APPENDIX A

NOT RECOMMENDED FOR PUBLICATION
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No. 18-1282

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICIA NELSON,
Plaintiff-Appellee,

v.

CITY OF BATTLE CREEK, MICHIGAN,
Defendant,

ESTEBAN RIVERA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

BEFORE: MOORE, GIBBONS, and COOK, Circuit Judges.

JULIA SMITH GIBBONS, Circuit Judge. In November 2013, City of Battle Creek police officer Esteban Rivera responded to reports of an armed man outside the Drive-Thru Party Store. In the parking lot, Rivera encountered a teenage boy, N.K., who fit the report's description. Rivera got out of his patrol car and shouted, "let me see your hands." Rivera drew his firearm. In a span of two seconds, three undisputed things happened: (1) N.K. pulled a black BB handgun—altered to resemble a real handgun—out of his waistband; (2) N.K. tossed it aside and raised his hands; and (3) Rivera shot N.K. in the shoulder.

N.K., by and through his mother Patricia Nelson, sued Rivera under § 1983, claiming that Rivera violated his Fourth Amendment rights by using excessive force. In defense, Rivera raised qualified immunity. The district court denied qualified immunity, finding that factual disputes

precluded summary judgment. Conceding the facts in a light most favorable to N.K., Rivera appealed. We reverse.

I.

On November 16, 2013, N.K. and his friends were playing "cops and robbers" around his neighborhood. N.K. carried around his Airsoft BB gun to make their game feel "more real." DE 60-3, N.K. Dep., Page ID 226. This toy handgun was all black and missing its blaze-orange barrel tip which typically characterizes these types of toy guns. N.K. and his friends took a break from their cops-and-robbers game in the parking lot of the Drive-Thru Party Store. In front of the party store, N.K. crouched down behind a sign, with the BB gun tucked into his waistband.

Meanwhile, a Battle Creek dispatcher reported that a white male was carrying a black handgun near the party store. At 11:58 a.m., Rivera responded to the dispatch call and drove to the party store. As Rivera approached in his patrol car, N.K. emerged from behind the sign and walked toward his friends by the storefront. Rivera stopped in front of N.K. and his friends, immediately exited his patrol car, and shouted "let me see your hands, let me see your hands." DE 60-10, Dash Cam, at 02:13–02:15.

Several things happened within the next two seconds. N.K. pulled the gun out of his waistband and tossed it away before raising his hands. While N.K. was doing this, Rivera fired his weapon at N.K. The dash cam video does not depict Rivera in-frame, nor does it completely show N.K. It does, however, capture the audio and timing of this exchange. While Rivera utters his second "let me see your hands" order, one of N.K.'s friends moves away from the patrol car. N.K. becomes partially visible. N.K.'s right hand appears near his right shoulder. Rivera fires his weapon. N.K. then turns slightly and crouches down, and his left hand appears near his left ear.

While both parties agree that is what occurred within that two-second time span, they disagree about the exact sequence of each independent act. N.K.'s view of the facts is that he dropped the gun before Rivera shot him. In Rivera's view, he "made the decision" to shoot while N.K. was still gripping and raising the gun. DE 60-1, Rivera Dep., Page ID 220. According to Rivera, it was only after he decided to shoot and started pulling the trigger that he realized N.K. was tossing the gun away. Importantly, for purposes of this appeal, Rivera has conceded that "at the moment the bullet *actually* hit N.K., N.K. had thrown away the gun and had begun to raise his hands 'sort of halfway or whatever.'" CA6 R. 27, Appellant Reply Br., at 7.

Rivera's single shot struck N.K. in his shoulder. N.K. then ran away as Rivera shouted "Get on the ground. Get on the ground." DE 60-10, Dash Cam, at 02:16–02:18. Rivera stayed in the parking lot and reported the incident over his radio. Officers found N.K. nearby and took him to the hospital for treatment.

In May 2016, Nelson sued Rivera and the City of Battle Creek for damages under 42 U.S.C. § 1983. Nelson alleged that Rivera violated N.K.'s Fourth Amendment right to be free from excessive force. Nelson later dismissed the claims against the City. Rivera raised a qualified immunity defense and moved for summary judgment. Finding that the "facts in this case rest somewhere between [Rivera]'s version and [N.K.]'s version," DE 76, Op., Page ID 630, the district court denied Rivera's motion. The district court specifically noted three major factual disputes that precluded summary judgment: (1) whether N.K. was "brandishing a gun" or "unarmed"; (2) whether N.K. complied with Rivera's orders; and (3) the timing of the shooting relative to N.K.'s compliance and handling of the gun. DE 76, Op., Page ID 630–33. Rivera appealed.

II.

We review *de novo* a district court's denial of a summary judgment motion based on qualified immunity. *Sample v. Bailey*, 409 F.3d 689, 695 (6th Cir. 2005). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986) (citing Fed. R. Civ. P. 56(c)). We must "view the facts and draw reasonable inferences in the light most favorable" to the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). Indeed, for purposes of appeal, "a defendant seeking qualified immunity must be willing to concede to the facts as alleged by the plaintiff and discuss only the legal issues raised by the case." *Sheets v. Mullins*, 287 F.3d 581, 585 (6th Cir. 2002) (citing *Shehee v. Luttrell*, 199 F.3d 295, 299 (6th Cir. 1999)).[1] At the same time, however, we must consider "only the facts that were knowable to the defendant officer[]" when a case concerns the defense of qualified immunity. *White v. Pauly*, 137 S. Ct. 548, 550 (2017).

When there is a video record of the incident, we take the facts as they appear in the video, which may not necessarily be in the light most favorable to the nonmoving party. *Scott*, 550 U.S. at 378–80; *Latits v. Phillips*, 878 F.3d 541, 547 (6th Cir. 2017). Any remaining gaps or ambiguities in the facts as recorded in the video, however, are to be viewed in the light most favorable to the nonmoving party." *Latits*, 878 F.3d at 544.

III.

"Police officers are immune from civil liability, unless, in the course of performing their discretionary functions, they violate the plaintiff's clearly established constitutional rights."

[1] While the parties debated below the exact factual circumstances of those two seconds surrounding Rivera's shooting N.K., Rivera has conceded the facts in N.K.'s favor—those not contradicted by the dash cam video—for purposes of this appeal.

Mullins v. Cyranek, 805 F.3d 760, 765 (6th Cir. 2015) (citing *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012)). Qualified immunity allows police officers "breathing room to make reasonable but mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law." *Stanton v. Sims*, 571 U.S. 3, 6 (2013) (per curiam) (citations and internal quotation marks omitted). Our court has long recognized that the purpose of this doctrine is to protect officers "from undue interference with their duties and from potentially disabling threats of liability." *Bailey*, 409 F.3d at 695 (quoting *Elder v. Holloway*, 510 U.S. 510, 514 (1994)). Once the defending officer raises qualified immunity, the plaintiff bears the burden of showing that the officer is not entitled to qualified immunity. *Burgess v. Fischer*, 735 F.3d 462, 472 (6th Cir. 2013); *Coble v. City of White House*, 634 F.3d 865, 870–71 (6th Cir. 2011).

There need not be "a case directly on point" for the law to be clearly established, "but existing precedent must have placed the statutory or constitutional question *beyond debate*." *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011) (emphasis added). To violate a plaintiff's clearly established right, an officer's conduct must be such that, at the time of the allegedly-violative conduct, the contours of that right were sufficiently defined that every "reasonable official would have understood that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Whether an asserted constitutional right was "clearly established" at such time "presents a question of law," not fact. *Elder*, 510 U.S. at 516 (quoting *Mitchell*, 472 U.S. at 528).

We follow a two-prong analysis to determine whether qualified immunity applies in a given case: (1) whether the facts, viewed in the light most favorable to the plaintiff, show that the officer's conduct violated a constitutional right; and (2) whether that right was clearly established at the time of the challenged conduct. *Burgess*, 735 F.3d at 472 (citing *Campbell v. City of Springboro*, 700 F.3d 779, 786 (6th Cir. 2012)). *See also Saucier v. Katz*, 533 U.S. 194, 201

(2001). The order in which we address these questions is a matter of discretion. *Pearson v. Callahan*, 555 U.S. 223, 226 (2009).

In cases involving the use of excessive force, the qualified immunity question "should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 395 (1989); *Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir. 2008). This court has said that an officer's seizure by use of deadly force is permissible "only in rare instances." *Bailey*, 409 F.3d at 697. Qualified immunity should nonetheless apply "if officers of reasonable competence could disagree on the issue." *Mullins*, 805 F.3d at 765 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

The district court denied Rivera's motion for summary judgment because it found the legal question—whether Rivera violated N.K.'s clearly established constitutional rights—turns on disputed facts and depends on which view of the facts the jury might accept. The material facts, however, can be gleaned from the parties' joint statement and the dash cam video. N.K.'s own deposition testimony fills any gaps, and Rivera has conceded to N.K.'s version of the facts to the extent they do not contradict those captured by video. The "key disputed issues," according to the district court, are "N.K.'s compliance vis-á-vis the timing of the shooting" and what movement N.K. made with his hands when Rivera ordered him to show his hands. DE 76, Op., Page ID 634. But these are not genuinely disputed. N.K. acknowledged that, when given an order to raise his hands, he pulled the BB gun out of his pants and then raised his hands. Rivera, in turn, has conceded that, by the time he shot N.K., N.K. had released the gun and begun raising his hands.

As explained below, the law was not so clearly established that every reasonable officer would know that shooting N.K. under these specific circumstances would constitute an excessive and unconstitutional use of force. Qualified immunity, therefore, applies.

To determine whether a constitutional right is clearly established, we "first look to decisions of the Supreme Court, then decisions of the Sixth Circuit . . . , and finally to decisions in other circuits." *Landis v. Baker*, 297 F. App'x 453, 462 (6th Cir. 2008) (citing *Chappel v. Montgomery Cnty. Fire Protection Dist. No. 1*, 131 F.3d 564, 579 (6th Cir. 1997)).

We have previously held that a suspect "ha[s] a right not to be shot unless he [is] perceived to pose a threat to the pursuing officers or to others during flight," and that such rule "has been clearly established in this circuit" for decades. *Bailey*, 409 F.3d at 699 (quoting *Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988)). *See also Mullins*, 805 F.3d at 765 (noting that it is "axiomatic" that suspects have a clearly established right not to be shot absent a reasonable belief that they pose a threat of serious physical harm). In *Bailey*, we explained the "*Robinson* principle" as follows:

> [R]egardless of whether the incident took place at day or night, in a building or outside, whether the suspect is fleeing or found, armed or unarmed, intoxicated or sober, mentally unbalanced or sane, it is clearly established that a reasonable police officer may not shoot the suspect unless the suspect poses a perceived threat of serious physical harm to the officer or others.

Bailey, 409 F.3d at 699.

Our *Robinson* rule is effectively a restatement of the rules from *Graham* and *Garner*. *See Graham*, 490 U.S. at 388 (establishing the general proposition that use of force contravenes the Fourth Amendment if it is excessive under objective standards of reasonableness); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (holding that deadly force is only constitutionally permissible if "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others").

But clearly established law must be defined with more specificity. "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." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015)); *see also White*, 137 S. Ct. at 552 ("The [lower court] misunderstood the 'clearly established' analysis: it failed to identify a case where an officer acting under similar circumstances as [the officer] was held to have violated the Fourth Amendment."). Therefore, outside of "an obvious case," the general principles of *Graham* and *Garner*—and thus the Sixth Circuit's *Robinson* rule—cannot clearly establish the law applicable to various sets of facts, including the facts in this case. *See Brosseau*, 543 U.S. at 199; *see also Mullenix*, 136 S. Ct. at 308–09 (noting that defining clearly established law in the Fourth Amendment context requires a high "degree of specificity"); *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014) (instructing courts not to define clearly established law at a "high level of generality" because doing so ignores the crucial inquiry of whether the officer acted reasonably under the circumstances faced); *Brosseau v. Haugen*, 543 U.S. 194, 198–99 (2004) (noting that *Garner* and *Graham* are cast at a "high level of generality" and will not suffice outside of an "obvious case").

We must therefore inquire whether, as of November 16, 2013, it was clearly established that it was unconstitutional for an officer to shoot when, over the span of two seconds, someone pulls what appears to be a gun, drops it, and raises his hands after being given a warning. We hold it was not. Rivera reasonably perceived a threat of serious physical harm when he saw N.K. reach for and grab what looked like a real gun. It was not objectively unreasonable for Rivera to decide to shoot N.K. as he saw N.K. grip and raise his gun, even if the bullet ultimately struck N.K. after he had dropped the gun.

Neither the district court nor Nelson identified any case law where an officer under sufficiently similar circumstances was held to have violated the Fourth Amendment. The district court instead relied on what it perceived as "sufficient factual disputes" as to the reasonableness

of Rivera's conduct. DE 76, Op., Page ID 634. The dissent similarly says the evidence is "equivocal" as to whether Rivera shot N.K. while N.K threw away his gun or after doing so. Dissent at 2. To the extent any facts are disputed, however, these disputes do not deprive Rivera of qualified immunity. The dissent highlights testimony from N.K. and his friend suggesting that Rivera shot N.K. after he had already thrown away his gun. But these observations about when N.K. was struck—which Rivera concedes was after N.K. threw his gun away—do not create a dispute of fact as to when Rivera *decided* to shoot. Rivera claims he decided to shoot when he saw N.K. grab and raise the gun. Nelson fails to dispute this fact because N.K. and other witnesses cannot speak to Rivera's decision-making or his perception of harm in the two-second span the events unfolded

Even assuming that N.K. dropped the gun—and was raising his hands—before Rivera shot him, this does not alter our analysis. "What matters is the reasonableness of the officers' belief," and "[t]he fact that [N.K.] was actually unarmed when he was shot is irrelevant to the reasonableness inquiry in this case." *Mullins*, 805 F.3d at 767. Although "hindsight reveals that [N.K.] was no longer a threat when he was shot, we do not think it is prudent to deny police officers qualified immunity in situations where they are faced with a threat of severe physical injury or death and must make split-second decisions." *Id.* at 768. Indeed, the Supreme Court and Sixth Circuit have repeatedly said that an officer's employment of deadly force in split-second decisions when faced with a threat of serious injury or death should not be questioned. *See Kisela*, 138 S. Ct. at 1153 (holding that an officer's use of deadly force did not violate clearly established law when the suspect was wielding a kitchen knife and the officer "had mere seconds to assess the potential danger"); *Graham*, 490 U.S. at 396–97 ("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."); *Simmonds v. Genesee Cnty.*, 682 F.3d 438, 445 (6th Cir. 2012) ("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 . . . .'"); *Williams v. City of Grosse Pointe Park*, 496 F.3d 482, 487 (6th Cir. 2007) ("[A]n officer may use deadly force whenever he or she, in the face of a rapidly evolving situation, has probable cause to believe that a suspect poses a serious physical threat either to the police or members of the public.").

Nelson argues that "at the time of the subject shooting it was clearly established that [N.K.] had the right to be free from deadly force." CA6 R. 26, Appellee Br., at 23 (citing *Bailey*, 409 F.3d at 697). As explained above, however, this generalized restatement of the principles of *Graham* and *Garner* does not suffice to "define clearly established law." *See, e.g.*, *Wesby*, 138 S. Ct. at 590; *White*, 137 S. Ct. at 552; *Plumhoff*, 572 U.S. at 779; *Brosseau*, 543 U.S. at 198–99. And Nelson's reliance on *Bailey* as factually analogous is misplaced. The case in *Bailey* arose from an officer's decision to shoot an unarmed suspect hiding inside a cabinet in a building that he had attempted to burglarize. 409 F.3d at 691–92. Law enforcement had ordered the suspect to come out of the cabinet with his hands visible. *Id.* at 693–94. The suspect used one of his hands to pull himself out of the cabinet, and an officer shot him. *Id.* at 692–95. First, this court held that the officer's conduct violated the suspect's rights because the officer lacked probable cause to believe that the suspect's movement posed a threat to the officers' safety. *Id.* at 697–98. Second, the panel held that the rights violated were "clearly established," reasoning that our previous precedents provided the officer with adequate notice that shooting a criminal suspect is unreasonable "unless the suspect poses a perceived threat of serious physical harm to the officer." *Id.* at 699. The facts

in the instant case are distinguishable. Unlike the suspect in *Bailey* who was attempting to comply with the officer's command to come out of the cabinet, N.K. initially pulled the gun from his waistband after Rivera's command to show his hands. An officer in Rivera's shoes could reasonably have perceived N.K. as a threat to his safety and/or to the safety of the other children in the party store parking lot. Accordingly, *Bailey*'s rule against the application of force when a suspect does not pose a threat to an officer's safety was insufficient to put Rivera on notice of the constitutionality of his actions when N.K. did pose a threat.

N.K.'s reliance on *Sova* is similarly unpersuasive. In *Sova*, two police officers shot a man while standing in the doorway of his parents' kitchen and holding two butcher knives. 142 F.3d at 900–01. The man's father had called 911 after seeing blood on his kitchen floor and receiving a call from a friend concerned about the man's mental state. *Id.* at 900. When police arrived, they found the man holding two knives, breaking kitchen windows, and cutting himself. *Id.* at 900–01. At one point, the officers shot and killed the man. *Id.* at 901. The district court in *Sova* granted qualified immunity to the officers, finding as a matter of law that the officers acted reasonably. *Id.* On appeal, this court reversed because the record "demonstrate[d] clearly that the two sides [did] not agree on the facts" and the district court "overlooked contentious factual disputes concerning the officers' actions." *Id.* at 902–03. The panel did not resolve the qualified immunity question because the parties had "irreconcilable versions of what happened the night [the man] was killed." at 900. Relying on *Sova*, Nelson contends that we must affirm the district court because Rivera's "request for qualified immunity [is] based upon the hotly contested disputed facts in this case." CA6 R. 26, Appellee Br., at 24. According to Nelson, the parties dispute the timing of the shooting vis-à-vis N.K.'s handling of the gun. But as explained above, the materials facts can be gleaned from the parties' joint statement and the dash cam video, and these are not in dispute.

Finally, the dissent relies heavily on this court's holding in *Bletz v. Gribble* that armed individuals have a clearly established right "to be free from deadly police force while complying with police commands to disarm." 641 F.3d 743, 754 (6th Cir. 2011). In *Bletz*, we denied qualified immunity to a police officer who shot an armed man because we found a factual dispute existed as to whether the man began lowering his gun—in compliance the officer's commands—before the officer shot him. *Id.* at 752. But the dissent fails to account for a key difference between the circumstances in *Bletz* and those here: While police in *Bletz* commanded the armed man to lower his gun and the man allegedly began to do so, Rivera commanded N.K. to show his hands and N.K. undisputedly first reached for the gun in his waistband. Only after grabbing and throwing the gun did N.K. begin to comply with Rivera's command to raise his hands. *Bletz* therefore hardly supports the dissent's view.

Thus, Nelson has not met her burden to demonstrate that the contours of N.K.'s right were sufficiently defined such that "every reasonable official" in Rivera's shoes would understand that using deadly force would violate N.K.'s constitutional rights. *See Reichle v. Howards*, 566 U.S. 658, 664 (2012) (internal quotation marks and citation omitted); *see also Anderson*, 482 U.S. at 640. This court's previous holdings tend to indicate the opposite. *See, e.g.*, *Boyd v. Baeppler*, 215 F.3d 594 (6th Cir. 2000) (reversing the denial of qualified immunity for police officers who used deadly force after an individual pulled a gun after they commanded him to stop); *Bell v. City of East Cleveland*, 125 F.3d 855 (Table), No. 96-3801, 1997 WL 640116 (6th Cir. Oct. 14, 1997) (upholding qualified immunity for police officer who used deadly force after a minor pulled a toy gun following the officer's command to stop).

The case before us is not an "obvious case" such that, under the general principles of *Garner*, *Graham*, and *Robinson*, a reasonable officer would be aware that shooting N.K. violated

his clearly established constitutional rights. *See Bailey*, 409 F.3d at 699 (holding that it was an "obvious case" that a police officer may not shoot an unarmed, intoxicated, and unresponsive suspect who moved his hand when ordered to exit the cabinet where he was hiding). General prohibitions do not suffice as clearly established law in this case. Nor has Nelson identified a sufficiently analogous case in which an officer was held to have violated the Fourth Amendment. We find, then, that N.K.'s right to be free from excessive force under these circumstances was not clearly established. Therefore, we reverse the district court's denial of qualified immunity and remand for the entry of summary judgment on the basis of qualified immunity.

KAREN NELSON MOORE, Circuit Judge, dissenting. It should go without saying that reasonable police officers do not shoot disarmed young boys with upraised hands. But because the majority misconstrues both the factual record and our circuit precedent to condone that result here, I must respectfully dissent. I would affirm the district court and allow this case to proceed to trial.

As the majority recognizes, "when undertaking the qualified immunity analysis on summary judgment" "we must consider the facts in the light most favorable to [the plaintiff] and make all reasonable inferences in [his] favor." *Godawa v. Byrd*, 798 F.3d 457, 463 (6th Cir. 2015); *accord Tolan v. Cotton*, 572 U.S. 650, 656–57 (2014). Indeed, even to bring an interlocutory appeal like this one, the officer-defendant "must be willing to concede the most favorable view of the facts to the plaintiff." *Jacobs v. Alam*, 915 F.3d 1028, 1039 (6th Cir. 2019) (citations omitted). Relatedly, although we must accept facts shown on video as true when "a reasonable jury could view those facts only one way," "[t]o the extent that facts shown [on] video[] can be interpreted in multiple ways," or are otherwise unclear, that video, too, must "be viewed in the light most favorable to [the plaintiff]." *Latits v. Phillips*, 878 F.3d 541, 547 (6th Cir. 2017).

Yet, contrary to this law, the majority repeatedly accepts Rivera's framing of the evidence over N.K.'s. More specifically, in its recitation of the facts, the majority states that "*[w]hile* N.K. was [pulling the gun out of his waistband and tossing it away], Rivera fired his weapon at N.K." Maj. Op. at 2 (emphasis added). Then, in its discussion of the law, the majority builds upon this assertion, insisting that, although there may be a triable dispute as to whether N.K. had a gun in his hand at the moment Rivera's bullet "struck" him, that dispute does not matter because there is (supposedly) no dispute that N.K. was still armed "when Rivera *decided* to shoot." *Id.* at 9.

This kind of metaphysical line drawing is confusing, for one; I struggle to see the distinction between Rivera "deciding" to shoot N.K. and Rivera actually "shooting" N.K. But more importantly, this framing fails to view the record in the light most favorable to N.K., as we must at this stage. Fairly read, the parties' deposition testimony is equivocal as to whether Rivera shot N.K. *while* N.K. was throwing down his gun and raising his hands or *after* N.K. had taken those two actions. *Compare, e.g.*, R.60-1 (Rivera Dep. at 79) (Page ID #205) ("[T]he decision to shoot was made when [N.K.] was pulling the weapon on me.") *with* R.60-3 (N.K. Dep. at 231–32) (Page ID #234-35) ("I go to put my hands up [after I dropped my gun and kicked it away] *and then* he shoots.") (emphasis added) *and* R.60-6 (S.C.[1] Dep. at 73) (Page ID #250) ("All I remember is seeing the cop saying put his hands up and I see in the corner of my eye [N.K.] puts his hands up halfway *and then* the cop shot him.") (emphasis added). And although we would be dutybound to reject N.K.'s and S.C.'s testimony if clear video evidence contradicted it, the dash-cam evidence submitted by Rivera is inconclusive. *Accord* Maj. Op. at 2 ("The dash cam video does not depict Rivera in-frame, nor does it completely show N.K."). Indeed, if anything, the dash-cam video supports N.K. For example, at the 2:15 mark in the video—an instant before Rivera shoots N.K. and an instant after Rivera orders N.K. to show him his hands—N.K.'s right hand is visibly raised, and empty. R.60-10 (Dash Cam). This seemingly minor detail matters because both N.K. and Rivera testified that, when N.K. discarded his firearm, he used his right hand. *See* R.60-3 (N.K. Dep. at 231) (Page ID #235); R. 60-1 (Rivera Dep. at 80) (Page ID #205).

All told, although a reasonable jury *could* accept Rivera's narrative (that he shot N.K. while N.K. was pulling a realistic-looking toy gun out of his pants), it could *alternatively* accept N.K.'s narrative (that Rivera shot him *after* he had thrown his gun to the ground and begun raising his

[1] S.C. was one of the young adolescent girls accompanying N.K. at the party store.

hands). And so, for purposes of this appeal, we must accept N.K.'s narrative as true and assume that Rivera shot N.K. under the latter circumstances.

Given these facts, the relevant legal question is whether, as of November 16, 2013, our case law put Rivera on fair notice that it is unconstitutional for a police officer to shoot an armed individual after that individual has thrown their weapon to the ground and begun raising their hands, in compliance with officer commands. It did. Indeed, not only is this principle arguably obvious, but also two years before this incident we specifically held in *Bletz v. Gribble* that armed individuals have a "clearly established" "right to be free from deadly police force while complying with police commands to disarm." 641 F.3d 743, 754 (6th Cir. 2011). This was enough to put Rivera on "notice" that his "specific use of force [was] unlawful." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018).

The majority makes three points in response, none of which are convincing.

First, the majority attempts to sidestep *Bletz*'s general holding by adjusting the "clearly established law" lens to a microscopic level. *See* Maj Op. at 8 ("We must . . . inquire whether . . . it was clearly established that it was unconstitutional for an officer to shoot when, over the span of two seconds, someone pulls what appears to be a gun, drops it, and raises his hands after being given a warning."). But this mode of analysis runs afoul of our precedent cautioning panels against being too particular in defining "clearly established" law. *See Hagans v. Franklin County Sheriff's Office*, 695 F.3d 505, 508–09 (6th Cir. 2012) ("If it defeats the qualified-immunity analysis to define the right too broadly . . ., it defeats the purpose of § 1983 to define the right too narrowly[.]"). To survive qualified immunity a plaintiff need only point to a "reasonably particularized" constitutional right that the government allegedly violated. *Id.* at 509. The Fourth

Amendment rule laid out in *Bletz* meets that "middle ground" standard. *Id.*; *accord Kent v. Oakland County*, 810 F.3d 384, 396 (6th Cir. 2016) (analogous reasoning).

Second, the majority contends that, even if *Bletz* could provide clearly established law in some other case, its distinguishable facts render it inapplicable here. *See* Maj. Op. at 12. But comparing *Bletz*'s facts to this case's facts show that, if anything, the victim in *Bletz* presented a *greater* threat to the police than 14-year-old N.K. did here—and yet we still denied the officers qualified immunity and allowed the case to proceed to trial. More specifically, in *Bletz*, police officers entered a home late at night to effectuate an arrest warrant, only to find themselves unexpectedly confronted by a man wielding a shotgun. The officers then shot and killed the man on the spot. However, because a fact dispute existed as to whether the man "was lowering his gun in response to [the officers'] command[s]" the moment before he was shot, we ruled that the shooting officer was *not* entitled to qualified immunity as a matter of law. *Id.* at 752. "If [the officer] shot [the plaintiff] while the latter was complying with the officer's command [to disarm]," we held, "then [the officer] violated [the plaintiff's] clearly established Fourth Amendment right to be free from deadly force." *Id.*

Here, by contrast, not only did N.K. not confront Rivera in a dark, close-quarters environment—as the video shows, their entire interaction took place in an uncrowded location in the bright of day—but also Rivera (allegedly) shot N.K. after the young boy had *discarded* his weapon *and* begun raising his hands, per Rivera's commands. That is far worse than *Bletz*, where the officer shot the armed decedent at a moment when the decedent was merely *lowering* his weapon in response to the officers' commands to disarm. As a result, I struggle to understand the majority's contention that *Bletz* cannot provide clearly established law here.

Finally, the majority emphasizes that, even assuming Rivera shot N.K. in the manner N.K. contends he did (which, of course, it should've been doing all along), the fact that N.K. was disarmed does not matter because this case involved a "split-second decision," where Rivera had mere moments to determine if N.K. intended to harm him or not. Maj. Op. at 9. But as we have noted before, "the fact that a situation unfolds relatively quickly does not, by itself, permit [an officer] to use deadly force." *Kirby v. Duva*, 530 F.3d 475, 483 (6th Cir. 2008) (citation and quotation marks omitted); *accord Bouggess v. Mattingly*, 482 F.3d 886, 894 (6th Cir. 2007) ("Even a split-second decision, if sufficiently wrong, may not be protected by qualified immunity."). This principle applies with particular force here because again, if the jury agrees with N.K.'s version of events, Rivera shot 14-year-old N.K. *after* he put down his weapon *and* raised his hands, which would suggest that Rivera did not face a life-or-death decision at the moment he pulled the trigger. *See, e.g.*, *Withers v. City of Cleveland*, 640 F. App'x 416, 420–21 (6th Cir. 2016) (analogous reasoning).[2]

For these reasons, I respectfully dissent. This case belongs in front of a jury.

---

[2] *Mullins v. Cyranek*, 805 F.3d 760 (6th Cir. 2015), cited repeatedly by the majority, is not to the contrary. In that case, a police officer shot and killed a young man in a crowded public place because the young man resisted arrest for nearly two minutes and then unexpectedly pulled a firearm out of his pants and threw it over the officer's head. We granted the officer qualified immunity, despite evidence that the officer had shot the young man a second or two after he hurled the firearm, because the officer "was faced with a rapidly escalating situation" and "a severe threat to himself and the public." *Id.* at 767.

This case is nothing like *Mullins*, as even a cursory comparison of this case's facts and *Mullins*'s facts shows. And, in any event, N.K. has submitted non-speculative evidence that a police officer shot him while he was *raising his hands* in compliance with the officer's order to disarm, thus bringing his case far closer to *Bletz* than to *Mullins*.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PATRICIA NELSON, *next friend of* N.K., *a minor*,

Plaintiff,

v.

CITY OF BATTLE CREEK, et al.,

Defendants.
_____/

Case No. 1:16-cv-456

HON. JANET T. NEFF

OPINION

Plaintiff filed this civil rights action pursuant to 42 U.S.C. § 1983 against Defendant City of Battle Creek and police officer Esteban Rivera, after N.K., a minor, was shot in the right shoulder by Officer Rivera outside a convenience store on November 16, 2013 when Rivera responded to a 911 dispatch of a male carrying a gun. The City has since been dismissed. The sole remaining claim is Plaintiff's § 1983 claim of excessive force.

The matter is before the Court on Defendant Rivera's Motion for Summary Judgment on the ground of qualified immunity (ECF No. 60). Plaintiff has filed a Response (ECF No. 61), and Defendant has filed a Reply (ECF No. 62). Defendant has also filed a notice of intent to rely on new authority (ECF No. 73), to which Plaintiff has filed an objection (ECF No. 74).[1] After full

[1] Plaintiff's "objection" merely states her argument on the merits of the authority cited by Defendant, i.e., that the case is distinguishable from the instant case. The Court has considered the parties' opposing arguments. Plaintiff's "objection" per se to Defendant's notice is therefore denied.

consideration, the Court concludes that oral argument is unnecessary to resolve the Motion. *See* W.D. Mich. LCivR 7.2(d). Defendant's Motion is denied.

I. Stipulated Facts

The parties stipulate to the following material facts:

> 1. On November 16, 2013, NK and three of his friends (SC, SW, and JW) were playing "Cops and Robbers" in NK's neighborhood.
>
> 2. On the day and times in question, NK had an Airsoft BB pistol, which he had colored all black with a Sharpie marker. The Airsoft gun had also been altered so that it no longer had an orange tip.
>
> 3. At some point, the girls (SC, SW, and JW) went to the Drive-Thru Party Store so they could use a bathroom.
>
> 4. The [dispatch] log indicates that at 11:58 am Officer Rivera was dispatched and en route to the call at the Party Store.
>
> * * *
>
> 6. Officer Rivera did not activate his lights or siren.
>
> 7. NK was still crouched down by a Newport cigarette sign at the end of the store when he first saw Officer Rivera's car. With the Airsoft gun placed in his waistband, NK walked from the sign toward the front door of the store.
>
> 8. As Rivera turned right onto the street of the Party Store, Officer Rivera could see NK and he radioed Dispatch to say, "OK, I got him. He's walking towards the store now."
>
> 9. As Officer Rivera turned into the Party Store parking lot, he could see the girls exit the Party Store and saw NK walk toward them.
>
> 10. Officer Rivera pulled in and parked his patrol car at an angle and exited his car.
>
> 11. At some point, Officer Rivera fired his gun one time, hitting NK in the right shoulder.

(Joint Statement of Material Facts (JSMF), ECF No. 72).

II. Legal Standards

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). The court must consider the evidence and all reasonable inferences in favor of the nonmoving party. *Burgess v. Fischer*, 735 F.3d 462, 471 (6th Cir. 2013); *U.S. S.E.C. v. Sierra Brokerage Servs., Inc.*, 712 F.3d 321, 327 (6th Cir. 2013) (citation omitted).

The moving party has the initial burden of showing the absence of a genuine issue of material fact. *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 200 (6th Cir. 2010). The burden then "shifts to the nonmoving party, who must present some 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "There is no genuine issue for trial where the record 'taken as a whole could not lead a rational trier of fact to find for the non-moving party.'" *Burgess*, 735 F.3d at 471 (quoting *Matsushita Elec. Indus., Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). "The ultimate inquiry is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Sierra Brokerage Servs.*, 712 F.3d at 327 (quoting *Anderson,* 477 U.S. at 251-52).

III. Analysis

To state a viable claim under 42 U.S.C. § 1983, a plaintiff must allege (1) the violation of a right secured by the Constitution or laws of the United States; and (2) that the deprivation was caused by a person acting under color of state law. *Harbin-Bey v. Rutter*, 420 F.3d 571, 575 (6th Cir. 2005). Claims that law enforcement officers have used excessive force are analyzed under the Fourth Amendment's reasonableness standard. *Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir. 2008). "'[T]he question is whether the officers' actions are 'objectively reasonable' in

light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.'" *Griffith v. Coburn*, 473 F.3d 650, 656 (6th Cir. 2007) (quoting *Graham v. Connor,* 490 U.S. 386, 397 (1989) (citation omitted)).

The affirmative defense of qualified immunity applies to excessive force claims under § 1983. "Police enjoy qualified immunity unless (1) the facts alleged show that the police violated a constitutional right; and (2) the right was clearly established." *Jones,* 521 F.3d at 559. Under this test, "qualified immunity is proper unless 'it would be clear to a reasonable officer' that his use of excessive force 'was unlawful in the situation he confronted.'" *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 902 (6th Cir. 2004) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). "The burden is on the plaintiff to demonstrate that the officer is not entitled to qualified immunity." *Coble v. City of White House*, 634 F.3d 865, 870-71 (6th Cir. 2011).

Defendant argues that Plaintiff has not met her burden to present a genuine challenge to Officer Rivera's qualified immunity from suit. Defendant contends that the facts concerning his shooting a teen who disobeyed police orders and instead seemingly drew a real weapon did not violate clearly established law because "[c]ourts nationwide recognize that when a person draws or brandishes a real-looking BB gun to an officer and disobeys police orders, an officer who shoots that person does *not* violate clearly established law because officers must diffuse reasonably perceived threats of serious harm, and BB guns (especially Airsoft ones) commonly look real" (ECF No. 60 at PageID.174-175).

Plaintiff does not disagree that whether an officer's conduct is objectively reasonable depends, in part, on whether the suspect poses an immediate threat to the safety of the officers or others. Plaintiff contends, however, that Defendant's deployment of deadly force against N.K. was unreasonable and excessive because case law precedent at the time of the incident clearly

established that "it is unlawful to shoot an unarmed man, who is neither fleeing nor a felon …" (ECF No. 61 at PageID.314).

"Under *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), the police may not use deadly force against a citizen unless 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'" *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 902-03 (6th Cir. 1998) (quoting *Garner*, 471 U.S. at 3). As the Supreme Court long ago explained:

> The proper application of Fourth Amendment reasonableness "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 v. Connor,* 490 U.S. 386, 396, 109 S. Ct. 1865, 1871–72, 104 L. Ed.2d 443 (1989). This is an objective test, to be "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," *id.*, and making "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," *id.* at 397, 109 S. Ct. at 1872. Thus, in a civil suit arising from the use of deadly force, the police "[d]efendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have [shot the victim]; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs,* 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271 (1986). The central legal question is whether a reasonably well-trained officer in the defendant's position would have known that shooting the victim was unreasonable in the circumstances. *Id.* at 345, 106 S. Ct. at 1098.

Sova, 142 F.3d at 903. However, "[w]hen 'the legal question ... is completely dependent upon which view of the facts is accepted by the jury,' the District Court cannot grant a defendant police officer immunity from a deadly force claim." *Id.* (quoting *Brandenburg v. Cureton,* 882 F.2d 211, 215–16 (6th Cir. 1989)).

Thus, whether Defendant is entitled to qualified immunity depends first on the facts and circumstances presented, and more specifically, whether the facts critical to the qualified immunity determination are in dispute.

The parties characterize the facts differently.

Defendant states that this lawsuit involves N.K.'s "brandishing of an Airsoft replica of a Smith and Wesson semi-automatic pistol altered to look real, as well as his disobedience of [Defendant's] clear order, 'Let me see your hands!,' when [N.K.] instead reached for the gun" (ECF No. 60 at PageID.191). Defendant cites the following underlying facts: Defendant "responded to a call about a 'man with a gun.' He waited to approach until it seemed as if the situation could quickly grow much more dangerous. He used his car to create a wedge between potential hostages. He twice demanded, 'Let me see your hands! Let me see your hands!' Instead, within mere seconds, [N.K.] admittedly reached for and pulled the gun out of his waistband from under his T-Shirt. [N.K.] had modified the gun to look real. He admittedly was afraid that he would be arrested or shot because he had the real-looking replica. [N.K.'s] mother and a friend both warned him that he was going to get himself hurt brandishing the replica *because* a reasonable person would think it was real at first glance." (*Id.* at PageID.194).

Defendant asserts that when presented with these circumstances, he had only a split-second to make a decision about a person pulling a gun on him in close proximity to three young women (*id.*). Under the Constitution and laws of the United States, that decision is not subject to second-guessing in hindsight. Thus, Defendant did not violate any clearly established law when he reasonably used potentially-deadly force to respond to a serious threat of death or serious bodily injury. "Instead, the cases say just the opposite; namely, that officers in similar situations were immune from suit." (*Id.* at PageID.194-195).

Plaintiff, on the other hand, argues that the facts in this case clearly support that the deployment of deadly force against N.K. was unreasonable and excessive, and the case law precedent holding that it is unlawful to shoot an unarmed man, who is neither fleeing nor a felon, has been clearly established long before the date of this incident, November 16, 2013 (ECF No. 61 at PageID.314). Plaintiff states as supporting facts that "N.K. was not a threat to Defendant or anyone else, did not have a weapon in his hand, and was complying with Defendant's order to show him his hands (which were empty)" (*id.* at PageID.316). Plaintiff cites S.W.'s testimony that N.K. was shot after he had already dropped the gun when he moved his shoulder a little bit as in a shrug (*id.*, citing S.W.'s Dep. at 40, ECF No. 60-5 at PageID.245). Plaintiff contends that contrary to Defendant's argument, the timing of the shooting does not justify Defendant's actions of shooting N.K. given the totality of the circumstances (*id.* at PageID.317).

In the Court's view, the actual underlying, material, facts in this case rest somewhere between Defendant's version and Plaintiff's version, particularly with respect to the shooting.[2] For instance, N.K. was neither "brandishing a gun" nor "unarmed." The record establishes that N.K. was openly displaying the gun before the incident, while playing cops and robbers with the three girls on neighborhood streets, as they walked toward the store. When Defendant arrived on the scene and observed N.K., however, he was not "brandishing" a gun. But neither was N.K. "unarmed" when confronted by Defendant. The radio dispatch, based on a local caller's observations and report, informed Defendant that the man carrying the gun, later determined to be N.K., was at the store. N.K.'s own testimony establishes that he tucked the gun in his pants waistband before Defendant arrived, and when commanded by Defendant to put his hands in the

[2] The Court cites its view of the facts only for purposes of this motion, and these facts are not intended as a final resolution of any factual disputes.

air, N.K. first reached into his pants and removed the gun, throwing it to the ground. Plaintiff's assertion that N.K. was "unarmed" is based on the contention that *at the moment he was shot*, N.K. "did not have a gun in his hand" (*see* ECF No. 61 at PageID.315, 316) because he had thrown it to the ground. However, the fact remains that N.K. did have a gun when Defendant confronted him at the store. This case hardly can be aligned with the case law involving an "unarmed" suspect.

Further, Defendant categorizes this case as one in which the suspect did not comply with police orders, i.e., to put out his hands so Defendant could see them. However, Plaintiff characterizes this case as one in which the suspect was complying with police orders: N.K. "was complying with Defendant's order to show him his hands (which were empty)" (ECF No. 61 at PageID.316). Again, whether N.K. complied with police orders lies somewhere between Defendant's version and Plaintiff's version depending on the moment in question.

The record establishes that N.K. did not immediately comply with Defendant's orders. According to N.K.'s testimony, when Defendant said "let me see your hands," N.K. "pulled the gun out and thr[e]w it and then kick[ed] it" (N.K. Dep. at 230, ECF No. 60-3 at PageID.235). When asked why he did that, N.K. stated: "Because I was like so scared because like I had a gun right there in front of me. And like, I don't know. I was scared. I thought I was going to die" (*id.* at 230-231). The record of N.K.'s deposition testimony indicates that that he did not *immediately* comply with Defendant's commands:

> Q. You were worried that he [Defendant] might shoot you because of the gun that you had in your pants?
>
> A. Yes.
>
> Q. You were worried that you might get in trouble in the first place because you had this BB gun, fair?
>
> A. Yes.

Q. And why were you afraid that you might die?

A. Because it was a gun – because a gun is pointed at me.

Q. And when you pull the gun out, you said – what did you do?

A. I was like this and that (indicating) and then I kicked it.

Q. So you're motioning with your right hand that you pulled it out of your waistband?

A. Yes.

Q. And sort of tossed it forward and then you kicked it?

A. Yes.

Q. And all of this happens in front of the police car?

A. Yes.

Q. And this happens after he says, let me see your hands?

A. Yes.

Q. Do I understand correctly, you're trying to get rid of the gun because you're scared?

A. Yes.

Q. You don't want to die?

A. Yes.

You don't want to get in trouble?

A. Yeah.

Q. And you're not thinking much about what you're doing, you're just trying to get rid of this thing, right?

A. Yes.

Q. He says, let me see your hands, all right. You've thrown the gun out now, and kicked it. What happens next?

A. I go to put my hands up and then he shoots.

Q. So your hands are going back up sort of halfway or whatever?

A. Yes.

Q. And you get popped in the shoulder?

A. Yes. And then I like go down some, and I think he's yelling like get on the ground. I turned around and run.

(*Id.* at 231-232).

Nevertheless, compliance with an officer's order is only one of the various circumstances that must be taken into account in determining whether a defendant officer's conduct is objectively reasonable under the totality of the circumstances. Here, the parties dispute the actual timing of the shooting with regard to N.K.'s compliance and whether Defendant reasonably perceived N.K. as a threat. Plaintiff maintains that N.K. did not have a gun in his hand at the time he was shot, and he posed no threat.

Defendant responds that the crucial moment was not the moment N.K. was shot, but instead Defendant's "decision/commitment to take the shot; that is, when his brain told his body to pull the trigger in response to a reasonably perceived threat of serious imminent harm" (ECF No. 62 at PageID.541). Defendant states: "For the average real human being, and regardless of training, about ½ to ¾ of a second elapses from when the person commits to take an action until their body actually completes the action, according to settled physiological studies about reaction time" (*id.* at PageID.541-542). Defendant provides a supporting affidavit and other evidence for this contention. Defendant thus contends that most of the facts upon which Plaintiff relies are irrelevant because Defendant did not know anything about them when he committed to take the shot in response to the threat he reasonably perceived N.K. to present.

Defendant relies on the dashboard camera video, which Defendant contends, eliminates any material issue about what happened during the shot, when considered in conjunction with N.K.'s testimony. While the video does provide evidence of the overall timing of the incident and the actions of both N.K. and Defendant, it is not conclusive as to the key disputed issues: N.K.'s compliance vis-à-vis the timing of the shooting. The video does not clearly show N.K.'s actions or specifically, what if any, movement he made when Defendant yelled "Let me see your hands." Here, the entire incident occurred very rapidly. Although Defendant is later heard on the video stating that N.K. went for the gun, the video does not show the crucial moment when that apparently occurred.

Here, Plaintiff likely has an uphill battle to prove that Defendant's conduct was objectively unreasonable. "'Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments,' and 'protects all but the plainly incompetent or those who knowingly violate the law.'" *Stanton v. Sims*, ___ U.S. ___; 134 S. Ct. 3, 5 (2013) (quoting *Ashcroft v. al-Kidd*, 563 U.S. ___, ___, 131 S. Ct. 2074, 2085 (2011) (citation and internal quotations omitted)); *see also Mullins v. Cyranek*, 805 F.3d 760, 765 (6th Cir. 2015). However, there are sufficient factual disputes, viewing the facts in the light most favorable to Plaintiff, to persuade the Court that the issue of qualified immunity is not properly decided by summary judgment.

In *Sova*, the Sixth Circuit reversed the district court's grant of summary judgment based on qualified immunity, finding that qualified immunity turned on disputed issues of fact:

> In the present case, the District Court apparently concluded that the immunity question was not clear-cut because the court allowed the parties to conduct extensive discovery. The discovery depositions, affidavits, exhibits, and other material demonstrate clearly that the two sides do not agree on the facts. The police officers claim Thomas threatened to get a gun and then charged at them through the kitchen door with knives drawn on the porch. The Sovas deny this

> version of what happened. They claim Thomas never said anything about a gun and was shot before he ever stepped out of the kitchen doorframe. Our resolution of this case therefore turns upon whether it was proper for the District Court to grant the officers qualified immunity in the face of such a factual dispute.
>
> * * *
>
> [S]ummary judgment is inappropriate where there are contentious factual disputes over the reasonableness of the use of deadly force. When "the legal question ... is completely dependent upon which view of the facts is accepted by the jury," the District Court cannot grant a defendant police officer immunity from a deadly force claim.

Sova, 142 F.3d at 902-03. Here, the question of qualified immunity turns upon which version of the facts one accepts, precluding a determination of liability by the Court.

IV. Conclusion

On the record presented, the Court concludes that genuine issues of material fact exist with respect to Plaintiff's claims, and Defendant's Motion for Summary Judgment is properly denied. An Order will enter consistent with this Opinion.

Dated: February 21, 2018

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

APPENDIX C

No. 18-1282

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 01, 2020
DEBORAH S. HUNT, Clerk

PATRICIA NELSON,

Plaintiff-Appellee,

v.

CITY OF BATTLE CREEK, MICHIGAN,

Defendant,

ESTEBAN RIVERA,

Defendant-Appellant.

ORDER

BEFORE: MOORE, GIBBONS, and COOK, Circuit Judges.

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 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 Moore would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk