APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

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Pursuant to Sixth Circuit I.O.P. 32.1(b)
File Name: 19a0191p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-5084

[Filed August 12, 2019]

ANGELA STUDDARD, individually and as lawful wife, next of kin, administrator ad litem, and personal representative for Edmond Studdard, deceased, and Estate of Edmond Studdard,	)
Plaintiff-Appellee,	)
v.	)
SHELBY COUNTY, TENNESSEE, et al.,	)
Defendants,	)
ERIN J. SHEPHERD and TERRY I. REED, individually and as employees or agents of Shelby County, Tennessee,	)
Defendants-Appellants.	)

Appeal from the United States District Court for the Western District of Tennessee at Memphis.
No. 2:17-cv-02517—Jon Phipps McCalla, District Judge.

Argued: August 6, 2019

Decided and Filed: August 12, 2019

Before: SUTTON, GRIFFIN, and READLER, Circuit Judges.

COUNSEL

ARGUED: E. Lee Whitwell, SHELBY COUNTY ATTORNEY'S OFFICE, Memphis, Tennessee, for Appellants. Daniel A. Seward, SEWARD LAW FIRM, Memphis, Tennessee, for Appellee. **ON BRIEF:** E. Lee Whitwell, John Marshall Jones, SHELBY COUNTY ATTORNEY'S OFFICE, Memphis, Tennessee, for Appellants. Daniel A. Seward, SEWARD LAW FIRM, Memphis, Tennessee, for Appellee.

OPINION

SUTTON, Circuit Judge. May police officers shoot an uncooperative individual when he presents an immediate risk to himself but not to others? No, case law makes clear. We thus affirm the district court's decision to deny the officers' motion for summary judgment based on qualified immunity.

I.

Three scenes capture what happened. Each one gives the benefit of the doubt to the plaintiff's presentation of the evidence.

Scene one. Just outside of Memphis on a hot July day in 2016, Officer Kyle Lane, a deputy in Shelby County, Tennessee, responded to a hit-and-run dispatch call. After he arrived at the accident site, several people told Lane that he should follow Edmond Studdard, who was walking away along the road. One of the bystanders told Officer Lane that Studdard had slit his wrists and needed attention. Concerned, Lane turned his patrol motorcycle around and rode after Studdard.

Scene two. Lane rode a short way down the road, saw Studdard, and pulled up next to him. He asked Studdard to stop and talk with him. Studdard ignored Lane's request and responded to further inquiry by turning toward Lane and displaying what appeared to be a knife. At that point, Lane noticed Studdard's bloody wrists.

Lane continued to follow Studdard, who intermittently walked and ran along the northbound side of the street. Before engaging Studdard again, Lane decided that he needed support. Lane sent out a call for backup, noting that Studdard had a knife and had slit his wrists. Three officers responded.

Deputies Samuel Pair and Erin Shepherd, on duty together that day, arrived at about the same time as Deputy Terry Reed. They parked their two vehicles

north of Studdard, seeking to block traffic and his path forward, while Lane continued to follow from the south.

Scene three. The three newly arrived officers exited their vehicles and pulled out their firearms. Studdard halted his northbound journey, taking up a spot in a grassy area on the east side of the street. A bush stood to Studdard's north, while a fence blocked him to the east. Lane (now off his motorcycle and with his gun trained on Studdard) stood to the south, and the three other officers stood to Studdard's west in the southbound lane of the road. Studdard faced the officers to the west, about 34 feet away.

All four officers directed Studdard to drop the knife. Studdard stood still, knife in hand. One of the officers said that they would shoot if Studdard did not drop the weapon. Studdard raised the knife up to his throat and began moving forward in a "swaying" motion. R. 96-4 at 52–53. "Almost immediately," Deputies Reed and Shepherd opened fire from the southbound lane. R. 96-2 at 17. Reed shot twice, Shepherd three times. Studdard, still in the grassy area, fell. Lane called for an ambulance. Reed kicked the knife out of Studdard's hand, and all four officers began administering aid. Studdard died in the hospital several weeks later due to complications from the gunshot wounds.

Angela Studdard, his wife, filed this § 1983 action, alleging that Officers Reed and Shepherd used excessive force in violation of the Fourth Amendment. The officers moved for summary judgment based on qualified immunity. The district court denied their motion.

II.

The ground rules for resolving this appeal are straightforward. Qualified immunity shields officers from personal liability unless they violate an individual's clearly established constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A seizure becomes unreasonable under the Fourth Amendment if the officer uses excessive force. *Graham v. Connor*, 490 U.S. 386, 394–95 (1989). To justify lethal force, an officer must have probable cause to believe the suspect presents an immediate threat of serious physical harm to the officer or others. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). In view of the many settings in which officers may use force against an uncooperative suspect, we must carefully define the right in determining whether the officers may be held liable. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152–53 (2018) (per curiam). The facts of another case need not be identical, but they must be similar enough that the other case "squarely governs" this one. *Id.* at 1153 (quotation omitted). In deciding what the facts are at summary judgment, we construe the record evidence in favor of the non-movant—here Studdard. *Sims Buick-GMC Truck, Inc. v. Gen. Motors LLC*, 876 F.3d 182, 185 (6th Cir. 2017). All things considered, we construe uncertain facts in Studdard's favor and uncertain law in the officers' favor.

Gauged by these standards, we think the district court correctly denied the officers' bid for qualified immunity.

As a general matter, the officers' actions violated clearly established requirements in this area. When

Officers Reed and Shepherd confronted Studdard, it's true, they had good reason to believe he was dangerous and uncooperative. They knew or reasonably believed that Studdard had a knife and that he had slit his wrists. And he refused to comply with their commands to put the knife down. But Studdard at this point did not pose a serious risk to anyone in the area. No bystander was remotely near him. And Officers Reed and Shepherd, in the southbound lane of the road, stood about 34 feet from Studdard, in the grassy area east of the road. He made no verbal threats to them or anyone else at the time. What he did do was raise the knife to his throat when the officers warned that they would use force if he did not put the knife down. And when he raised the knife to his throat, he moved forward in a swaying motion. These actions did not justify lethal force.

As a specific matter, the officers' actions violated *Sova v. City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998). Officers faced a knife-wielding man who had gashed his arms and chest. From inside his parents' home, he told the police to go away. The officers entered a screened porch off the kitchen of the house and asked the man what he wanted. He replied that he wanted the police to shoot him. When the man moved toward the door to the porch, the officers yelled at him to drop the knife. He did not comply and instead stepped out on the porch. One officer sprayed the man with mace, forcing him back inside the house. But the man walked back to the door. When he pushed the screen door open, but while he still stood in the doorframe, the officers fired. *Id.* at 900–01, 902. On

those facts, we held, a reasonable jury could find that the officers used excessive force.

The two cases warrant the same outcome. Both cases involved men with knives who had cut themselves—and threatened worse to themselves. In each case, the suspects ignored commands to drop their knives. And in each case, the suspects made similar movements toward the officers just before being shot—one swaying forward from 34 feet away, one opening the screen door onto the porch where the officers stood. *Sova* indeed seems to be the harder case, as the officers were closer to the suspect and more at risk. That means Studdard's claim deserves resolution by a jury too.

The officers push back in several ways.

They start by taking issue with the facts. Even viewing the evidence in Studdard's favor, they say, it reasonably supports only the conclusion that Studdard began walking toward Deputies Reed and Shepherd before they shot him. The district court rightly disagreed. Reed and Shepherd, it's true, said that Studdard walked toward them before they fired. But Deputy Lane said he did not see Studdard walk toward them. Lane said Studdard moved his upper body forward, in a swaying motion, but that he never saw Studdard advance toward the officers.

While Lane admits that he focused on the knife at Studdard's throat instead of whether Studdard moved his feet, other evidence supports Lane's view that Studdard merely swayed. Lane had a clear view of the entire incident, which means he likely would have

noticed if Studdard walked several feet toward the officers (as they testified), even with his focus centered on the knife. Lane also said the officers shot "[a]lmost immediately" after Studdard raised the knife to his neck, R. 96-2 at 17, which supports an inference that not enough time elapsed for Studdard to walk forward. And Shepherd testified that Studdard stood near the middle of the 19-foot-wide grassy area before raising the knife to his neck and beginning to move. Studdard fell upon being shot, and no officers said they moved him while administering aid. The paramedic found Studdard 10 feet from the curb, in the middle of the grassy area. That suggests, again, that Studdard didn't walk before the officers shot. At this stage, we must assume Studdard swayed forward but never walked toward the officers.

The officers try to separate *Sova* from this case. They note that the interaction there lasted much longer than the interaction in this case. That's true. But it doesn't change matters.

The man in *Sova*, who had clearly heard and responded to the officers, ignored their commands once by coming onto the porch. And, despite being sprayed with mace the first time, he began to approach again. The history here, while not as long, provided no more cause for concern. The officers add that the man in *Sova* never walked forward through the door. True again. But Studdard also did not walk forward. The man in *Sova* moved his arm forward to open the door; Studdard swayed forward. Any distinction between the two cases is not a meaningful one. If anything, the man's action of pushing the screen door open in *Sova*

seems like a more purposeful move toward the officers, making this the easier case.

The officers also invoke *Stevens-Rucker v. City of Columbus*, which granted officers qualified immunity for using lethal force against a knife-wielding suspect. 739 F. App'x 834 (6th Cir. 2018). After the suspect in that case twice recovered from being tased, an officer shot him as he ran at them. *Id.* at 837, 842. There is a world of difference between a knife-wielding suspect who runs at officers and one who doesn't. A different officer, after chasing the suspect through an apartment complex in the dark, shot him again upon confronting him in an open space. That officer fired four quick shots, two of which hit the suspect after he had fallen down but while he pushed himself back off the ground. *Id.* at 843–44. Studdard didn't present the same kind of perilous defiance, and the officers had better control over the surroundings here.

We affirm.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

Case No. 2:17-cv-2517-JPM-tmp

[Filed January 22, 2019]

ANGELA STUDDARD individually and as next of kin, administrator ad litem and personal representative of EDMOND STUDDARD, deceased, and estate of EDMOND STUDDARD,	)
Plaintiff,	)
v.	)
SHELBY COUNTY, TENNESSEE; ERIN J. SHEPHARD, in her individual capacity; and TERRY I. REED, in his individual capacity,	)
Defendants.	)

ORDER DENYING TERRY REED AND ERIN SHEPHERD'S MOTION FOR SUMMARY JUDGMENT; GRANTING SHELBY COUNTY'S MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendants Terry Reed and Erin Shepherd's Motion for Summary Judgment filed on August 31, 2018. (ECF No. 89.) These two individual defendants move for summary judgment, arguing that they are entitled to qualified immunity. (Reed and Shepherd's Memo in Support of Summary Judgment, ECF No. 89-1 at PageID 427.) For the reasons stated below, the Motion is DENIED.

Also before the Court is Defendant Shelby County's Motion for Summary Judgment filed on August 31, 2018. (ECF No. 90.) Shelby County argues there is no underlying constitutional violation, which prevents a municipality from being held liable. (Shelby County's Memo in Support of Mot. for Sum. J., ECF No. 90-1 at PageID 835.) Alternatively, Shelby County argues that if there was a constitutional violation, Plaintiff "can submit no evidence showing that such a violation was the result of a policy, practice, custom, or failure to train sufficient to establish liability on the part of Shelby County." (Id. at PageIDs 835-36.) For the reasons set out below, the Motion of Shelby County is GRANTED.

I. BACKGROUND

A. Factual Background

This action arises out of County Sheriff's Deputies Erin Shepherd and Terry Reed's fatal shooting of Edmond Studdard. (See Pl.'s Resp. to Def.'s Statement of Undisputed Facts, ECF No. 115-2 at PageIDs 1641-43; Amended Complaint, ECF No. 33 at ¶ 23.) On July 7, 2016, Studdard slit his writs and walked along the shoulder of Big Orange Road where he was

eventually boxed in by a fence and several Sheriff's Deputies. (Pl.'s Resp. to Def.'s Statement of Undisputed Facts, ECF No. 115-2 at PageID 1634.) Reed and Shepherd fired their guns at Studdard multiple times resulting in his hospitalization. (Id. at PageIDs 1641-42.) Studdard died in the hospital on September 4, 2016. (Id. at PageID 1645.)

B. Undisputed Facts

The following facts are undisputed based on Plaintiff's Response to Defendants' Statement of Undisputed Facts (ECF No. 115-2) (internal citations omitted throughout):

Shelby County Sheriff's Office (SCSO) training

- SCSO "has policies for its deputies governing firearms, deadly force, and suspects suffering from mental illness" which "were in effect on and before July 7, 2016." (Id. at PageID 1621.)
- The SCSO provided training to Shepherd "regarding firearms, use of force, and handling mentally ill suspects." Shepherd received training at the SCSO training academy regarding mentally ill/unstable suspects. "The training academy lasts six and a half months." (Id. at PageID 1622.)
- Additional training known as Critical Incident Team ("CIT") training "is a 40-hour class provided at the Memphis Police Department training academy." It includes "advanced training on how to deal with suspects suffering from mental illness or incompetence." (Id.)

- "Erin Shepherd, Terry Reed, and Samuel Pair were all CIT-certified as of and before the day Edmond Studdard was shot--July 7, 2016." (Id. at PageID 1623.)

- "Prior to becoming an SCSO Deputy, Reed was a police officer in Millington, Tennessee." "He became a Sheriff's Deputy in 2013." (Id.)

- "In addition to CIT training, Reed received mental health training during in-service with the SCSO and at the SCSO training academy." (Id. at PageID 16424.)

- "Shepard has a Bachelor's degree in criminal justice and a Master's degree in criminology from the University of Memphis." "While she was a graduate assistant, she was assigned to the CIT grant program, which helped facilitate training for CIT officers based on the CIT Memphis model." (Id.)

- "SCSO deputies, including Reed and Shepherd, received training on firearms, use of force, and defense against suspects with weapons." "SCSO deputies are trained, when forced to fire, to aim center mass and are not trained to shoot to kill, but instead shoot to end the threat." (Id. at PageID 1625.)

Initial response

- On July 7, 2016 Lane responded to a call reporting a hit-and-run. When Lane responded, "Lane knew only that a male white had a wreck and then he left the scene." (Id. at PageID 1627.)

- "Lane pulled into the A & H Iron Works parking lot and a group of people ran out to him yelling, 'There he is. Go get him. He slit his wrists.' They were referring to Edmond Studdard." (Id. at PageID 1627.)
- "Studdard continued walking, and at times running, northbound on Big Orange Road toward Macon Road and away from Lane and Lane continued to follow. There was a tall wooden fence to Studdard's right, on the east side of the road. The fence was more than 4 feet tall, running north to south on the east side of Big Orange Road." (Id. at PageID 1630.)
- Lane made a call for assistance and "Sheriff's Deputies Erin Shepherd, Samuel Pair and Terry Reed–all members of the Patrol Crime Response Unit ("PCRU")–responded." (Id.)
- "Deputies Reed, Shepherd, and Pair wore plainclothes, but were wearing black vests with the yellow lettering 'sheriff' on the front and back in bold print." (Id. at PageID 1632.)
- "All deputies on the scene carried Sig Sauer .40 caliber service handguns." (Id.)
- "Pair was in an unmarked truck and Shepherd was his passenger." "Reed was driving a Ford Fusion car." (Id.)
- "Reed knew that the call for assistance from Lane 'started off as a hit-and-run call that came out. And then it turned into an armed party' call." (Id.) (quoting Reed Dep., ECF No. 89-4 p. 113.)

- "Radio traffic reflected that an 'individual that was walking had a knife or an edged weapon in his hand, he was walking, and the other officer on a motor bike was behind him.'" (Id.) (quoting Abdullah Dep., ECF No. 89-7 at p. 48.)
- "Radio traffic reflected that Studdard had cut his wrists." (Id. at 1633.)
- "Big Orange Road is an industrial complex with various businesses throughout it, including A&H Iron Works, Conway Heating and Air, a golf driving range, and the Memphis Cheer Elite All-Stars cheerleading training camp." (Id.)
- "Pair and Shepherd were in a vehicle together, and arrived basically simultaneously with Reed." (Id.)
- "Shepherd told Pair as they were pulling up to 'pull in front [north] of him so we can try to stop his forward movement.'" (Id. at PageID 1634) (quoting Shepherd Depo, ECF No. 89-3 at p. 215.)
- "The officers parked their vehicles and got out in the middle, toward the opposite side of the street." (Id.)

After officers exited their vehicles

- "The officers essentially boxed Studdard in with the fence and their vehicles. The three deputies—Pair, Shepherd, and Reed—got out into the southbound lane, opposite Deputy Lane and Studdard." (Id.)
- "Pair came around the back of his truck and started approaching Studdard." "When Shepherd got out of the vehicle, she walked farther down the street."

"When Pair, Reed, and Shepherd arrived, Lane threw his bike down, took off his helmet, grabbed his weapon, and pointed it at Studdard." (Id. at PageID 1635.)

- "Shepherd was in the southbound lane 'towards the middle of the street.'" "Studdard was in the grassy area on the east side of Big Orange Road." (Id.)
- When the deputies came face to face with Studdard, he had at least "some blood on him prior to being shot." (Id. at PageID 1636.)
- The grassy area between northbound Big Orange Road to the wooden fence was at least 19 feet across. (Id. at PageID 1644.)
- "Before Pair could pull his trigger, Reed and Shepherd fired." (Id. at PageIDs 1641-42.)
- "Paramedic Natalie Stewart was not on the scene when Studdard was shot or when Studdard fell. Paramedic Stewart does not know where Studdard was standing when he was shot, nor does she know if Studdard's body was moved during medical aid between the shooting and her arrival." (Id.)
- "As soon as Studdard went down, Shepherd ran up to him and reached down to touch him; Reed stopped her and kicked the blade out of Studdard's hand first." "The deputies then started to give Studdard medical aid." "Lane called for an ambulance immediately and Shepherd used a tampon to plug one of Studdard's wounds." (Id.)

- "Pair ran to his truck and got a t-shirt and a towel to stop the bleeding on Studdard's wrists." "The Deputies also put pressure on the wounds to try to stop the bleeding. They rendered aid until the ambulance arrived." (Id. at PageID 1645.)
- "Plaintiff alleges Mr. Studdard died in the hospital on September 4, 2016." (Id.)

C. Procedural Background

Edmond Studdard's wife, Angela Studdard, filed the instant lawsuit in state court as Edmond Studdard's next of kin, administrator ad litem, and personal representative before it was removed to federal court on July 21, 2017.[1] (Notice of Removal, ECF No. 1.) Plaintiff filed an Amended Complaint on November 13, 2017. (ECF No. 33.) Defendants filed their Answer to the Amended Complaint on December 6, 2017. (ECF No. 38.) Trial is set for March 11, 2019. (Order Updating Trial Dates, ECF No. 128.)

Defendants Reed and Shepherd filed a Motion for Summary Judgment on August 31, 2018. (ECF No. 89.) That same day, Defendant Shelby County also filed a Motion for Summary Judgment (ECF No. 90.) Plaintiff filed a response to both summary judgment motions on October 5, 2018. (ECF No. 115.) Reed and Shepherd filed a reply on October 17, 2018 (ECF No. 123.) Shelby County also filed a reply the same day. (ECF No. 122.) Defendants filed supplemental authority for the

[1] Throughout the order Edmond Studdard will be referred to as "Studdard." Angela Studdard will be referred to as "Plaintiff."

summary judgment motions on November 13, 2018. (ECF No. 129.)

II. LEGAL STANDARD

A party is entitled to summary judgment "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). "A fact is 'material' for purposes of summary judgment if proof of that fact would establish or refute an essential element of the cause of action or defense." Bruederle v. Louisville Metro Gov't, 687 F.3d 771, 776 (6th Cir. 2012).

"In considering a motion for summary judgment, [the] court construes all reasonable inferences in favor of the non-moving party." Robertson v. Lucas, 753 F.3d 606, 614 (6th Cir. 2014) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). "The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact." Mosholder v. Barnhardt, 679 F.3d 443, 448 (6th Cir. 2012) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). "Once the moving party satisfies its initial burden, the burden shifts to the nonmoving party to set forth specific facts showing a triable issue of material fact." Mosholder, 679 F.3d at 448-49; see also Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 587. "When the non-moving party fails to make a sufficient showing of an essential element of his case on which he bears the burden of proof, the moving parties are entitled to judgment as a matter of law and summary judgment is proper." Martinez v. Cracker Barrel Old Country Store, Inc., 703 F.3d 911, 914 (6th Cir. 2013)

(quoting Chapman v. UAW Local 1005, 670 F.3d 677, 680 (6th Cir. 2012) (en banc)) (internal quotation marks omitted).

In order to "show that a fact is, or is not, genuinely disputed," a party must do so by "citing to particular parts of materials in the record," "showing that the materials cited do not establish the absence or presence of a genuine dispute," or showing "that an adverse party cannot produce admissible evidence to support the fact." Bruederle, 687 F.3d at 776 (alterations in original) (quoting Fed. R. Civ. P. 56(c)(1)); see also Mosholder, 679 F.3d at 448 ("To support its motion, the moving party may show 'that there is an absence of evidence to support the nonmoving party's case.'" (quoting Celotex, 477 U.S. at 325)). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]" Martinez, 703 F.3d at 914 (alteration in original) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)). "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). "[T]he district court has no 'duty to search the entire record to establish that it is bereft of a genuine issue of material fact.'" Pharos Capital Partners, L.P. v. Deloitte & Touche, 535 Fed. Appx. 522, 523 (6th Cir. 2013) (per curiam) (quoting Tucker v. Tennessee, 539 F.3d 526, 531 (6th Cir. 2008), abrogation recognized by Anderson v. City of Blue Ash, 798 F.3d 338 (6th Cir. 2015)).

The decisive "question is whether 'the evidence presents a sufficient disagreement to require

submission to a [fact finder] or whether it is so one-sided that one party must prevail as a matter of law.'" Johnson v. Memphis Light Gas & Water Div., 777 F.3d 838, 843 (6th Cir. 2015) (quoting Liberty Lobby, 477 U.S. at 251-52). Summary judgment "'shall be entered' against the non-moving party unless affidavits or other evidence 'set forth specific facts showing that there is a genuine issue for trial.'" Rachells v. Cingular Wireless Employee Servs., LLC, No. 1:08CV02815, 2012 WL 3648835, at *2 (N.D. Ohio Aug. 23, 2012) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 884 (1990)). "[A] mere 'scintilla' of evidence in support of the non-moving party's position is insufficient to defeat summary judgment; rather, the non-moving party must present evidence upon which a reasonable jury could find in her favor." Tingle v. Arbors at Hilliard, 692 F.3d 523, 529 (6th Cir. 2012) (quoting Liberty Lobby, 477 U.S. at 251). "[I]n order to withstand a motion for summary judgment, the party opposing the motion must present "affirmative evidence" to support his/her position." Mitchell v. Toledo Hosp., 964 F.2d 577, 584 (6th Cir. 1992) (citing Liberty Lobby, 477 U.S. at 247-254; Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989)). "[C]onclusory assertions, unsupported by specific facts made in affidavits opposing a motion for summary judgment, are not sufficient to defeat a motion for summary judgment." Rachells, 2012 WL 3648835, at *2 (quoting Thomas v. Christ Hosp. and Med. Ctr., 328 F.3d 890, 894 (7th Cir. 2003)). Statements contained in an affidavit that are "nothing more than rumors, conclusory allegations and subjective beliefs" are insufficient. See Mitchell, 964 F.2d at 584-85.

III. DISCUSSION

A. Shepherd and Reed's Liability

1. Legal Standard

"[Q]ualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 555 U.S. 223, 232 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Qualified immunity applies unless "a plaintiff is able to establish (1) the facts show a violation of a constitutional right, and (2), the right at issue was 'clearly established when the event occurred such that a reasonable officer would have known that his conduct violated' the plaintiff's constitutional right." Foster v. Patrick, 806 F.3d 883, 886 (6th Cir. 2015) (quoting Martin v. City of Broadview Heights, 721 F.3d 951, 957) (internal citation and quotation marks omitted).

To determine whether qualified immunity applies, a court must decide (1) "whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right," and (2) "whether the right at issue was clearly established at the time of defendant's alleged misconduct." Pearson, 555 U.S. at 232 (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). The court need not answer the questions in any particular order, but qualified immunity applies unless the answer to both questions is "yes." Id. at 231-32.

Claims of excessive force are evaluated under the Fourth Amendment's objective reasonableness

standard: "the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them[.]" Graham v. Connor, 490 U.S. 386, 395, 397 (1989) (internal citation and quotation marks omitted). The "proper application" of the Fourth Amendment's reasonableness standard "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396 (citing Tennessee v. Garner, 471 U.S. 1, 8-9 (1985)). "To determine the constitutionality of a seizure 'we 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.'" Garner, 471 U.S. at 8 (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

"[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." Garner, 471 U.S. at 7. But "notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is unmatched." Id. at 9. Accordingly, "[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." Id. at 11.

"'[T]he reasonableness of officer conduct in an excessive-force claim is a question of law that a court may decide,' but only if 'all material facts are undisputed.'" Oliver v. Buckberry, 687 Fed. Appx. 480, 484 (6th Cir. 2017) (quoting Stricker v. Twp. of Cambridge, 710 F.3d 350, 364 (6th Cir. 2013)).

2. Analysis of Factual Disputes

The three main factual disputes are: (1) what type of weapon Studdard was holding, (2) whether Studdard moved closer to Reed and Shepherd before he was shot, and (3) how far away Reed and Shepherd were from Studdard. As explained below, whether Studdard was holding a knife or box cutter does not affect the qualified immunity analysis. Whether Studdard was moving and how far away from Reed and Shepherd he was, on the other hand, do affect the qualified immunity analysis.

Weapon held

Plaintiff disputes that Studdard ever held a "knife" on July 7, 2016 and argue no "knife was ever recovered on or near the scene." (Pl.'s Resp. to Def.'s Statement of Undisputed Facts, ECF No. 115-2 at PageIDs 1620-21.) Plaintiff asserts the Tennessee Bureau of Investigation ("TBI") "recovered a box cutter handle without a razor blade but no witnesses in this cause can identify said item as being the object that Edmond Studdard allegedly held in his hand at the time of the shooting." (Id.) The handle is shown in Exhibit 2 to Lane's deposition (ECF No. 96-5 at PageID 1198) and in the crime scene photo attached to Lanes deposition (ECF No. 96-5 at PageID 1215.) There is no blade visible in

either picture. The TBI investigation recovered a separate razor blade from a sink at 1175 Big Orange Road. (TBI evidence log, ECF No. 132-1 at PageID 2076.)

Defendants argue Studdard was "holding what appeared to be a knife, waving the knife and refusing to drop it" before he was shot. (Def. Memo in Support of Sum. J., ECF No. 89-1 at PageID 426.) Deputy Lane testified that as he was following Studdard down Big Orange Road, Studdard "reache[d] his hand back, show[ed] me a knife." (Lane Depo., ECF No. 96-1 at p. 74.) Once Lane "realized he had the knife" and that "both his wrists were bloody, that's when [Lane] backed up and started calling all the information in." (Id. at p. 82.) Lane radioed to dispatch that Studdard was "not resisting, just walking around with knife in hand." (Id. at p. 83.) Lane thought the blade was about two to five inches long and the entire weapon appeared to be six to eight inches long. (Id. at pp. 78-79.) Radio traffic reflect that the "individual that was walking had a knife or an edged weapon in his hand." (Abdullah Depo., ECF No. 89-7 at p. 48.)

Defendants also had their expert, Richard Lichten, evaluate the type of weapon Studdard had when he was shot. Based on the photos of the recovered weapon, Lichten determined it was not a box cutter but a "Husky Folding Lock-Back Utility Knife" with replaceable blades. (Lichten Report, ECF No. 89-10 at PageID 748.) When a blade is inserted into the knife handle "the cutting surface of the blade is about 1.2 inches in length." (Id.) Lichten concluded that "based on the design of this knife it was impossible for a

reasonable deputy to have been able to visually determine if the 1.2 inch blade was in the knife or not at a distance and when the knife is moving." (Id. at PageID 749.) He further concluded that "[i]t does not make any difference at all if the weapon was a large bladed knife, such as a hunting knife, or a very small bladed knife like a box cutter." (Id. at PageID 748.) Either one can be used to "kill and maim" at a short distance. (Id.)

For a qualified immunity analysis, the general type of weapon is important. The specific name a party calls the weapon does not affect the analysis. Neither party disputes Studdard's wrists were cut or that radio traffic reflected that Studdard was walking with a knife or an edged weapon in his hand. (Pl.'s Resp. to Def.'s Statement of Undisputed Facts, ECF No. 115-2 at PageIDs 1632-33.)

Whether Studdard moved towards Reed and Shepherd

Defendants Reed and Shepherd argue that Studdard was walking towards them with the weapon in his hand. (Mot. for Sum. J., ECF No. 89-1 at PageIDs 431-32.) Shepherd testified that "he started walking towards [Deputy Lane]." (Shepherd Depo., ECF No. 89-3 at p. 135 l. 24-25.) Shepherd stated that Studdard started walking towards Shepherd and Reed:

> Q. At some point, did [Studdard] turn around and come back to where he was?
>
> A. He turned around and – came back, started walking towards Deputy Reed and I.

> Q. Okay. How far – okay. And how far did he walk toward you and Deputy Reed?
>
> A. We let him get about seven to 10 feet before we opened fire.

(Shepherd Depo., ECF No. 89-3 at p. 150 l. 17-24.)

Reed and Shepherd argue that Lane saw Studdard swaying but was not sure if he was moving. (Reed and Shepherd Reply to Mot. for Sum. J., ECF No. 123 at PageID 1671.) In Lane's July 8, 2016 statement to the Shelby County Sheriff's Office Bureau of Professional Standards and Integrity, Lane stated:

> Lane: . . . Well what also what I noticed when his neck when he had his knife up to his neck well I was zoned in on that knife. That was all I was looking at. Tunnel vision I was looking straight at that knife.
>
> Little: Um Hmm.
>
> Lane: Well when he was doing that he was I don't know if he was walking I don't know but his upper I know his upper shoulders I know his upper shoulders were moving I don't know if he was pacing or what he was doing but I just saw that knife and then as soon as it started going forward on his neck that's when the shots were fired and he went straight to the ground.

(BPSI file, ECF No. 131-1 at PageID 1775.)

> Peterson: Yes when he um you said his back was to the fence so as he [was] walking[,] did he walk towards y'all while he had the knife up?

> Lane: Not that I saw.
>
> Peterson: You don't remember?
>
> Lane: His back was to the fence and I was looking up at his neck when he brought it up here.
>
> Peterson: You didn't know if he was walking or not?
>
> Lane: I know his shoulders were moving but I was looking to the upper part of his body I didn't I didn't.
>
> Lane: No, Ma'am.
>
> Peterson: You had tunnel vision?
>
> Lane: Right.

(Id. at PageID 1776.)

Plaintiff argues Studdard was not moving towards the deputies before he was shot. (Response to Summary Judgment, ECF No. 115-1 at PageID 1608.) Deputy Lane's February 21, 2018 deposition testimony supports this argument:

> Q. And at any time did Mr. Studdard ever walk toward anybody with a knife or whatever he had in his hand?
>
> A. Not that I saw. No, sir.
>
> Q. Right. On the date after the shooting, the question was asked of you by the Detective Peterson. "Yes. You said his back was to the

fence, so he was walking. Did he walk towards y'all while he had the knife up?" And Your answer was, "Not that I saw." Right?

A. No, sir. Not that I saw.

Q. He never walked toward anybody while he had the knife to his throat, did he?

A. Not that I saw. No, sir.

Q. And you were there. You could see from where you were at, right?

A. (Nodding head affirmatively.)

Q. You got – you have good vision, nothing blocking your view, was it?

A. No, sir.

Q. And that's the truth, isn't it?

A. Yes, sir.

(Lane Depo., ECF No. 96-3 at p. 188 l. 14-p. 189 l. 10.)

Lane's deposition testimony clarifies that he saw Studdard swaying but not advancing towards anyone as Reed and Shepherd claim:

Q. And again, you don't know why Deputy Shepherd or Deputy Reed fired their weapons?

A. I can't speak for them. At the time the shots were fired, there was – the situation was starting to become heightened, and he was moving. I can't – I don't remember if he was

walking, or if he was swaying. I just – he was moving. That's all I can say.

Q. You're changing your testimony from –

A. No, sir. That's how it is, is he was moving.

Q. I want you to stand up and show the videographer how he was moving. Was he moving toward people or swaying?

A. He was swaying like this (demonstrating).

Q. Right.

A. That's what I envisioned him doing.

Q. Okay. Was he advancing toward anybody?

A. Not that I saw. No, sir.

(Lane Depo., ECF No. 96-4 at p. 260 l. 25-p. 261 l. 17.)

Lane's answers during his deposition indicate that he was not changing his prior testimony. Lane was clarifying what movement he saw from his unobstructed view of Studdard. According to Lane, the movement did not involve Studdard advancing towards anyone.

Reed and Shepherd argue there is no genuine dispute of material fact that Studdard walked toward the deputies. (Reply, ECF No. 123 at PageID 1669.) Lane's deposition testimony has provided evidence that, if believed, shows Studdard was not moving towards any of the officers and was instead swaying in place before he was shot. Defendants' claim that "especially in light of the testimony of all three other

deputies who saw Studdard walking" there is no genuine dispute of material fact requires the Court to weigh the credibility of the witnesses. (Id. at PageID 1674.) It is not proper for the Court to weigh evidence when ruling on a summary judgment motion. Martinez, 703 F.3d at 914. Whether Studdard was walking towards the officers or swaying and moving his arms while standing in place is a factual dispute that will affect the qualified immunity analysis.

How far Reed and Shepherd were from Studdard

Plaintiff argues "Studdard would have been at least 34 feet away from the officers at the moment of the shooting." (Response to Mot. for Sum. J., ECF No. 115-1 at PageID 1612.) Based on the video footage of the area of where Studdard was shot, from east to west there was: a wooden fence, a grassy area from the fence to the curb, the northbound lane of Big Orange Road, two solid yellow lines, and the southbound lane of Big Orange Road. (IR 49 Crime Scene Videos at 2:13; IR 46 Crime Scene Diagram.)

Lane testified that Studdard "dropped immediately" to the ground after he was shot. (Lane Depo., ECF No. 96-2 at p. 135 l. 14-16.) Lane recalls that Studdard "fell on his back" and that "he was parallel to the fence." (Id. at p. 136 l. 11-24.) Lane does not remember "if we moved him or what, but we were trying to administer aid." (Id.)

Paramedic Natalie Stewart was dispatched to Big Orange Road to respond to the shooting. (Stewart Dec., ECF No. 95 at ¶ 3.) Stewart asserts that "The distance from the curb on the eastern side of Northbound Big

Orange Road across the grassy area to the place in the grassy area where Edmond Studdard's body was located and lying when [she] arrived to administer emergency medical first aid is over ten feet." (Id. at ¶ 7.)

Jason Cunningham works for a business located on Big Orange Road. (Cunningham Dec., ECF No. 94 at ¶ 3.) Cunningham was working almost directly across the street from the shooting the day Studdard was shot. (Id. at ¶ 5.) Cunningham traveled on Big Orange Road on a regular basis and had personal knowledge of the width of Big Orange Road and the immediate surrounding area. (Id. at ¶¶ 3, 7.) He asserts that "The distance from the curb on the eastern side of Northbound Big Orange Road to the first yellow solid line in the middle of Big Orange Road is greater than 24 feet." (Id. at ¶ 8.)

When they arrived, Pair, Shepherd, and Reed got out into the southbound lane, opposite Lane and Studdard. (Pl's Response to Def's Undisputed Facts, ECF No. 115-2 at PageID 1634.) Because Lane testified Studdard "dropped immediately" when he was shot and because Lane testified he does not remember anyone moving Studdard's body, a jury could reasonably believe he was shot where his body was found. According to paramedic Stewart, that is at least ten feet from the eastern curb. (Stewart Dec., ECF No. 95 at ¶ 7.)

Since Shepherd and Reed were in the southbound lane they must have been over 24 feet from the curb at the time of the shooting if Cunningham's testimony about the distance of Big Orange Road is believed.

Cunningham asserted that the distance from the eastern curb to the "first yellow solid line in the middle of Big Orange Road is greater than 24 feet." (Cunningham Dec., ECF No. 94 at ¶ 8) (emphasis added.) Shepherd and Reed must have been past the second yellow solid line to be in the southbound lane. (See IR Crime Scene Videos at 2:13.) This would be further than 24 feet from the eastern curb. If, as Stewart and Lane's testimony suggests, Studdard was shot ten feet away from the curb, then Shepherd and Reed would be a total of at least 34 feet away from Studdard when they opened fire.

Reed and Shepherd argue that Studdard was walking towards them and they "let him get about seven to [ten] feet before we opened fire." (Shepherd Depo., ECF No. 89-3 at p. 150 l. 23-24.) Defendants' expert, Richard Lichten also relied on Shepherd's testimony to analyze the shooting if Studdard was "about 7 to 10 feet away" when he was shot. (Lichten Report, ECF No. 89-10 at p. 10.)

Plaintiff's cited testimony creates a genuine issue of how far away Studdard was when he was shot. Plaintiff provides evidence which, if believed, places Studdard at least 34 feet away from Reed and Shepherd when he was shot. Because there is specific evidence indicating 34 feet (paramedic Stewart's 10 feet, Cunningham's 24 feet, and Reed and Shepherd standing on the southbound side of the road) and because the Court must interpret the record in the light most favorable to Plaintiff, that is the distance that will be used for the qualified immunity analysis.

Reframed question for qualified immunity analysis

Based on resolving factual issues in dispute in favor of the non-moving party for summary judgment, the questions for the qualified immunity analysis are:

Given that Studdard was 34 feet away from Shepherd and Reed, was not moving towards officers, and was holding a bladed weapon, did he have a constitutional right to not be shot? If so, was that right clearly established so that a reasonable officer would understand it?

3. Application of Factual Analysis to Qualified Immunity Framework

To determine whether qualified immunity applies, a court must decide (1) "whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right," and (2) "whether the right at issue was clearly established at the time of defendant's alleged misconduct." Pearson, 555 U.S. at 232 (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)).

Whether the facts Plaintiff alleged make out a violation of a constitutional right

Plaintiff argues that "based upon the totality of the circumstances known to Reed and Shepherd at the time of the shooting, the use of deadly force was objectively unreasonable and violated the Fourth Amendment." (Mot. for Sum. J., ECF No. 115-1 at PageID 1616.) While the test of reasonableness under the Fourth Amendment is "not capable of precise definition or mechanical application," Bell v. Wolfish, 441 U.S. 520, 559 (1979), its "proper application

requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396 (1989). Plaintiff argues "Studdard was never charged with any crime. Further, Eddie Studdard was not actively resisting arrest." (Response to Mot. for Sum. J., ECF No. 115-1 at PageID 1614.) Plaintiff relies on Lane's testimony for support:

> Q. All right. And Deputy, I'm going to ask you just hopefully a few short questions. And they all go to what you knew at the time the shots were fired in which Mr. Edmond Studdard was shot. Okay? Just at that moment the shots were fired. Was he a fleeing violent felon to your understanding at that point?
>
> A. No, sir.
>
> Q. Was he threatening imminent or serious bodily injury to anyone aside from himself at the time he was shot?
>
> A. I did not view him as a threat.
>
> Q. Okay. To your knowledge, was there anything blocking the view of Deputy Shepherd in seeing Edmond Studdard from what you saw?
>
> A. No, sir. I can't say.

Q. There was open space, wasn't there?

A. Right.

(Lane Depo., ECF No. 96-4 at p. 253 l. 20-p. 254 l. 12.)

Plaintiff's expert, Jeffrey Noble, concluded that Studdard "was not an immediate threat to either Deputy Shepherd or Deputy Reed." (Noble Report, ECF No. 99 at ¶ 33.) He concluded that "the use of deadly [force] would not be objectively reasonable or consistent with generally accepted police practices." (Id.)

Defendants' expert, Richard Lichten, evaluated Noble's report and the available evidence. (Lichten Report, ECF No. 89-10 at PageID 783.) He agreed with Noble that at 34 feet "if the decedent was in fact standing still and had not made any move at all toward the shooter deputies, the shooting would be unjustified." (Id. at ¶ 42.1.)

> Q. What about if Mr. Studdard was 25 feet away from Deputy Shepherd and Deputy Reed at the time he was shot and he was not moving towards them at the time he was shot, would it, again, be a violation of Shelby County Sheriff's Department policies and procedures for those two officers to shoot Mr. Studdard?
>
> A. If under your hypothetical he was standing still and not moving towards the deputies, they would not have been justified in the shooting.

(Lichten Depo., ECF No. 98 at p. 136 l. 1-9.)

Lichten opines that "Professionally trained, reasonable deputies are aware that a suspect can cover

a distance of 21 feet very quickly. The concept of the so called 21-foot rule has been around a long time." (Lichten Report, ECF No. 89-10 at ¶ 37.) He explained that "an average suspect can cover a distance of 21 feet in about 1.5 seconds, which is the time it takes most officers to draw and fire." (Id. at ¶ 38.)

Shepherd testified that she was "trained on a 25 foot rule in relation to bladed weapons. That someone within the 25 feet can get to us and injure us before we can draw out weapons and pull the trigger. And so we're not supposed to – we're trained not to let someone in that 25 foot threshold who has a weapon, rather it's to their throat, out at us, or anything like that." (Shepherd Depo., ECF No. 91-1 at p. 173 l. 12-19.) When Shepherd got out of her truck she drew her gun. (Id. at p. 122 l. 20-22.)

Since the 21- or 25-foot rule of thumb applies based on the time it would take to both draw and fire a gun, if a gun is already drawn it would take less time to fire it. The further away the suspect is the more time it would take the suspect to reach an officer. This suggests that if Reed and Shepherd already had their guns drawn and Studdard was 34 feet away there would be even less reason for either of them to think Studdard posed an immediate threat.

Noble's conclusion, with which Defendants' expert agrees, is that if Studdard was shot from 34 (or as little as 25) feet and he was not moving towards or threatening the deputies, the shooting was unjustified. When the record is viewed in the light most favorable to Plaintiff, Studdard was not a fleeing felon, was not resisting arrest, and was not posing an immediate

threat to the safety of the officers or others. The Graham analysis shows that Plaintiff relies on evidence which, if believed, shows that Reed and Shepherd's use of deadly force was objectively unreasonable and violated the Fourth Amendment.

Whether the right at issue was clearly established

The U.S. Supreme Court elaborated on the clearly established right element of the qualified immunity analysis in Kisela v. Hughes, 138 S. Ct. 1148 (2018) (per curiam). An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." Id. at 1153 (citing Plumhoff v. Rickard, 134 S.Ct. 2012, 2023 (2014)).

> "[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." Mullenix v. Luna, 136 S. Ct. 305 (2015) (*per curiam*) (internal quotation marks omitted). Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. Id., at 309 (internal quotation marks omitted and emphasis deleted). Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable

> force" and thereby provide an officer notice that a specific use of force is unlawful. Id., 312 (internal quotation marks omitted).

Kisela, 138 S. Ct. at 1152–53 (2018).

Plaintiff's caselaw

Plaintiff's argument starts with Lopez v. City of Cleveland, 625 F. App'x 742 (6th Cir. 2015) (reversing the district court that granted summary judgment for qualified immunity). In Lopez the Sixth Circuit denied qualified immunity to an officer who shot a suspect holding a knife but not moving towards or attacking anyone. Id. at 743. The district court granted summary judgment after finding there was no constitutional violation. Id. at 747 n.2. The district court "did not analyze the 'clearly established' prong of the qualified-immunity analysis, and Defendants [] made no argument regarding that prong on appeal." Id. The Sixth Circuit noted "that the law was clearly established that officers could not use deadly force unless they had probable cause to believe that an individual posed a serious risk of harm to officers or others." Id. The Lopez court specifically referred to Ciminillo v. Streicher, 434 F.3d 461, 468 (6th Cir. 2006) to show that this right had been clearly established by the Sixth Circuit. Id.

In Ciminillo, Officer Knight shot Ciminillo with a beanbag propellant at point blank range as he attempted to leave the scene of a riot. Ciminillo, 434 F.3d at 463. The Sixth Circuit reasoned that "It was clearly established law in this Circuit at the time of the underlying events that individuals have a right not to

be shot unless they are perceived as posing a threat to officers or others." Id. at 468. The Ciminillo court analogized the case to those where pepper spray was used and where beanbag propellants were used against individuals who posed no immediate risk to officer safety to conclude that "it was clearly established that shooting Ciminillo with a beanbag was objectively unreasonable." Id. at 469.

As found above, the Court finds that Reed and Shepherd may have violated Studdard's constitutional "right not to be shot unless [he was] perceived as posing a threat to officers or others." Id. at 468. Determining whether that is a clearly established right in this case requires the Court to compare the present case to cases with individuals holding a sharp object but not threatening police.

In Robinson v. City of Memphis, this Court applied the clearly established right not to be shot where he or she poses no threat to a pursuing police officer to deny Officer Lucas's motion for summary judgment as to a Fourth Amendment excessive force claim. 340 F. Supp. 2d 864, 868 (2004). Lucas "battered down the door to the bedroom where the decedent was located in order to execute the search warrant." Id. The decedent was "naked and unarmed" when he reached for a shirt and was shot. Id. The Court explained that "A reasonable officer would know that a naked unarmed man standing at the back of a room poses no threat to the officer and should not be shot." Id. at 869. Officer Lucas claimed "that the decedent was near the door and approaching him with a box cutter at the time of the shooting." Id. at 868. The medical examiner testified

that "if the decedent had been approaching Officer Lucas at the door, it would not have been possible for the decedent to end up crouched in the back of the room" where he was. Id. at 868-69.

Because Robinson is a district court opinion, it does not directly show what the Sixth Circuit has clearly established. It does, however, demonstrate how courts in the Sixth Circuit have applied the clearly established right "not to be shot where he or she poses no threat to a pursuing police officer." Id. at 868 (citing Russo v. City of Cincinnati, 953 F.2d 1036, 1045 (6th Cir.1992)). That is the same right that applies in this case.

In Russo the decedent, Bubenhofer, was a paranoid schizophrenic who was shot by police officers after they attempted to take him back to the Rollman Psychiatric Institute ("RPI"). (Russo, 953 F.2d at 1039.) Officers were told Bubenhofer was "a walk-away from RPI who was suicidal, homicidal, and a hazard to police." Id. (internal quotes omitted). Bubenhofer was alone in his brother's apartment and officers were told that Bubenhofer "did not have a gun." Id. at 1040. Three officers were on the landing outside the apartment. Id. Bubenhofer "threatened to kill anyone who entered the apartment." Id. Officers were told Bubenhofer had two butcher knives on a table in the apartment. Id. Bubenhofer eventually opened the door "holding a knife in each hand." Id. Officer Sizemore fired a Taser dart at Bubenhofer, who recovered and rushed towards that officer, both knives pointed at him. Id. Two other officers "fired their revolvers several times at Bubenhofer, who lurched into Sizemore and then fell

down six or seven steps to a small landing by the front door of the building." Id.

After falling Bubenhofer still had one knife in his hand. Id. Officers repeatedly asked Bubenhofer to drop the knife. Id. According to defendants, Bubenhofer managed to get up, was Tasered twice more, then charged up the steps at the officers, "knife in hand." Id. at 1041. Two officers fired their revolvers several more times. Id. Officers claim Bubenhofer got up a second time and "again stood up and began to come up the stairs, knife in hand." Id. At that point all three officers fired at Bubenhofer. Id. Plaintiffs denied that Bubenhofer ever stood up or charged towards the officers and relied on testimony of a neighbor who witnessed some of the incident from his house through a window onto the stairway. Id. Bubenhofer was shot a total of twenty-two times by the three officers. Id. at 1045.

The district court in Russo granted summary judgment to two of the shooting officers on excessive force claims, finding their use of firearms justified. Id. at 1041. The Sixth Circuit relied on the "clearly established precedent" that a person has "a right not to be shot unless he [is] perceived to pose a threat to the pursuing officers or others" to reverse the district court's grant of summary judgment with respect to the use of deadly force. Id. at 1045. The Sixth Circuit reasoned that "plaintiffs raise a genuine issue of fact as to whether, in the second and third round of discharges of the officers' revolvers, the officers may have shot Bubenhofer even though he posed no serious threat of physical harm." Id. The record also suggested that

"some ten to twelve minutes elapsed between the second and third series of shots, during which time Bubenhofer apparently dropped his knife." Id. Given that record, the Sixth Circuit "believe[d] that a reasonable jury might conclude that the officers' repeated use of their revolvers violated this court's clearly established precedent on the use of deadly force." Id.

Here, like in Russo, both decedents held what appeared to be a bladed weapon. Officers asked both decedents numerous time to drop the knife. Both decedents showed signs of having mental health issues. Unlike Bubenhofer, Studdard never threatened to harm anyone but himself. According to Lane, after Shepherd and Reed arrived at the scene Studdard had not threatened anybody other than himself. (Lane Depo., ECF No. 96-3 at p. 177 l. 2-4.) Bubenhofer lunged at the officers at least once, but it is disputed whether Studdard ever started walking towards the officers. While Bubenhofer was only "six or seven steps" below the officers, there is evidence that Studdard was 34 feet away. Russo, 953 F.2d at 1040. Bubenhofer was shot at three different times for a total of twenty-two shots. Five shots were fired at Studdard in at a single moment.

Comparing Russo to this case, Bubenhofer was more of a threat to officers than Studdard was. Bubenhofer was closer than Studdard, had previously tried to lunge at the officers, and threatened them numerous times. Even though officers shot twenty-two times in Russo, Bubenhofer was arguably still a threat if, as the officers claim, he was able to get back up and continue

lunging towards the officers. The Sixth Circuit's application of the clearly established right not to be shot unless perceived to be a threat to officers or others applies with greater force in the instant case because, viewing the evidence in the light most favorable to the Plaintiff, Studdard posed less of a threat to officers than Bubenhofer. Russo strongly supports that there is a clearly established right that squarely governs the facts at issue in this case. Kisela, 138 S. Ct. at 1152–53.

Cases from other Circuit Courts of Appeal also support this proposition. The Tenth Circuit in Tenorio v. Pitzer affirmed the district court's denial of summary judgment for qualified immunity related to excessive force by analyzing the distance and aggressiveness a knife-holding suspect was from the shooting officer. 802 F.3d 1160, 1166 (10th Cir. 2015). In Tenorio, Officer Pitzer responded to a call that Tenorio was intoxicated and holding a knife to his own throat. Id. at 1161-62. Pitzer entered Tenorio's 14 feet by 16 feet living room through the front door. Id. at 1162. Tenorio "walked forward into the living [room] at an average speed" carrying a knife loosely in his right hand, his arm hanging by his side. Id. at 1163. Pitzer saw the knife and yelled for Tenorio to put it down. Id. After Tenorio was "about two and one-half steps into the living room," Pitzer shot him. Id. The district court relied in part on the facts that "Tenorio made no hostile motions toward the officers but was merely 'holding a small kitchen knife loosely by his thigh,' made no threatening gestures toward anyone, was shot before he was within striking distance of Pitzer, and that, for all Pitzer knew, Tenorio 'had threatened only himself and was not acting or speaking hostilely at the time of the

shooting.'" Id. at 1164-65. The Tenth Circuit agreed with the district court's analysis noting that Tenorio "was not charging Pitzer," he "had merely taken three steps toward the officer," and was not within striking distance when he was shot. Id. at 1166.

While the Tenth Circuit is only persuasive and not controlling as to what clearly established law in the Sixth Circuit is, the facts of Tenorio are a useful comparison for this case. Unlike Studdard, there is no dispute that Tenorio was walking towards Pitzer. Like Studdard, there was no indication that Tenorio threatened to harm anyone other than himself and Tenorio made no hostile motions toward the officers. Tenorio supports Plaintiff's argument that shooting Studdard from 34 feet when he was not approaching or threatening Shepherd or Reed violates Studdard's clearly established right not to be shot unless perceived to be a threat to officers or others.

The Sixth Circuit has relied on other Circuits' rulings on qualified immunity to establish what an officer would have been on notice of as unreasonable conduct that violates clearly established rights. In Ciminillo the Sixth Circuit relied on a Ninth Circuit case[2] where officers also used a beanbag propellant against an unarmed man. 434 F.3d at 469. The Sixth Circuit determined that officer Knight was "on notice that it is unreasonable to use beanbag propellants against individuals who pose no immediate risk to officer safety" because of Ninth Circuit caselaw. Id.

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[2] The Ninth Circuit case was Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001).

Similarly, the Sixth Circuit can rely on the Tenth Circuit's caselaw in Tenorio to establish what notice Shepherd and Reed had in this case. Tenorio establishes it is unreasonable for an officer to shoot someone less than 16 feet away who has not threatened an officer even if that person has a bladed weapon and is walking forward.

Defendants' caselaw

Defendants direct the Court to Bouggess v. Mattingly 482 F.3d 886 (6th Cir. 2007) to support their argument that for "distance in particular, the Sixth Circuit has not established precedent that squarely governs the distance a knife-wielding suspect must breach in order to make a shooting *per se* reasonable or unreasonable." (Reed and Shepherd Mot. for Sum. J., ECF No. 89-1 at PageID 443.) In Bouggess Officer Mattingly relied on several cases from the Sixth Circuit where, with one exception, the Sixth Circuit "either reversed the denial of qualified immunity or affirmed the grant of qualified immunity." 482 F.3d at 892. In each case, "the suspect in question was both known by the police to possess a weapon and had indicated an intent to use that weapon against the police or others." Id. Defendants incorrectly claim that the cases "shared only two components" listed above. Bouggess does not state that those are the only two components that are similar between the cases Mattingly cited.

As to the two components identified, Defendants argue "a deputy relying on that precedent could reasonably believe that those two criteria were sufficient." (Reed and Shepherd Mot. for Sum. J., ECF No. 89-1 at PageID 443.) Even if a deputy thought

those two components were sufficient for qualified immunity, they are not both present in this case. Studdard had a bladed weapon when he was shot, but the deputies did not have an indication that Studdard intended to use that weapon against the police or others. Defendants made no argument and the record does not show that Studdard verbally threatened police or others. Moreover, there is evidence that Studdard was not moving towards either the officers or others. Without evidence of threatening words or movement, Reed and Shepherd could not reasonably believe that Studdard, 34 feet away, intended to use the weapon against the officers or others. Defendants have not offered any support that an officer could reasonably believe an individual intended to use a weapon against the police or others absent threatening words or actions.

Defendants argue that Sixth Circuit opinions do not "add any more clarity to the precise distance (if one can even be said to exist) at which an officer's use of force against a knife-wielding suspect is unreasonable." (Reed and Shepherd Mot. for Sum. J., ECF No. 89-1 at PageID 443.) A precise distance is not necessary to meet the requirements of Kisela if it is clear based on existing caselaw that an officer would be on notice that her action would violate clearly established rights. The specificity Kisela requires is met by the substantially similar factual scenarios in Russo and Tenorio. Defendants' argument suggests an individual in Studdard's position could have been shot from distances well beyond 34 feet and the law would not meet the specificity requirement. While the Sixth Circuit may not have drawn a bright line, in the

instant case there is no question that the facts asserted by the Plaintiff, and as to which proof has been submitted, places the individual Defendants well outside any reasonably conceivable zone of danger.

Defendants also direct the Court to Chappell v. City Of Cleveland, 585 F.3d 901 (6th Cir. 2009), which Defendants argue "provides a somewhat closer set of facts that a reasonable officer could have relied on." (Reed and Shepherd Mot. for Sum. J., ECF No. 89-1 at PageID 444.) In Chappell officers entered a fifteen-year old boy's bedroom while conducting a protective sweep of the home. 585 F.3d at 903. Officers encountered a male suspect, McCloud, hiding in a bedroom closet. Id. "When they ordered him to come out and show his hands, the suspect came toward the officers with a knife upheld. When he ignored their commands to drop the knife and continued to move toward the officers in close quarters, they opened fire, killing him instantly." Id. The distance between McCloud and the Detectives was approximately five to seven feet and a mattress was lying on the floor between the closet and the Detectives. Id. at 910. The Sixth Circuit reasoned that because the mattress was lying flat on the floor and did not pose much of a barrier it would have "posed little impediment to a knife-wielding assailant of McCloud's stature." Id. at 911. If McCloud was able "to take even one more step, [detectives] would have been within his arm's reach and vulnerable to serious or even fatal injury." Id. The Sixth Circuit reversed the district court's denial of summary judgment for qualified immunity. Id. at 916.

Chappell is distinct from the present case in several ways. Seven feet with a mattress on the floor is not the same as 34 feet without a mattress. Chappell makes it clear that "if the detectives had hesitated one instant" they could have suffered serious or fatal injuries, especially since McCloud was already "moving quickly towards" them. Id. at 911.

Here, it would take Studdard much longer to reach Reed and Shepherd than it would have taken McCloud to reach the detectives in Chappell. Unlike McCloud, Studdard was not "moving quickly towards" Reed or Shepherd. Id. In fact, there is evidence that Studdard was not moving towards Reed or Shepherd at all, let alone at a fast pace. Studdard was also not in a confined area such as McCloud's bedroom. Chappell is readily distinguished from this case and is not an appropriate comparison given the important factual differences. Those differences made it reasonable for officers to fear imminent harm in Chappell, but not in this case.

Studdard's right not to be shot unless perceived as posing a threat to officers or others has been clearly established by supporting caselaw.

Conclusion

Because the facts that Plaintiff has alleged and shown make out a violation of a constitutional right and the right at issue was clearly established at the time of defendant's alleged misconduct, qualified immunity does not apply. Reed and Shepherd's Motion for Summary Judgment on the issue of qualified immunity is DENIED.

B. Municipal Liability for Shelby County

To successfully bring a claim against a local government under 42 U.S.C. § 1983, a plaintiff must establish that the local government's "policy or custom cause[d] the constitutional violation in question." Miller v. Calhoun Cty., 408 F.3d 803, 813 (6th Cir. 2005); see also Miller v. Sanilac Cnty., 606 F.3d 240, 254-55 (6th Cir. 2010); Waters v. City of Morristown, Tenn., 242 F.3d 353, 362 (6th Cir. 2001). A plaintiff may invoke a custom, policy, or practice sufficient to state a claim for local government liability by alleging "(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance [of] or acquiescence [to] federal rights violations." D'Ambrosio v. Marino, 747 F.3d 378, 386 (6th Cir. 2014) (alterations in original). "'A municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.'" Bright v. Gallia Cnty., Ohio, 753 F.3d 639, 660 (6th Cir. 2014) (quoting Monell v. Dep't of Social Servs. of City of New York, 436 U.S. 658, 691 (1978) (emphasis original). Because a local government does not incur *respondeat superior* liability under § 1983, "a plaintiff must adequately plead (1) that a violation of a federal right took place, (2) that the defendants acted under color of state law, and (3) that a municipality's policy or custom caused that violation to happen" to state a valid claim. Id. (citing

Lambert v. Hartman, 517 F.3d 433, 439 (6th Cir. 2008)).

1. Legal Standard for Failure to Train

"[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by [the relevant] officials . . .." Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986) (opinion of Brennan, J.). "[T]he failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury." City of Canton v. Harris, 489 U.S. 378, 388 (1989). "To succeed on a failure to train or supervise claim, the plaintiff must prove the following: (1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury." Ellis v. Cleveland Mun. School. Dist, 455 F.3d 690, 700 (6th Cir. 2006). See also City of Canton, 48 U.S. at 388.

"[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." Connick v. Thompson, 563 U.S. 51, 61 (2011) (internal citation and quotation marks omitted). A plaintiff can survive summary judgment by showing that a municipality's failure to train "ha[d] the highly predictable consequence of constitutional violations of the sort Plaintiff suffered." Gregory v. City of Louisville, 444 F.3d 725, 753 (6th Cir. 2006) (internal citation and quotation marks omitted).

Deliberate indifference can be established in two ways. First, a plaintiff can show a "pattern of similar constitutional violations by untrained employees[.]" Connick, 563 U.S. at 62. Second, a plaintiff can show that a pattern of past misconduct caused the violation of constitutional rights alleged in suit and that "there is essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable, or would properly be characterized as substantially certain to result." Hays v. Jefferson County, Ky., 668 F.2d 869, 874 (6th Cir. 1982) (internal citations omitted). Where a claim of deliberate indifference is premised only on the violation of constitutional rights alleged in suit and the municipality provides some level of training, a plaintiff must show that a municipality "was on notice that, absent additional training, it was so highly predictable that [officers] would misuse deadly force as to amount to conscious disregard for citizens' rights." Harvey v. Campbell County, Tenn, 453 Fed. Appx. 557, 567 (6th Cir. 2011).

2. Analysis of Shelby County's Training Policies

Shelby County argues that even if a constitutional violation occurred in this case, "Plaintiff Angela Studdard can submit no evidence showing that such a violation was the result of a policy, practice, custom, or failure to train sufficient to establish liability on the part of Shelby County." (Shelby County Memo. in Support of Mot. for Sum. J., ECF No. 90-1 at PageIDs 835-36.) Even if Shelby County's training was insufficient, Shelby County asserts "Plaintiff can point

to no evidence showing that the deficiency was the result of deliberate indifference by the County." (Shelby County Reply to Mot. for Sum. J., ECF No. 122 at PageIDs 1665-66.)

Plaintiff argues "that there is admissible evidence in the record of this cause to establish that the training was inadequate for the tasks performed, the inadequacy was the result of Defendant Shelby County's deliberate indifference and the inadequacy was closely related to or closely caused Eddie Studdard's injury." (Response to Mot. for Sum. J., 115-1 at PageID 1617.) Plaintiff claims the "clearly improper training of Defendants Shepherd and Reed" is "that there is no 21 foot rule or 25 foot rule that allows a Shelby County Deputy to shoot any individual who is holding a bladed weapon or knife but not attacking, approaching or constituting an imminent threat of serious bodily injury or death to the officer or anyone else." (Id.)

Plaintiff argues she "will rely upon Defendant Erin Shepherd's testimony to prove said inadequate training." (Id.) Plaintiff does not cite any specific portion of Shepherd's deposition or any other part of the record for support. Plaintiff does not cite any evidence on the record that Shelby County had deliberate indifference towards constitutional rights. "A district court is not required to speculate on which portion of the record the nonmoving party relies, nor is it obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." InterRoyal Corp. v. Sponseller, 889 F.2d 108, 111 (6th Cir. 1989). Plaintiff's

response does not cite evidence that creates a genuine dispute of a material fact.

Shepherd's deposition provides evidence that deputies did receive training about when they could use deadly force.

> Q. In this case, did you feel that Eddie Studdard was an eminent or immediate threat to cause you serious bodily injury or death at the time you pulled the trigger?
>
> A. Yes.
>
> Q. Why?
>
> A. Because we are trained on a 25 foot rule in relation to bladed weapons. That someone within the 25 feet can get to us and injure us before we can draw out weapons and pull the trigger. And so we're not supposed to – we're trained not to let someone in that 25 foot threshold who has a weapon, [whether] it's to their throat, out at us, or anything like that.
>
> Q. Okay. You called it the 25 foot rule. Is that – is that a written rule that Shelby County Sheriff's Department has adopted?
>
> A. As far as I know, yes. The research has been done on it. It used to be 21 feet, but I believe they've extended it in the past few years to 25 feet.

(Shepherd Depo., ECF No. 91-1 at p. 173 l. 6-25.)

Shepherd's above testimony does not support Plaintiff's failure to train allegation. Shelby County has policies for use of deadly force. (ECF No. 89-8.) The record shows both Shepherd and Reed were trained in Shelby County's Use of Force and Deadly Force Policies. (Training Logs, ECF No. 89-9 at PageIDs 695-97, 707-09.) Because Shepherd and Reed received at least some training on the use of deadly force, Plaintiff must show that Shelby County "was on notice that, absent additional training, it was so highly predictable that [officers] would misuse deadly force as to amount to conscious disregard for citizens' rights." Harvey, 453 Fed. Appx. at 567. She has failed to do so.

The record reflects no genuine issue of material fact as to Shelby County's deliberate indifference with respect to its deadly force policy: Shelby County was not deliberately indifferent. First—and of critical importance to our analysis—Plaintiff has alleged no prior instances of unconstitutional conduct that would have put Shelby County on notice that its training was unconstitutional. Accordingly, Shelby County cannot have been deliberately indifferent based on prior constitutional violations.

Plaintiff has not cited evidence that shows a genuine dispute about whether: (1) the training or supervision was inadequate for the tasks performed, or (2) the inadequacy was the result of the municipality's deliberate indifference. Without that evidence, a plaintiff's failure to train claims cannot survive summary judgment. See Ellis, 455 F.3d at 700 (6th Cir. 2006). Shelby County's Motion for Summary Judgment is, therefore, GRANTED.

CONCLUSION

Defendants Reed and Shepherd's Motion for Summary Judgment on the issue of qualified immunity is DENIED. Shelby County's Motion for Summary Judgment is GRANTED.

SO ORDERED, this 22nd day of January, 2019.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE