands of Defendant Elderidge, did not approach him and that he did not have his hands in his pockets. Furthermore, Plaintiff says that he did not understand Defendant Elderidge's hostility toward him because Defendant Elderidge kept yelling at Plaintiff that he was going to shoot him. Plaintiff agrees that he told Defendant Elderidge to go ahead and shoot him, but not in a defiant way, but in his bewilderment as to why Defendant Elderidge kept yelling this when he had been arrested several times and this had never happened before. There were other officers at the scene, but the parties agree that one is discredited and the other testified that he did not see anything during the 10 seconds that led up to the shooting.

Pursuant to *Steelvest, Inc. v. Scansteel Serv. Ctr. Inc.*, 807 S.W.2d 476 (Ky. 1991), this Court must find against the movant for summary judgment unless the right to the judgment is shown with such clarity that there is no room left for controversy and if there exists no issue of material fact. CR 56.03 states as follows:

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Defendants Elderidge and City of Harrodsburg argue that summary judgment should be granted to them because Elderidge is entitled to qualified immunity. They further argue that if the Court agrees with Elderidge the case should also be dismissed against the city because its liability is premised upon Elderidge's liability. Plaintiff argues that summary judgment cannot be granted in this matter because the Court must accept his version of the facts when considering whether to grant summary judgment, leading to a conclusion that this is a material issue of fact that a jury must settle.

Defendant Elderidge is entitled to qualified immunity as a police officer if his conduct did not violate clearly established statutory or constitutional rights, which a reasonable person would have known. *Messer-*

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schmidt v. Millender, 132 S.Ct. 1235, 1244, 182 L.Ed.2d 47 (2012). Defendant Elderidge violated the Fourth Amendment to the United States Constitution for unreasonable seizure if he used excessive force to apprehend him which was unreasonable. *See Graham v. Conner*, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Plaintiff, citing *Rowan County v. Sloas*, 201 S.W.3d 469 (Ky. 2006), argues that Kentucky's standard for qualified immunity is a subjective standard instead of an objective one. In order to have the protection of qualified immunity, Plaintiff argues Elderidge must have acted in good faith. *Id.* at 474. The Court finds after reading the deposition of Plaintiff that there are material facts in controversy in this matter and that summary judgment cannot be granted.

WHEREFORE, based upon the foregoing, the Court OVERRULES Defendants' Motion for Summary Judgment.

DATED this the 21st day of January, 2015.

/s/ Rob Johnson

Special Judge,
Mercer Circuit Court

CLERK: Please serve a copy of the foregoing Order upon the parties via their attorneys of record.

**DEFENDANTS' MOTION FOR LEAVE TO FILE
THIRD PARTY COMPLAINT
(MARCH 20, 2015)**

COMMONWEALTH OF KENTUCKY
50TH JUDICIAL CIRCUIT
MERCER CIRCUIT COURT

JAMES THOMAS HURST, II,

Plaintiff,

v.

JASON ELDERIDGE;
CITY OF HARRODSBURG, KENTUCKY,

Defendants.

Civil Action No. 08-CI-00461

The Defendants, Jason Eldridge (“Eldridge”) and City of Harrodsburg, Kentucky (“Harrodsburg”) by counsel, and pursuant to CR 14.01, move for leave to file the attached Third Party Complaint against the City of Burgin, Kentucky (“Burgin”) and James Caldwell (“Caldwell”) (collectively referred to as “Third Party Defendants”). In support of said Motion, Eldridge and Harrodsburg state that the evidence exists from which a jury may infer that the events of the night in question were set in motion by the acts and/or omissions of the Third Party Defendants. If a jury makes that inference, Eldridge and Harrodsburg are

entitled to indemnity from these Third Party Defendants as a matter of law.

The record in this case establishes that Caldwell, while acting within the course and scope of his employment with Burgin, (a) reported to dispatch that he believed the Plaintiff to be a convicted felon, despite the fact that the Plaintiff was not a convicted felon, (b) erroneously reported to dispatch that the Plaintiff had threatened Aaron Nichols on the night in question, (c) failed to correct subsequent dispatch communications indicating that the Plaintiff had threatened Mr. Nichols, and (d) reported to dispatch that the Plaintiff had brandished a weapon “out here” in the past. The Defendants reasonably relied upon these statements, actions and omissions during their encounter with the Plaintiff which culminated in the subject shooting.

Summary judgment has been entered in favor of the Third Party Defendants with regard to the Plaintiff's claims against the Third Party Defendants. However, the Defendants have not yet made any claims against the Third Party Defendants. On January 21, 2015, this Court entered an Order denying the Plaintiff's Motion to Vacate Summary Judgment in favor of the Third Party Defendants. The Third Party Defendants have requested this Court to add language to this Order indicating it is final and appealable. In order to fully preserve all claims the Defendants may have against the Third Party Defendants, the Defendants respectfully request that this Court permit the filing of the attached Third Party Complaint prior to the entry of a final Order.

In a trial of this action, a jury must be asked to apportion the Plaintiff's damages among all persons or entities potentially liable for those damages. *See*

KRS 411.182(1); *Kevin Tucker & Assoc., Inc. v. Scott & Ritter, Inc.*, 842 S.W.2d 873, 874 (Ky. Ct. App. 1992). Persons or entities not a party to an action cannot be listed in apportionment instructions. *Bass v. Williams*, 839 S.W.2d 559, 563 (Ky. Ct. App. 1992), *overruled on other grounds by Regenstreif v. Phelps*, 142 S.W.3d 1, 4 (Ky. 2004); *Baker v. Webb*, 883 S.W.2d 898, 899 (Ky. Ct. App. 1994). Thus, in order to allow a jury to apportion among all persons or entities potentially liable, the Third Party Defendants must be joined as parties to this action.

WHEREFORE, Eldridge and Harrodsburg respectfully request that their Motion for Leave to file a Third Party Complaint against Burgin and Caldwell be granted and the attached Third Party Complaint be filed of record and summons issued.

{ Continued }

NOTICE

Please take notice that the foregoing Motion shall come on for hearing before Special Judge Robert Johnson at the Woodford Circuit Court, Versailles, Kentucky, on the 8th day of April, 2015 at 9:30 a.m., or as soon thereafter as counsel may be heard.

Respectfully submitted,

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