APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMANDA N. REICH; ELISE DAVIDSON, Successor Administratrix of Estate of Joshua Steven Blough,
Plaintiffs-Appellants,

v.

CITY OF ELIZABETHTOWN, KENTUCKY; MATTHEW MCMILLEN; SCOT RICHARDSON,
Defendants-Appellees.

No. 18-6296

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 3:16-cv-00429—Rebecca Grady Jennings,
District Judge.

Argued: July 31, 2019

Decided and Filed: December 19, 2019

Before: MOORE, COOK, and THAPAR, Circuit Judges.

COUNSEL

ARGUED: Robert L. Astorino, Jr., STEIN WHATLEY ATTORNEYS, PLLC, Louisville,

Kentucky, for Appellants. Jason B. Bell, BELL, HESS & VAN ZANT, PLC, Elizabethtown, Kentucky, for Appellees. **ON BRIEF:** Robert L. Astorino, Jr., Matthew W. Stein, STEIN WHATLEY ATTORNEYS, PLLC, Louisville, Kentucky, for Appellants. Jason B. Bell, BELL, HESS & VAN ZANT, PLC, Elizabethtown, Kentucky, D. Dee Shaw, Elizabethtown, Kentucky, for Appellees.

COOK, J., delivered the opinion of the court in which THAPAR, J., joined. MOORE, J. (pp. 19–29), delivered a separate dissenting opinion.

OPINION

COOK, Circuit Judge. En route to a mental health treatment facility, Joshua Blough got out of his fiancée's vehicle holding his knife, walked through traffic, and wandered into a residential neighborhood. When he ignored his fiancée's repeated pleas to get back in the car, police officers intervened. After he refused commands to drop the knife, the officers fired three shots, killing Blough. His fiancée and his estate sued under federal and state law, claiming that the officers used excessive force by shooting Blough. Because the officers' use of deadly force was objectively reasonable under the Fourth Amendment, we hold that qualified immunity shields the officers and AFFIRM the grant of summary judgment.

I.

On July 6, 2015, Joshua Blough sought help at a Communicare mental health facility in Leitchfield, Kentucky. During his evaluation, he reported having auditory hallucinations (thinking television shows were talking to him) and paranoia. He told evaluating staff that he'd stopped taking his prescribed schizophrenia medication about four months earlier. Blough also reported three suicide attempts in the past two weeks, most recently five days earlier, but denied current suicidal ideation. A Communicare therapist recommended psychiatric hospitalization and arranged for Blough to voluntarily admit himself at a mental health facility nearby the next day.

In the morning, Blough's fiancée, Amanda Reich, began the drive to the facility. Blough sat in the passenger seat and Reich, who had accompanied Blough to Communicare the previous day, took the wheel. About halfway into the trip, Blough saw a

Kentucky State Police vehicle stopped on the side of the road. High on methamphetamine, Blough became "really upset" and started hallucinating, remarking that "there were police officers everywhere." Hoping a different road might calm Blough, Reich exited to take the highway.

When they later stopped at a traffic light, Blough pulled out his three-inch knife, opened the blade, and jumped out of the car. Though they had not seen any other police officers, Blough climbed out and told Reich, "I'm not gonna let anybody hurt you but I'm not gonna let anybody hurt me either." Reich replied that there were no police around, and that Blough needed to get back in the car so he could get help. Blough complied but left the knife—blade open and locked—on his lap.

When they stopped at another red light, without a word, Blough got out of the car with the knife. And this time he would not get back in. Blough took off on foot through traffic and walked to an empty field behind a residential neighborhood. Reich said that "it was like when he was walking he wasn't even acknowledging any cars coming by or nothing." Unable to "do anything with him," Reich dialed 911. She worried that, because Blough had a knife, "somebody else would get the wrong idea and call in thinking that [Blough] was a threat to someone and that he would end up getting shot."

Reich told the dispatcher that Blough had "schizophrenia real bad," had not been taking his medication, had a knife, and thought "everybody [was] out to get him." The dispatcher relayed that information by radio to the Elizabethtown Police Department; Officer McMillen heard the message and responded. The dispatcher then connected Reich directly to Officer McMillen, who arrived at the scene

"three or four minutes" later to conduct a welfare check. During that short window of time, Reich herself got out of the car and asked Blough to get back in and put down the knife, but he refused.

With Officer McMillen now at the scene, Reich told him the information she shared with the dispatcher. Reich let the officer know that she thought it would be better if she "could handle it on [her] own," that Blough did not like the police, and that a Kentucky State Police officer shot him a few years ago. Officer McMillen agreed to let Reich try to get Blough back in the car and explained that, given Blough's paranoid state, "he could perceive [officers] as a threat and act upon it, especially if he's armed with a knife." He told Reich that police were "not going to actively search for [Blough]" and returned to his car.

Once there, Officer McMillen advised dispatch of his discussion, including that officers should not actively look for Blough because "if [they] . . . did find him, there was a potential for it to go bad." He then drove away to make sure Blough had not entered the roadway. Around that time, Officer Richardson, from his car in a church parking lot, saw Blough—now in the neighborhood—"acting bizarre." He had his shirt off, pacing between houses, carrying something in his hand. Officer Richardson radioed Officer McMillen, who informed him that Blough had a knife. Officer McMillen then circled back toward the scene.

Now alone, Reich pulled into the subdivision and set out on foot to go reason with Blough. As she approached him, however, she realized that he "must have seen the police . . . talking to [her]" and "thought that [she] was involved in trying to get him hurt, too." He again refused to return to the vehicle or put the knife down. Reich walked back to her car "to pull it up

and park," and saw the police coming down the road. When the officers pulled up (no lights or sirens), Reich requested another chance to get Blough to put down the knife—neither officer responded, but neither tried to stop her. Blough then began walking toward the group.

Reich approached Blough for a second time, now in a neighbor's front yard. She asked him the same two questions for "probably" the tenth time, and he gave the same answer to each: No. At that point, the officers had stepped out of their cars and "were just standing by" near their vehicles, which were parked on the neighborhood street in front of single-family homes. They then "told [Reich] to get out of the way."

According to Reich, the officers next ordered Blough "to put the knife down" in a "very firm, loud tone." In response, Blough "took a step forward toward them" with his knife raised in his right hand in a stabbing position. And—again according to Reich—before or after this step, Blough told one of the officers, "you're gonna have to kill me mother ****er." Reich says Blough then "turned around" and took "one or two steps" before the officers fired.

Both officers and three independent eyewitnesses disagree that Blough turned around. They all say that, at the time the officers fired, Blough was walking at a fast pace toward Officer Richardson; all but one stated that Blough had the knife in his right hand. *See* R. 61-14, Richardson Depo., PageID 4600; R. 61-11, McMillen Depo., PageID 2372, 2384–85; R. 55-11, PageID 823; R. 55-14, PageID 829; R. 55-17, PageID 839.[1] As for Reich, she testified that she did not

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[1] One of those eyewitnesses wrote in her initial statement for the Kentucky State Police that she thought "[Blough] was going to try to get away." R. 61-10, PageID 2262. But her affidavit says

remember whether Blough "ever raised his arm with his knife in it towards the officers."

Officer Richardson fired two shots in rapid succession and Officer McMillen fired once; two of those three shots hit Blough, who fell face down in the grass. Both officers administered first aid, but Blough died shortly after.

Reich and the administratrix of Blough's estate brought this suit under 42 U.S.C. § 1983 against the City of Elizabethtown and both officers,[2] alleging Fourth and Eighth Amendment violations, along with various state tort claims. After discovery concluded in February 2018, the City and officers moved for summary judgment. Plaintiffs filed a response that included an affidavit from Reich attesting—unlike her deposition—to the distance between Blough and the officers when they fired. The district court disregarded the affidavit and granted summary judgment for defendants, holding that qualified immunity shielded them from liability. This appeal followed.

II.

We review de novo a district court's grant of summary judgment on qualified immunity grounds. *Burgess v. Fischer*, 735 F.3d 462, 471 (6th Cir. 2013). A court must grant summary judgment if the moving party "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).

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the opposite. R. 55-11, PageID 823 ("[Blough] was still moving toward the officers and was close to them when they drew their guns and shot him.").

[2] This suit also named Tracy Shiller, Chief of the Elizabethtown Police Department, as a defendant. But the parties later agreed to dismiss all claims against him.

When the movant carries this burden, the burden shifts to the opposing party, who must come forward with "specific facts showing that there is a genuine issue for trial." *Haddad v. Gregg*, 910 F.3d 237, 243 (6th Cir. 2018). No genuine issue exists when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Courts "must construe the evidence and draw all reasonable inferences in favor of the nonmoving party." *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 332 (6th Cir. 2008).

III.

A. Reich's Affidavit

We start with Reich's affidavit. We review a court's "refusal to consider an affidavit filed as an appendix to a motion in opposition of a motion for summary judgment for an abuse of discretion." *Myers v. Huron Cty.*, 307 F. App'x 917, 918 (6th Cir. 2009); *Briggs v. Potter*, 463 F.3d 507, 511 (6th Cir. 2006). The district court declined to consider Reich's affidavit, filed with her response to the defendants' motion for summary judgment (more than two months after discovery closed), because it contradicted her sworn deposition testimony. Reich sees it differently, arguing her affidavit actually closely mirrors her deposition testimony and simply clarifies issues that she could not answer precisely. On this record, we cannot say that the district court abused its discretion in assessing the two as contradictory.

"A party may not create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts her earlier deposition testimony." *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir. 1986). At summary judgment, to evaluate a post-deposition affidavit's admissibility, we

ask first whether the affidavit "directly contradicts the nonmoving party's prior sworn testimony." *Aerel, S.R.L. v. PCC Airfoils, L.L.C.*, 448 F.3d 899, 908 (6th Cir. 2006). If so, absent a persuasive justification for the contradiction, the court should not consider the affidavit. *Id.* But if no direct contradiction exists, "the district court should not strike or disregard th[e] affidavit unless the court determines that the affidavit 'constitutes an attempt to create a sham fact issue.'" *Id.* (quoting *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986)).

Our precedents suggest "a relatively narrow definition of contradiction." *Briggs*, 463 F.3d at 513. If a party "was not directly questioned about an issue," a later affidavit on that issue simply "fills a gap left open by the moving party." *Aerel*, 448 F.3d at 907. After all, deponents have no obligation to volunteer information the questioner fails to seek. *Id.*; *see Briggs*, 463 F.3d at 513 (holding that a party has no obligation to volunteer the content of a conversation when deponent "was not expressly asked" what another said to him). But a deponent may not "duck her deposition" or "hold her cards in anticipation of a later advantage." *Powell-Pickett v. A.K. Steel Corp.*, 549 F. App'x 347, 353 (6th Cir. 2013). Where a deponent is "asked specific questions about, yet denie[s] knowledge of, the material aspects of her case, the material allegations in her affidavit directly contradict her deposition." *Id.*; *see Biechele v. Cedar Point, Inc.*, 747 F.2d 209, 215 (6th Cir. 1984) (citation omitted) ("If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.").

At her deposition, when first asked if she could estimate the distance between the officers and Blough, Reich responded that she could not—"[I]'m not sure . . . . I don't want to guess about it." R. 55-5, PageID 614. But she later guessed that Blough "was probably 20 feet [away] when he took a step toward them." *Id.* After more probing about the distances, Reich's attorney intervened, telling Reich that "if [she] fe[lt] comfortable with the distances" she could testify to that, but that she should not guess. *Id.*, PageID 615. Reich then gave her final answer: "Yeah, I don't feel comfortable with the -- the estimated length of -- you know, I don't feel comfortable with it. Because it's been a long time and I just don't feel comfortable with estimating on that." *Id.* And the exchange ended with a definitive answer from Reich, removing any doubt as to her testimony on the issue:

> Q: So your testimony is you have no idea how far [Blough] was from the officers when he was shot.
>
> A: Right. But he was far enough that he wasn't a threat to them.
>
> Q: Okay. But you have no idea how far he was when he was shot.
>
> A: No.

Id.

Almost a year to the day later, Reich's affidavit swore something different. She asserted that once she returned to the scene of the shooting in April 2018—over two months after discovery closed—she accurately recalled where all four stood when the officers fired on Blough. So nearly three years after the shooting she measured and recorded the distances between them. She placed the distance between

Blough and Officer Richardson—who fired the first shot—at just over twenty-five feet. Her measurements put Officer McMillen over thirty-six feet away from Blough. And she placed herself thirty-four-and-a-half feet from him.

Reich's affidavit plainly contradicts her deposition testimony. Counsel asked several times for her recollection regarding the distance between Blough and the officers. In the face of this direct and thorough questioning, Reich said that she did not know. Her affidavit, asserting that she *does know*, therefore contradicts. *Powell-Pickett*, 549 F. App'x at 353; *see Reid*, 790 F.2d at 459–460 ("If such a statement had been made, she was required to bring it out at the deposition[.]"); *Myers v. Huron Cty.*, No. 3:06CV3117, 2008 WL 271657, at *2 n.2 (N.D. Ohio Jan. 31, 2008) (holding that a post-deposition affidavit's new assertions, filed after the close of discovery should not be considered in deciding a motion for summary judgment), *aff'd*, 307 F. App'x 917 (6th Cir. 2009). Reich offered no persuasive justification for this contradiction, so the district court disregarded it.

Even generously viewing this affidavit as noncontradictory, Reich makes no real attempt to argue that she filed her affidavit to supplement or clarify her deposition testimony—in other words, that it should not be viewed as "an attempt to create a sham fact issue." *Aerel*, 448 F.3d at 908. All other signs point the same direction; Reich made no attempt to clarify or qualify her answers on this issue at her deposition when questioned by her own attorney, had access to the scene before (and after) her deposition testimony, and did not claim that her earlier testimony reflected confusion about the questions asked. *See id.* at 908–09 (citing these three factors as "[a] useful starting point for this inquiry"). In fact, her

affidavit concedes that she "returned to the scene of the incident with [her attorney] to . . . respond to [defendants'] motion for summary judgment." R. 61-15, PageID 2565; *see Lanier v. Bryant*, 332 F.3d 999, 1004 (6th Cir. 2003).

As for the dissent, it grounds its disagreement on Reich's not having access to the site *during* her deposition, and on the evidence therefore being "newly discovered." Not knowing the distances before her deposition, is one thing. But not using the many months between that deposition date and the end of the discovery period to visit the site, take measurements, and amend her testimony is quite another. Rather, she waited until after discovery closed and she could no longer be deposed to offer her revised view. This timing supports evaluating the evidence as "newly discovered" only in the sense that she refused to "discover" it earlier.

We see no abuse of discretion in the district court so deciding.

B. Excessive Force

Reich argues the officers violated the Fourth Amendment in shooting Blough.[3] The officers assert the affirmative defense of qualified immunity. The district court held that qualified immunity shielded the officers. We agree.

Qualified immunity protects government officials from civil damages "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 138 S. Ct.

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[3] Reich did not appeal her Eighth Amendment claim. *See generally* Appellant Br. At the summary judgment hearing in October 2018, plaintiffs stated that they no longer wished to pursue the claim, so the district court dismissed it as moot.

577, 589 (2018); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This doctrine "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Chappell v. City of Cleveland*, 585 F.3d 901, 907 (6th Cir. 2009) (citation omitted). Plaintiffs bear the burden of showing that qualified immunity does not apply, and must show both prongs to carry it. *Id.* Courts have discretion to engage the prongs in any order, *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), so we first answer whether the officers violated Blough's constitutional right to be free from excessive force.

We analyze excessive force claims during the "seizure" of a free citizen under the Fourth Amendment's "objective reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 392 (1989). An officer's use of deadly force is objectively reasonable 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." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); *see Latits v. Phillips*, 878 F.3d 541, 547 (6th Cir. 2017); *Williams v. City of Grosse Pointe Park*, 496 F.3d 482, 487 (6th Cir. 2007). This objective test requires courts to judge the use of force from the perspective of a reasonable officer on the scene, "in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 396.

That means we must give careful attention to the facts and the totality of the circumstances of the case, "including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396; *see Garner*, 471 U.S. at 8–9.

Police officers routinely face "tense, uncertain, and rapidly evolving" situations that force split-second judgments about the degree of force required; our calculus must account for that fact. *Graham*, 490 U.S. at 396–97. So we evaluate the force used through the eyes of a reasonable officer at the scene, not with "the 20/20 vision of hindsight." *Id.* at 397; *see Burchett v. Kiefer*, 310 F.3d 937, 944 (6th Cir. 2002) ("This standard contains a built-in measure of deference to the officer's on-the-spot judgment about the level of force that is necessary" in a particular situation.).

Our precedents further refine our view by requiring that we analyze excessive force claims in segments. *Dickerson v. McClellan*, 101 F.3d 1151, 1162 (6th Cir. 1996); *see Livermore ex rel. Rohm v. Lubelan*, 476 F.3d 397, 406 (6th Cir. 2007). This approach requires us to evaluate the use of force by focusing "on the 'split-second judgment' made immediately before the officer used allegedly excessive force," not on the poor planning or bad tactics that might have "created the circumstances" that led to the use of force. *Lubelan*, 476 F.3d at 407 (quoting *Dickerson*, 101 F.3d at 1161); *see Rucinski v. City of Oakland*, 655 F. App'x 338, 342 (6th Cir. 2015) ("[W]e are required to . . . focus[] on the moments immediately preceding th[e] use of force[.]").

We thus need not engage Reich's argument that the officers created the need to use deadly force by pursuing and initiating contact with Blough despite his mental illness. Even were we to consider that argument, Supreme Court precedent suggests that it should not change our answer. *See City and Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1777 (2015) ("[Plaintiff] cannot establish a Fourth Amendment violation based merely on bad tactics that result in a

deadly confrontation that could have been avoided.") (internal quotation marks omitted).

Nor do we find persuasive Reich's citation to *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893 (6th Cir. 2004), for the proposition that we should consider a person's mental illness when determining whether an officer used reasonable force. That case actually says that "[t]he diminished capacity of an *unarmed* detainee must be taken into account when assessing the amount of force exerted." *Id.* at 904 (emphasis added). Wielding a knife until the moment officers shot him obviates *Champion* here. And Reich points to "no case law restricting an officer's ability to use deadly force when she has probable cause to believe that a mentally ill person poses an imminent threat of serious physical harm to her person[.]" *Rucinski*, 655 F. App'x at 342.

With that foundation, our analysis focuses on the officers' final encounter with Blough. We construe the evidence and draw all reasonable inferences in Reich's favor but, because this case concerns qualified immunity, consider "only the facts that were knowable to the defendant officers." *White v. Pauly*, 137 S. Ct. 548, 550 (2017). That means we put aside the numerous 911 calls from neighborhood residents describing Blough's alarming behavior and the steps each took to secure their homes and families. *See* R. 61-11, PageID 2329 ("We don't hear the 911 calls. We just hear what we're dispatched to."). Here, applying the *Graham* factors, the totality of the circumstances gave the officers probable cause to believe that Blough posed a threat of serious physical harm to them and others.[4] *See Garner*, 471 U.S. at 11.

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[4] Because this situation plainly fits within the Graham test, we, like the district court, look past the "more tailored set of

The undisputed facts show that both officers saw Blough wielding a knife, shirtless, pacing back and forth between houses in the neighborhood.[5] They both knew that he had severe schizophrenia, had not been taking his medication, disliked the police, and thought "everybody [was] out to get him." After the officers exited their vehicles, Blough walked at a fast pace toward the officers with the knife in his right hand and refused Reich's pleas to drop the knife and return to her vehicle. Both officers stayed near their vehicles, never moving toward Blough.

When both officers then commanded—at least once each—that Blough drop the knife, he again did not. Instead, Blough "took a step forward toward" Richardson with his knife raised in his right hand in a stabbing position and said, "you're gonna have to kill me mother ****er." That prompted officers to fire three rapid shots in a single volley—the first two by Richardson, the last by McMillen—with Blough having advanced within six to twelve feet of Officer Richardson. Reich claims that Blough "turned around" and took "one or two steps" before the officers fired, and thus posed no threat to anyone at the time the officers fired.

Absent Blough's step away, our precedents provide a clear answer. In *Chappell*, we held the use of deadly force objectively reasonable where detectives shot and killed a fifteen-year-old when he stepped toward them, closing the distance to five to seven feet, raised his right hand holding a knife, and refused commands to drop it. 585 F.3d at 910–11. *See Rhodes*

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factors" suggested for medical-emergency cases. *See Estate of Hill by Hill v. Miracle*, 853 F.3d 306, 314 (6th Cir. 2017).

[5] As Officer McMillen explained, Blough's conduct constituted—at the very least—trespass, disorderly conduct, menacing, and wanton endangerment.

v. McDannel, 945 F.2d 117, 118 (6th Cir. 1991) (holding use of deadly force objectively reasonable where officer shot and killed suspect brandishing a knife after suspect failed to comply with demands to drop the knife and advanced within four to six feet of the officer). More recently, in *Rucinski*, we held that an officer acted reasonably as a matter of law when she shot and killed a mentally ill man after he pulled out and opened a knife, said "here we go" or "bring it on," moved toward the officer, disregarded orders to drop the knife, and approached to within five feet of the officer while "brandishing the knife in his outstretched hand." 655 F. App'x at 341– 42.

But even including Reich's view that Blough "step[ped] away" in the story, the officers' conduct was still objectively reasonable—Blough had just told Officer Richardson "you're going to have to kill me mother ****er," refused repeated commands to drop his weapon, and advanced within six to twelve feet of Richardson with the knife raised in a stabbing position. *Stevens-Rucker v. City of Columbus*, 739 F. App'x 834, 840 (6th Cir. 2018) (holding use of force objectively reasonable where officer shot man holding knife six to eight feet away after he refused to drop the knife, even though it "[was] certainly possibl[e] that [he] was merely attempting to leave the enclosure," because "it [was] undisputed that his first move—once confronted by [the officers]—was a move toward [one officer]").

Yes, in addition to the bullet that grazed Blough's forearm and entered his "lower right chest," one bullet entered Blough's "upper right back." But the officers fired from different spots, and Blough approached Officer Richardson "at a slight angle" with his body "bladed a little bit," not with his shoulders square to the officers. *See Gaddis v. Redford Twp.*, 364 F.3d 763,

776–77 (6th Cir. 2004) (reasoning that, because the officers fired at Gaddis from different vantage points, his back wound from the shots did not undercut the officers' testimony (corroborated by video) that they fired in response to a knife attack). Taken as a whole, this record cannot support the inference Reich wishes us to draw—that the officers shot despite Blough posing no imminent threat at the time. *See Chappell*, 585 F.3d at 909 ("[A]ll *reasonable* inferences are drawn in favor of the plaintiff, to the extent supported by the record[.]") (emphasis added).

Though we view the facts in the light most favorable to Reich, we note that her version of events only faintly resembles the picture offered by the officers, the eyewitnesses, and the medical evidence. What's more, her own deposition testimony often contradicts. *See Jeffreys v. City of New York*, 426 F.3d 549, 555 (2d Cir. 2005) (affirming grant of summary judgment in excessive force case where "nothing in the record" supported plaintiff's allegations "other than plaintiff's own contradictory and incomplete testimony"). At times she painted a protracted confrontation: that the first shot struck Blough's back, prompting him to turn around and say "you shot me," and that he turned around *again* (back facing the group) before the officers resumed firing. But at other times she testified that Blough did not "say anything else to" the officers, and that the officers fired rapidly—"[i]t was bam, bam, bam, like pretty much right there together."

In the face of such contradictions, no reasonable fact finder would credit her allegation that, after being shot once, Blough turned to the officers, spoke, and then turned around before the officers fired the second and third shots. *See Bush v. Compass Grp. USA, Inc.*, 683 F. App'x 440, 449 (6th Cir. 2017)

("Although the non-moving party is entitled to all reasonable inferences when evaluating a summary judgment motion, when a plaintiff's claims are only supported by his 'own contradictory and incomplete testimony . . . no reasonable person would undertake the suspension of disbelief necessary to credit the allegations made in his complaint." (quoting *Jeffreys*, 426 F.3d at 555)).

"This is not a case where 'a jury could conclude that [the police were not] in any danger[.]'" *Mullins v. Cyranek*, 805 F.3d 760, 767 (6th Cir. 2015) (citation omitted). Still armed and belligerent, Blough posed a serious threat to Officer Richardson and neighborhood residents. In a matter of seconds, Blough advanced within feet of an officer in a residential neighborhood, ignored commands to drop his knife, stepped toward the officer, raised the knife, and told the officer he would have to kill him. Where "all parties agree that the events in question happened very quickly," *Graham*'s prohibition on evaluating the scene with 20/20 hindsight "carries great weight." *Untalan v. City of Lorain*, 430 F.3d 312, 315 (6th Cir. 2005) (citation omitted). The calculus of reasonableness thus permits the officers' split-second determination here. *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) ("We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.").

Even were we to find a constitutional violation, Reich has failed to show that the unlawfulness of the officers' conduct was clearly established at the time. *Wesby*, 138 S. Ct. at 589. To be "clearly established," the law must have been "sufficiently clear" such that

"every 'reasonable official would understand that what he is doing' is unlawful." *Id.* (internal quotation marks omitted). In other words, existing case law "must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). And it must not be defined at "a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018). That's especially true 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 . . . will apply to the factual situation the officer confronts." *Id.* Thus, in excessive force cases, qualified immunity shields the officers "unless existing precedent 'squarely governs' the specific facts at issue." *Id.* at 1153 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam)). Given our decisions in *Chappell* and *Rhodes*, we cannot say that *every* reasonable officer would have understood his actions to be unlawful.

The dissenting opinion argues that it was error to exclude Reich's affidavit and that the affidavit defeats qualified immunity. But the district court held that it would grant summary judgment even if it considered the affidavit. We agree. Shooting Blough from a distance of twenty-five to thirty-six feet would not have violated any clearly established right. Because "officers of reasonable competence" could believe that it did not violate the Constitution, Officers Richardson and McMillen may not be held liable. *Malley v. Briggs*, 475 U.S. 335, 341 (1998).

If Reich's affidavit were credited, Blough would still be a knife-wielding belligerent who (as the officers knew) disliked the police, had "real bad" schizophrenia, and was not taking his medications. He would still have ignored the officers' demands that

he drop the knife. He would still have advanced toward them with his knife hand raised in a stabbing position. And he would still have announced—moments before the shooting—"you're gonna have to kill me mother ****er."

The only change the affidavit would make is to place Blough some twenty feet farther away from the officers. An assailant can close that distance in a second or two. There is no rule that officers must wait until a suspect is literally within striking range, risking their own and others' lives, before resorting to deadly force.

Considering how perverse such a rule would be, it is no surprise that no authority— including the dissent's—clearly establishes it. Indeed, *Sova v. City of Mt. Pleasant* does not stand for a "strike zone" rule. 142 F.3d 898 (6th Cir. 1998). *Sova* does not even mention the suspect's distance from the officers. While *Studdard v. Shelby County* does mention distance, it does so as only one factor among several, not as the be-all and end-all of Fourth Amendment reasonableness. *See* 934 F.3d 478, 481–82 (6th Cir. 2019). Reading *Sova* and *Studdard* would not impress upon every reasonable officer the clear understanding that it is illegal to shoot someone behaving like Blough if that person is twenty-five feet away from one officer and thirty-six feet away from another.

In the "tense, uncertain, and rapidly evolving" circumstances of Blough's encounter with Officers Richardson and McMillen, reasonable minds could deny that twenty feet made the difference between a legal use of deadly force and an illegal one. *Graham*, 490 U.S. at 396–97. Thus, for the same reasons the officers did not violate constitutional law by shooting Blough if he was five feet away, they did not violate *clear* constitutional law by shooting Blough if he was

twenty-five to thirty-six feet away. No legal principle "clearly prohibit[ed]" the use of deadly force "in the particular circumstances before [the officers]." *Wesby*, 138 S. Ct. at 590. And it was not "plainly incompetent" for the officers to consider Blough a threat. *Id.* at 589 (citation omitted).

C. State Law Claims

Reich argues that Officers Richardson and McMillen violated various state laws during the confrontation with Blough. The officers again raise the defense of qualified immunity, this time under Kentucky law. The district court agreed with the officers. So do we.

Under Kentucky law, qualified immunity protects a police officer so long as he performed "(1) discretionary acts or functions . . . ; (2) in good faith; and (3) within the scope of [his] authority." *Yanero v. Davis*, 65 S.W.3d 510, 521–22 (Ky. 2001). This doctrine applies to negligence actions and intentional torts. *Gati v. W. Ky. Univ.*, 762 F. App'x 246, 253 (6th Cir. 2019). The determination of the amount of force required, including the decision to use deadly force, is a discretionary act. *Nichols v. Bourbon Cty. Sheriff's Dep't*, 26 F. Supp. 3d 634, 642 (E.D. Ky. 2014); *see Marson v. Thomason*, 438 S.W.3d 292, 297 (Ky. 2014) (stating that discretionary acts involve "the exercise of discretion and judgment, or personal deliberation, decision, and judgment"); *Yanero*, 65 S.W.3d at 522 (noting that qualified immunity affords protection for "good faith judgment calls made in a legally uncertain environment").

And the use of deadly force plainly falls within the scope of a police officer's authority. Ky. Rev. Stat. Ann. § 503.050(1)-(2) (stating that an officer may use deadly force if he "believes that such force is necessary to protect himself against death[] [or] serious physical

injury"); *see Woosley v. City of Paris*, 591 F. Supp. 2d 913, 922 (E.D. Ky. 2008). Because the officers performed discretionary acts within their authority, the burden shifts to Reich "to establish by direct or circumstantial evidence that the discretionary act[s] w[ere] not performed in good faith." *Yanero*, 65 S.W.3d at 523.

That leaves us with the question whether the officers acted in good faith. This inquiry, adopted from the Supreme Court's decision in *Harlow*, has both an objective and subjective component. *Id.* (citing *Harlow*, 457 U.S. at 815). Objectively, a court must ask whether the officer's conduct demonstrates "a presumptive knowledge of and respect for basic, unquestioned constitutional rights." *Bryant v. Pulaski Cty. Detention Ctr.*, 330 S.W.3d 461, 466 (Ky. 2011). Subjectively, courts ask whether the official behaved with "permissible intentions." *Id.* Thus, Reich can show bad faith by pointing to (1) "a violation of a constitutional, statutory, or other clearly established right which a person in the public employee's position presumptively would have known was afforded a person in [Blough's] position"; or (2) evidence that an officer "willfully or maliciously intended to harm [Blough] or acted with a corrupt motive." *Id.*; *Yanero*, 65 S.W.3d at 523.

Our analysis of Reich's Fourth Amendment claim takes care of prong one—the officers did not violate Blough's constitutional right to be free from excessive force and, even if they did, the unlawfulness of the officers' conduct was not clearly established at the time. As to the second, Reich never argued that the officers willfully or maliciously intended to harm Blough or acted with corrupt intentions. *See Howell v. Sanders*, 668 F.3d 344, 356 (6th Cir. 2012) ("This inquiry is resolved by determining 'whether the

official has behaved with permissible intentions.'") (citation omitted). To be sure, Reich's opening brief includes one line addressing the issue: "[T]he patently unjustifiable circumstances of [the] shooting . . . raise the question of whether [the officers] acted with malice or a corrupt motive, which is a state-of-mind issue that must be resolved by a jury[.]" Appellant Br. 53. This statement, however, unsupported by citation to the record, fails to present a genuine issue of fact. *See Matsushita*, 475 U.S. at 586. Our independent review of the record turned up no facts to support a finding of bad faith.

For that reason, Reich's claims of negligence, negligent infliction of emotional distress, and wrongful death fail. *See Patton v. Bickford*, 529 S.W.3d 717, 729 (Ky. 2016) ("[A] wrongful death claim . . . is, at its core, a tort claim based upon negligence."); Ky. Rev. Stat. Ann. § 411.130(1). So too her common law battery claim. *See Atwell v. Hart Cty.*, 122 F. App'x 215, 219 (6th Cir. 2005) (holding that a battery claim under Kentucky law must fail where the officer's conduct was deemed objectively reasonable in the § 1983 context). Same goes for her outrage and intentional infliction of emotional distress claims. *See id.* ("[T]he torts of outrage and intentional infliction of emotional distress are premised upon extreme and outrageous conduct intentionally or recklessly causing emotional distress.").

Last, Reich's briefs lodge no argument supporting claims, federal or state, against the City of Elizabethtown. But even if she had mentioned here the same claims she brought below—negligent hiring, training, and supervising—they would fail because she has not shown that the officers inflicted a constitutional harm on Blough. *See Scott v. Clay Cty.*, 205 F.3d 867, 879 (6th Cir. 2000) ("[O]ur conclusion

that no officer-defendant had deprived the plaintiff of any constitutional right a fortiori defeats the claim against the County as well."); *McQueen v. Beecher Cmty. Sch.*, 433 F.3d 460, 471 (6th Cir. 2006); *Whitlow v. City of Louisville*, 39 F. App'x 297, 302 (6th Cir. 2002) ("[I]f Whitlow suffered no constitutional violation, then Plaintiff's claims against Louisville . . . alleging that their lack of training and failure to supervise the individual officers resulted in Decedent's death, must fail.").

We AFFIRM.

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting. The majority paints a distressing picture, one in which Officers Richardson and McMillen shot and killed Joshua Blough because he was a "knife-wielding belligerent" "advanc[ing] toward them with his knife hand raised in a stabbing position," and screaming obscenities like "you're gonna have to kill me mother ****er." Maj. Op. at 15. If the record supported that picture—and that picture alone—I might agree with my colleagues that the officers are entitled to qualified immunity. The problem, however, is that the record is not amenable to such a one-sided rendering. Rather, as I see it, there are two sides to this story: the officers' view—which the majority details with great care— and Elizabeth Reich's view—which the majority sweeps under the rug. And, as Reich tells it, Officers Richardson and McMillen shot and killed her fiancée, Blough, right in front of her, (a) while Blough was standing *20 to 30 feet away* from the officers and Reich, and (b) while Blough was *turning to run away from the officers*. Accepting Reich's narrative as true, as we must at this stage of litigation, any reasonable police officer should have known that shooting Blough violated clearly established Sixth Circuit law. *See Studdard v. Shelby County*, 934 F.3d 478 (6th Cir. 2019); *Sova v. City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998). Accordingly, in my view, qualified immunity does not protect Officers Richardson and McMillen; this case should be going to trial.

A. Reich's Affidavit

As an initial matter, I, unlike the majority, believe the district court abused its discretion when it

disregarded Reich's post-deposition affidavit. Consequently, in my opinion, Reich's affidavit should be considered as important a piece of evidence as anything else in the record. This is so for the following reasons.

At her deposition, Reich testified that, during the final confrontation between Blough and the officers, the officers ordered Blough to put down his knife. After that, Reich continued, Blough "took a step forward toward them and then he turned around to run," prior to being shot. R. 55-5 (Reich Dep. at 102–03) (Page ID #614–15). Defense counsel then asked Reich about Blough's distance from the officers. The following colloquy occurred:

> Q: Okay, when he took a step toward the officers, how close was he to the officers?
>
> A: He was far enough away that it—they—he wasn't a direct threat to them.
>
> Q: Okay. Can you estimate that in feet or yards or car lengths—
>
> A: No.
>
> Q: —or—
>
> A: No, because I'm not sure.
>
> Q: Okay. And I don't want you to guess,—
>
> A: Right.
>
> Q: —I'm just—
>
> A: Yeah, I'm not—I don't want to guess about it.
>
> Q: Or, you know, you can look at this room and the clock down there or something. I—I'm just trying to get an idea was—was Josh ten feet

> away, 20 feet away, 30 feet away, 50 feet away.
>
> A: I would say about 20.
>
> Q: Okay. And was—was he 20 feet when he took a step toward them or was that the 20 feet or—
>
> A: Yeah, it was probably 20 feet being when he took a step toward them.
>
> Q: Okay. So he's roughly 20 feet away, plus he took one step toward them, which would bring him roughly what, I don't know, 18, 17—
>
> A: Yeah.
>
> Q: —something like that. And then he turned and went the—
>
> A: He turned to—
>
> Q: —other direction.
>
> A: Yeah, he turned around to run.

R. 55-5 (Reich Dep. at 103–04) (Page ID #614). Some intervening testimony occurred, and then counsel returned to the subject of distance:

> Q: I don't want you to guess, I'm just trying to get an idea, would he have then been 22 or 23 feet or so away when he was shot?

Reich's counsel then intervened:

> [Reich's counsel]: You know, I've let it go on way too long I guess. You say you don't want her to guess, but then you want her to guess. So I'm going to object to the question. You can—if you feel comfortable with the distances and so on, you can testify to that—
>
> [Reich]: Right.

> [Reich's counsel]: —but don't guess.
>
> [Reich]: Okay.

Reich and defense counsel resumed their conversation:

> A: Yeah, I don't feel comfortable with the—the estimated length of—you know, I don't feel comfortable with it. Because it's been a long time and I just don't feel comfortable with estimating on that.
>
> Q: So your testimony is that you have no idea how far Josh was from the officers when he was shot.
>
> A: Right. But he was far enough that he wasn't a threat to them.
>
> Q: Okay. But you have no idea how far he was when he was shot.
>
> A: No.

Id. at 105–06 (Page ID #615).

About a year later, Reich (and her attorney) returned to the site of the shooting—a spot Reich had long avoided due to the emotional trauma it provoked—and decided to place cones at the spots where Reich believed she, Blough, Richardson, and McMillen had stood at the time of the shooting. R. 63-3 (Reich Aff. at 1, 3) (Page ID #2965, 2967). Reich then reported the results of this exercise in an affidavit in response to Defendants' summary-judgment motion. More specifically, Reich placed Blough as having been 25 feet and 6 inches from Richardson, 36 feet and 4 inches from McMillen, and 34 feet and 6 inches from herself at the moment he was shot. *Id.* at 3 (Page ID #2967). Notably, despite the considerable differences between Reich's affidavit's measurements and the

distance estimates that McMillen and Richardson offered at their depositions, the locations of the cones placed by Reich more or less line up with the scene described by the officers: Blough had been shot at the edge of the grass and the street, the officers had been in the middle of the street (because they had parked in the right lane and were standing beside the drivers' sides of their vehicles), Blough and Reich were closer to Richardson than to McMillen, and McMillen was farther down the street than Richardson. R. 63-3 (Reich Aff. at 46) (Page ID #3010).

"A party cannot create a factual dispute by filing an affidavit, after a motion for summary judgment has been made, which contradicts earlier testimony." *Dotson v. U.S. Postal Serv.*, 977 F.2d 976, 978 (6th Cir. 1992). If the party does so, she "must explain why she disagrees with herself." *Powell-Pickett v. A.K. Steel Corp.*, 549 F. App'x 347, 352 (6th Cir. 2013). Where "the alleged inconsistency created by the affidavit existed within the deposition itself," however, the later affidavit should be allowed. *O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567, 593 (6th Cir. 2009) (quotation omitted). In such a case, "there is no direct contradiction" and "the court must not disregard the affidavit, unless the court determines that the affidavit constitutes an attempt to create a sham fact issue." *Id.* (quotation omitted). "Factors relevant to the existence of a sham fact issue include [1] whether the affiant was cross-examined during his earlier testimony, [2] whether the affiant had access to the pertinent evidence at the time of his earlier testimony or whether the affidavit was based on newly discovered evidence, and [3] whether the earlier testimony reflects confusion which the affidavit attempts to explain." *Franks v. Nimmo*, 796 F.2d

1230, 1237 (10th Cir. 1986); *accord Aerel, S.R.L. v. PCC Airfoils, L.L.C.*, 448 F.3d 899, 908 (6th Cir. 2006).

We have applied these standards to allow the striking of affidavits that are truly in *direct* conflict with the *unequivocal* content of the earlier testimony. In *Powell-Pickett v. A.K. Steel Corp.*, for example, the plaintiff invoked a constant refrain of "I don't recall at this time" in response to broad deposition questions about the discrimination she allegedly suffered. 549 F. App'x at 351–52. In opposing a motion for summary judgment, however, the plaintiff submitted an affidavit that recounted specific instances of discrimination. *Id.* at 352. We accordingly concluded that, because the plaintiff had "profess[ed] a comprehensive and incredible lack of memory" at her deposition, and yet had submitted no evidence explaining why she had been so unresponsive, the district court acted properly when it struck her affidavit. *Id.* at 353. By contrast, in *Briggs v. Potter*, 463 F.3d 507, 513–14 (6th Cir. 2006), we concluded that the district court abused its discretion when it struck an affidavit that merely added "greater detail" to a subject a party had been questioned about only in generalities at his deposition.

Reich's affidavit submitted in opposition to Defendants' motion for summary judgment neither directly contradicts her deposition testimony nor fails to explain any inconsistencies between them. Rather, it is easy to understand why she could not answer questions about the distance between the actors present at the scene of the shooting during her deposition and why she was able to furnish that information in the subsequent affidavit.

To begin, this is a case where "the alleged inconsistency created by the affidavit existed within the deposition itself," not one where the later affidavit

directly contradicted unequivocal testimony from the earlier deposition. *O'Brien*, 575 F.3d at 593 (quoting *Kennett-Murray Corp.*, 622 F.2d at 894). Unlike the plaintiff in *Powell-Pickett*, Reich neither testified unequivocally about, nor completely denied knowledge of, the general distance between the parties present at the shooting. The fairest interpretation of the quoted exchange from Reich's deposition is *not* that she had no knowledge *at all* of the distances between the various actors during the shooting she witnessed, but rather that she did not feel comfortable estimating those distances in feet and inches while sitting at her deposition. Indeed, Reich initially ventured a guess when pressed (20 feet between Richardson and Blough, which is fairly close to the 25 feet and six inches measurement included in her affidavit) before then admitting she was unsure of "the estimated length." R. 55-5 (Reich Dep. at 105–06) (Page ID #615). In other words, Reich did anything but provide a "definitive answer" to the distance issue at her deposition. Maj. Op. at 7.

Furthermore, Reich did not create a sham issue of fact with her affidavit. Consider the three *Franks* factors. First, although Reich was essentially cross-examined at her deposition, the questioning by both attorneys only teased out the equivocal nature of her testimony. *See O'Brien*, 575 F.3d at 593 ("[Whether the deponent/affiant was cross-examined] matters, because a party who is cross-examined but nevertheless offers *unequivocal* testimony, only to be contradicted by a later affidavit, has indeed tried to create a sham fact issue.") (emphasis added). Second, Reich did not have "access to the pertinent evidence at the time of" her deposition. *Franks*, 796 F.2d at 1237. She had not been back to the site of the shooting since it occurred years earlier and had certainly not

been there with a tape measure. Consequently, her affidavit is best classified as "newly discovered evidence." *Id.* And, third, as I explained above, Reich's "earlier testimony reflects confusion which [her later] affidavit attempts to explain." *Id.* Moreover, unlike the party offering the stricken affidavit in *Powell-Pickett*, Reich explained any inconsistency between her deposition testimony and her affidavit: she had initially avoided returning to the site of the shooting because it was emotionally traumatic to do so, but then summoned up the courage when it became necessary to clarify her earlier testimony.

All told, although a reasonable juror might find the timing of Reich's affidavit concerning, that does not mean the district court had a firm legal basis on which to strike the affidavit in its entirety. Accordingly, the district court abused its discretion when it struck Reich's affidavit; I would consider it part of the record in evaluating Defendants' motion for summary judgment. *See Briggs*, 463 F.3d at 511 (noting that a district court can abuse its discretion by "misapply[ing] the correct legal standard when reaching a conclusion").

B. The Facts, Viewed in the Light Most Favorable to Reich

With that threshold issue resolved, I now consider what version of the facts we must accept as true for purposes of this appeal. With respect to the legal standard, I agree with the majority: "Courts must construe the evidence and draw all reasonable inferences in favor of the nonmoving party," here, Reich. Maj. Op. at 5–6 (quotation omitted); *accord Tolan v. Cotton*, 572 U.S. 650, 656 (2014) ("[U]nder either prong [of the qualified-immunity analysis], courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment.").

When it comes to applying this standard, however, the majority ignores or downplays two genuine disputes of material fact, both of which are essential to the resolution of this case: First, Blough's *distance* from Reich, McMillen, and Richardson at the time the officers shot him. Second, Blough's *position* vis a vis the officers and Reich at the time the officers shot him.

Viewing these disputes in the light most favorable to Reich, a reasonable juror could find (1) that Blough was dozens of feet from any other person at the time he was shot, and (2) that he was turning to run away from the officers at that time, too. Accordingly, I, unlike the majority, would credit those two facts as true, period. *But see* Maj. Op. at 13–14 (repeatedly casting doubt on Reich's credibility, instead of simply accepting her narrative as true).

1. Distance between Blough, Reich, and the officers at the time of the shooting

With respect to the distances between Blough, Reich, and the officers at the time of the shooting, Officer Richardson testified that when he first began speaking to Blough, Blough was across the street from Richardson, standing between two houses, some 125 feet away. Richardson then testified that Blough advanced from the grassy yard to the edge of the road and was only "six to eight feet" away from him when he (Richardson) opened fire. R.55-9 (Richardson Dep. at 92) (Page ID #709); *accord* R. 55-10 (McMillen Dep. at 152) (Page ID #775) (similar testimony).

Reich, however, disagrees. Again, as Reich tells it, at the moment the officers shot Blough, Blough was 25 feet and 6 inches away from Richardson, and 36 feet and 4 inches away from McMillen. R. 63-3 (Reich Aff. at 3) (Page ID #2967). Reich's testimony thus puts Blough three to four times further away from

Richardson than Richardson's and McMillen's accounts do.

2. Whether Blough had turned to run

With respect to whether Blough had turned to run by the time the officers shot him, Officer McMillen testified that Blough never stopped to turn away and was facing Richardson during the entire encounter. R. 55-10 (McMillen Dep. at 154) (Page ID #776).

Reich, however, testified that Blough *had* turned to run away from the officers and had taken "one or two steps" away from them before he was shot. R. 55-5 (Reich Dep. at 105) (Page ID #615). She also testified that after Blough was "shot the first time he turned around and said, you shot me," and that, after that, Blough "turned back around and [] got shot two more times." *Id.* at 114 (Page ID #617). And, if that testimony weren't enough, Reich has also pointed out that Blough's autopsy indisputably proved that one of the officers' bullets hit Blough in the "upper right back." R.55-5 (Medical Report) (Page ID #547–48).

The majority attempts to explain away Reich's narrative by either (a) calling Reich's testimony "contradictory," or (b) asserting that the officers must have shot Blough "from different spots" (presumably reasoning that one officer shot Blough in the chest while the other shot him in the back). Maj. Op. at 13–14. This reasoning not only ignores the testimony of Defendants' own ballistics expert—who opined that the two bullets that struck Blough came from *just* Officer Richardson's gun (thus obviating the majority's "second shooter" theory), *see* R. 55-20 (Smock Rep. at 9) (Page ID #915)—but it impermissibly prejudges Reich's credibility, which, of course, we cannot do at this stage. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 ("Credibility determinations, the weighing of the evidence, and the

drawing of legitimate inferences from the facts are jury functions, *not* those of a judge.") (emphasis added). Police officers may be entitled to a number of unique defenses in civil litigation, but a watered-down summary-judgment standard is not one of them. *Tolan*, 572 U.S. at 656–57.

C. Qualified Immunity

With this understanding of the facts in hand, I now turn to qualified immunity. Again, I agree with the majority's description of the legal standard in all relevant respects. Qualified immunity is a two-pronged inquiry, where we ask (1) whether the officers "violated a federal statutory or constitutional right," and (2) whether "the unlawfulness of [the officers'] conduct was clearly established at the time." Maj. Op. at 9 (quotation omitted). We must "evaluate the force used through the eyes of a reasonable officer at the scene, not with the 20/20 vision of hindsight." *Id.* at 10 (quotation omitted). And clearly established law "must not be defined at a high level of generality." *Id.* at 14 (quotation omitted). Rather, "existing precedent" must "squarely govern[] the specific facts at issue." *Id.* (quotation omitted).

But, even accepting all these premises as true,[1] I still believe that Defendants are not entitled to qualified immunity here, on these specific facts.

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[1] It bears mentioning that, in recent years, jurists and scholars from across the ideological spectrum have questioned whether we *should* accept all of these premises as true. *See, e.g., Kisela v. Hughes*, 138 S. Ct. 1148, 1161–62 (2018) (Sotomayor, J., dissenting); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871-72 (2017) (Thomas, J., concurring); *Zadeh v. Robinson*, 902 F.3d 483, 498-500 (5th Cir. 2018) (Willett, J., concurring); William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797 (2018).

With respect to prong one, a reasonable juror could find that Defendants used excessive force against Blough, in violation of the Fourth Amendment. *See* Maj. Op. at 9–10 (setting forth standard). Two cases—one very recent, the other a bit older—prove the point.

First, in *Sova v. City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998), we considered whether the police violated the Fourth Amendment when they shot and killed a suicidal, knife-wielding man standing in his front door—near his parents—and yelling to the police "that he wanted [them] to shoot him." *Id.* at 901. Although the police claimed the man "charged at them through the kitchen door with knives drawn on the porch," and that they accordingly had no choice but to shoot to kill, we denied qualified immunity at summary judgment because the man's parents claimed the officers shot their son "before he ever stepped out of the kitchen doorframe" (meaning the officers weren't necessarily in immediate physical danger at the moment they fired their weapons). *Id.* at 902–903.

Similarly, in *Studdard v. Shelby County*, 934 F.3d 478 (6th Cir. 2019), *petition for cert. filed*, No. 19-609 (Nov. 12, 2019), we considered whether the police violated the Fourth Amendment when they shot and killed a suicidal, knife-wielding man standing beside a road, about 34 feet from the officers, swaying and threatening to slit his own throat. *Id.* at 480. We likewise denied the officers qualified immunity at summary judgment, reasoning that, although the man was "dangerous and uncooperative," and had "refused to comply with [the officers'] commands to put the knife down," the man "did not pose a serious risk to anyone in the area" at the moment he was shot because he was 30-some feet away from the officers

and had not moved towards the officers in any appreciable way. *Id.* at 481. "There is a world of difference between a knife-wielding suspect who runs at officers and one who doesn't," we observed. *Id.* at 483.

This precedent effectively resolves the prong-one analysis. Even acknowledging the "tense, uncertain, and rapidly evolving" nature of Defendants' encounter with Blough, and the challenges of evaluating police conduct with "the 20/20 vision of hindsight," Maj. Op. at 10, if there was a genuine dispute of material fact in *Sova* and *Studdard* as to whether the suicidal, knife-wielding decedent posed a "threat of serious physical harm" to the surrounding public, such that deadly force was justified, surely there is a triable dispute here. If anything, Reich's testimony that Defendants essentially shot Blough in the back, as he turned to run away, makes the officers' actions even *more* unreasonable than the actions at issue in *Sova* and *Studdard*. *Cf. Bouggess v. Mattingly*, 482 F.3d 886, 892 (6th Cir. 2007) (finding fact issue as to whether officer behaved reasonably when evidence showed that officer shot the plaintiff "three times in the back," following a "hand-to-hand struggle").

This brings me to the second prong of the qualified-immunity analysis—clearly established law. As the majority observes, this is a tough standard, meant to protect "all but the plainly incompetent or those who knowingly violate the law." Maj. Op. at 9 (quotation omitted). But it is not insurmountable. *See, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (noting that there does not need to be a case "directly on point" for a right to be clearly established); *Hagans v. Franklin County Sheriff's Office*, 695 F.3d 505, 508–09 (6th Cir. 2012) (similarly remarking that a constitutional right need only be "*reasonably*

particularized" by prior case law). In my view, then, the correct question to ask for purposes of this second prong is whether, as of July 6, 2015, our law clearly established that it was unconstitutional for a police officer to shoot a non-compliant, mentally unstable person with a knife, *if* that person was *not* advancing toward another individual in the immediate area.

The answer to the question is yes. In 1998—almost two decades before the shooting— *Sova* established that reasonable police officers do *not* shoot non-compliant persons brandishing knifes when they are *not* advancing toward another individual in the immediate area, even if the person is mentally ill, suicidal, and/or yelling threats to the officers.[2] Consequently, because a reasonable juror could find that Defendants violated this clearly established law when they shot Blough, Reich has met her burden under prong two.

In response, the majority claims I am trying to create a black-and-white "strike zone rule," where the viability of a Fourth Amendment claim rise and falls solely on the precise number of feet the decedent stood from the police at the time of the shooting. Maj. Op. at 15. I am not. I am simply noting that, when confronted with a materially similar set of facts twenty years ago, we held that qualified immunity did not lie, and that, therefore, Officers Richardson and McMillen were on fair notice that qualified immunity would not protect them here either. *Cf. Kisela*, 138 S. Ct. at 1154 (finding that officers were *not* on "fair notice" that their conduct violated the Fourth Amendment because the factual differences between the purportedly governing Ninth Circuit precedent and

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[2] Indeed, just four months ago, another panel of this court found exactly that. *See Studdard*, 934 F.3d at 481–83 (relying on *Sova* as "clearly established law").

the facts before the Court "leap[t] from the page"). Indeed, to hold otherwise is to hold Reich, and other Fourth Amendment plaintiffs like her, to an impossibly high standard, where they must dredge up a mirror-image case (that happened to arise in this circuit, and happened to result in a decision by this court) to have any hopes of surviving a qualified-immunity challenge at summary judgment. But, because history rhymes far more often than it repeats exactly, we cannot, and should not, condition a Fourth Amendment plaintiff's access to a jury trial on their meeting such an onerous burden.

The majority seeing it differently, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

AMANDA M. REICH, ET AL. Plaintiffs

v. Civil Action No. 3:16-cv-00429-RGJ

CITY OF ELIZABETHTOWN, ET AL. Defendants

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MEMORANDUM OPINION AND ORDER

Plaintiffs, Elise Davidson, successor administratrix for Joshua Blough's estate, and Amanda Reich (collectively, "Plaintiffs"), bring this action against the City of Elizabethtown ("City"), Officer Scot Richardson, and Officer Matthew McMillen (collectively, "Defendants") alleging that the City and its officers violated the Fourth and Eighth Amendments to the United States Constitution when the officers shot and killed Joshua Blough on July 7, 2015. [DE 35, Amend. Compl. at 217]. Plaintiffs also bring related state-law tort claims. Discovery has concluded, and Defendants now move for summary judgment under Federal Rule of Civil Procedure 56. [DE 55, MSJ]. A timely response [DE 61] and reply [DE 68] were filed. Oral argument was held on October 30, 2018. [DE 76]. This matter is ripe for adjudication. Having considered the parties' filings and the applicable law, the Court **GRANTS** Defendants' Motion for Summary Judgment.

BACKGROUND

A. Factual Background

On July 6, 2015, Steven Blough went to a Communicare mental health facility in Leitchfield, Kentucky. [DE 61, Resp. MSJ at 1707]. While being assessed for potential treatment, Blough—who suffered from chronic schizophrenia, paranoia, depression, bipolar disorder, and was a chronic methamphetamine and benzodiazepine user—reported that he had not taken his medication for four months and had attempted suicide three times, including once in the prior five days. [DE 55-7, Comm. Record]. He had previously been hospitalized for his mental health conditions and drug abuse. [DE 55-6, KYIBRS Rep.]. The Communicare counselor recommended immediate admission. [DE 55-7, Comm. Record]. Blough declined, but agreed to return for admission and treatment the next day. *Id.* Before departing, Blough signed a document agreeing that he would not try to commit suicide or harm himself or others before checking into a facility. *Id*.

The next day, Blough and his fiancé, Amanda Reich, began traveling from Leitchfield to a Communicare facility in Elizabethtown. [DE 61 at 1708]. While stopped at a traffic light, Blough saw a Kentucky State Police ("KSP") vehicle stopped on the side of the Western Kentucky Parkway near White Mills. [DE 55 at 503]. Blough, high on methamphetamine, became "really upset," hallucinated that the KSP were after him, and said that "there were police officers everywhere." [DE 55-5, Reich Depo. at 606].

Later, Blough and Reich stopped at another traffic light on Highway 62 in Elizabethtown. *Id.* at 607–08.

Blough was still hallucinating and, referring to the police, said to Reich, "I'm not gonna let anybody hurt you, but I'm not gonna let anybody hurt me either." *Id.* at 608. Blough, armed with an open and locked three-inch knife, exited the vehicle. *Id.* After a brief moment, Reich successfully talked him into reentering the vehicle, and they drove on. *Id*.

Still armed with the blade open and locked, Blough again exited the vehicle at the intersection of Ring Road and Patriot Parkway in Elizabethtown. *Id.* at 609. Reich said that "it was like when [Blough] was walking he wasn't even acknowledging any cars coming by or nothing." *Id.* She pleaded with Blough to reenter the vehicle, but he refused and left the intersection on foot. *Id*.

Reich felt that "she couldn't contain the situation" and immediately called 911. [DE 55-9, Richardson Depo. at 693]. She told the dispatcher that she "was afraid that somebody else would get the wrong idea and call in thinking that [Blough] was a threat to someone and that he would end up getting shot." [DE 55-8, First 911 Transc. at 681]. She said that Blough had "schizophrenia and stuff," had "not had his medicine," and thought everybody was "out to get him." *Id*.

In response to Reich's 911 call, Hardin County Dispatch connected Reich to Officer Matthew McMillen, and they spoke on the phone. [DE 55-5, Reich Depo. at 610]. Officer McMillen then arrived at the scene to do a welfare check, where Reich said that Blough was off his medication, paranoid, and disliked police. [DE 55-6, KYIBRS Rep.]. Reich told Officer McMillen that she wanted to get Blough to reenter the vehicle without police involvement. [DE 55-5, Reich Depo. at 621]. Officer McMillen told her that if Blough "is in that paranoid state and he sees an officer, you

know, he could perceive us as a threat and act upon it, especially if he's armed with a knife." [DE 61-7, McMillen Statem. at 2192–95]. Reich told Officer McMillen that Blough had not threatened anyone, and Officer McMillen agreed to follow Reich's plan. *Id.* Officer McMillen returned to his vehicle and advised dispatch of the situation. *Id*.

In the meantime, Blough had entered a residential subdivision near Fontaine Drive. He had removed his shirt and was sweating profusely. [DE 55-5, Reich Depo. at 608]. Reich thought Blough seemed "agitated and upset." *Id.* at 621. Nearby residents reported that Blough was wandering onto local properties and attempting to enter residences. First, Helen Howlett said that she saw "a suspicious-looking" man "wandering up-and-down the street into my yard and the yards of my neighbors." [DE 55-11, Howlett Aff. at 823]. Second, Madison Pils said that she "was walking home and saw a strange guy walking a little bit of the way down the street..." [DE 55-12, Pils Statem. at 825]. Third, Randal Ray said that, in response to Blough's behavior, Ray "became concerned and locked [his truck], closed the garage door, and went into [his] house to get his pistol." [DE 55-13, Ray Aff. at 826]. Finally, David Mills said that he "saw a man on the patio of [his] brother's house and it looked like he was trying to get into [the] back door." [DE 55-14, D. Mills Aff. at 828]. Later, Mills said that he "saw a man standing in [his] front yard" with a knife in his hand. *Id.* Mills told Reich that he would call 911 because "there were people and kids in the neighborhood." *Id.* The 911 Call Center received calls from drivers passing the subdivision, one of whom said that Blough had "a knife in his hand like he's going to stab somebody or someone." [DE 55-15, Second 911 Transc. at 830].

Across from the subdivision, Severns Valley Baptist Church was hosting a camp for about 200 children. [DE 55-16, Wilson Aff. at 837]. Reich had parked "right by Severns Valley" [DE 55-8, 911 Transcript at 681–82], and the children were recreating and playing on the lawn adjacent to Blough's location. [DE 55-16, Wilson Aff. at 837]. The Church's Executive Pastor said that Severns Valley went on "lock down" and notified parents that the children were unharmed. *Id*.

Reich entered the subdivision and asked Blough to put the knife down and reenter the vehicle. [DE 55-5, Reich Depo. at 611]. Blough refused, and Reich testified that Blough "must have seen the police—the police talking to [her] so [Blough] thought [she] was involved in trying to get him hurt too, you know." *Id.* at 611–12. Officer Scot Richardson was nearby and reported seeing Blough in the neighborhood, describing Blough's behavior as "bizarre." [DE 55-9, Richardson Depo. at 697]. Officer McMillen returned and spoke with Reich while Officer Richardson arrived separately in a marked vehicle. [DE 55-10, McMillen Depo. at 764]. Officer McMillen described Blough's presence in the residential neighborhood as adding "another dynamic." *Id.* at 784. Similarly, Officer Richardson said that "the situation changed from an enclosed vehicle to running across the major roadway, to entering a field, to the situation changed from 'he's probably going to be okay in a field' setting, to now he's in the neighborhood with a knife and there's residents that live in that neighborhood." [DE 55-9, Richardson Depo. at 705].

With Officers Richardson and McMillen now present, Reich again asked the officers not to approach Blough until she tried to make him drop the knife. [DE 55-5, Reich Depo. at 613]. The officers

agreed, and Reich approached Blough in a resident's front yard. *Id.* Blough still refused to drop the knife or enter the vehicle. *Id.* As Reich continued to ask Blough to drop the knife [DE 53, Reich Interview], Blough moved toward Officer Richardson at a "very fast pace." [DE 55-9, Richardson Depo. at 700–02]. He looked at Officer Richardson with the knife blade in a stabbing position. *Id.* at 700; [DE 55-10, McMillen Depo. at 768]. Blough stopped, touched Reich, and told her to "get the fu** back." [DE 55-9, Richardson Depo. at 704].

Officer Richardson perceived Blough as a threat to himself, Reich, and other persons in the neighborhood, and commanded Blough to drop the knife. *Id.* at 709, 715. Blough refused.[1] [DE 55-5, Reich Depo. at 617]. Officer Richardson had his pistol raised to the "on target" position.[2] *Id.* at 614. Still

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[1] The parties agree that Blough was intoxicated on methamphetamine during this interaction. [DE 55 at 509; DE 61 at 1715]. Officer Richardson said Blough's actions were consistent with methamphetamine-induced behavior. [DE 55-9, Richardson Depo. at 714]. Officer McMillen described such individuals as "unpredictable." [DE 55-10, McMillen Depo. at 787]. Plaintiffs also attribute Blough's refusal to follow the officers' commands to his intoxication. [DE 61 at 1715]. Officers Richardson and McMillen testified that they attempted to de-escalate the situation by not activating their police lights or sirens, not calling for more units to the scene, not crowding Blough, and giving repeated commands for Blough to stop and drop his weapon. [DE 55-9, Richardson Depo. at 714–15; DE 55-10, McMillen Depo. at 761, 786–788]. They testified that they employed other techniques as well, but Defendants dispute that the officers employed those other techniques.

[2] The parties disagree about when Officers Richardson and McMillen first drew their weapons. Plaintiffs claim that the officers had their weapons drawn while Reich spoke to Blough in the subdivision. [DE 55-5, Reich Depo. at 619]. But Defendants claims that the officers did not fully draw their weapons until

looking at Officer Richardson, Blough said, "you're going to have to kill me motherf**ker." *Id.* at 615.

Blough stepped either toward or away from Officer Richardson.[3] Officer Richardson fired two shots in rapid succession, each striking Blough. [DE 55-9, Richardson Depo. at 693]. Blough said "you shot me" and fell face down in the grass. [DE 55-5, Reich Depo. at 617]. Officer McMillen also fired his weapon but missed Blough. [DE 55-10, McMillen Depo. at 776–77]. Officers Richardson and McMillen administered first aid, but Blough died shortly thereafter on the way to Hardin Memorial Hospital. *Id.* at 777.

B. Procedural Background

Reich and Jamie Nelson, as Personal Representative of Blough's Estate, filed this action alleging Fourth and Eighth Amendment violations under 42 U.S.C. § 1983, as well as state law tort claims for negligence; battery; negligent hiring, training, and supervision; negligent infliction of emotional distress; and outrage, also known as intentional infliction of emotional distress. [DE 35 at 222–26]. Plaintiffs then filed a Motion to substitute

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moments before the shooting. [DE 55-9, Richardson Depo. at 704].

[3] There is disagreement about whether Blough continued to step toward Officer Richardson or turned in the other direction the moment before he was shot. Officer Richardson and three independent eye witnesses testified that Blough continued toward Officer Richardson with the knife in a stabbing position. [DE 55-9, Richardson Depo. at 714; DE 55-11, Howlett Aff. at 823; DE 55-14, D. Mills Aff. at 829; DE 55-17, H. Mills Statement at 839]. But one of those same witnesses, Helen Howlett, initially wrote a statement for KSP claiming that Blough was trying to get away from the officers when he was shot. [DE 61-10, Howlett KSP Stat. at 2262]. Reich also testified that Blough took "one or two steps" away from the police. [DE 55-5, Reich Depo. at 615].

Elise Davidson for Jamie Nelson as Personal Representative of Blough's Estate [DE 22], which the Court granted [DE 30]. Later, the Court granted an Agreed Order of Partial Dismissal for all claims against Tracy Shiller, Chief of the Elizabethtown Police Department. [DE 38].

Discovery concluded on February 1, 2018, and Defendants now move for summary judgment under Federal Rule of Civil Procedure 56. [DE 55]. Plaintiffs filed a Response that includes an affidavit attested to by Reich. [DE 61]. The affidavit includes new assertions that Defendants claim contradict Reich's earlier deposition testimony, and Defendants argue in their Reply that the Court should therefore disregard the affidavit. [DE 68, Reply MSJ at 3915]. Oral argument on the Motion for Summary Judgment was held on October 30, 2018. [DE 76].

LEGAL STANDARD

Summary judgment is required when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the burden of specifying the basis for its motion and demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party satisfies this burden, the nonmoving party must produce specific facts demonstrating a material issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). "Factual differences are not considered material unless the differences are such that a reasonable jury could find for the party contesting the summary judgment motion." *Bell v. City of E. Cleveland*, 125 F.3d 855 (6th Cir. 1997) (citing *Liberty Lobby*, 477 U.S. at 252).

A district court considering a motion for summary judgment may not weigh evidence or make credibility determinations. *Daugherty v. Sajar Plastics, Inc.*, 544 F.3d 696, 702 (6th Cir. 2008); Adams v. Metiva, 31 F.3d 375, 379 (6th Cir. 1994). The Court must view the evidence and draw all reasonable inferences in a light most favorable to the nonmoving party. *Williams v. Int'l Paper Co.*, 227 F.3d 706, 710 (6th Cir. 2000). But the nonmoving party must do more than show some "metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); see also Loyd v. Saint Joseph Mercy Oakland, 766 F.3d 580, 588 (6th Cir. 2014). Instead, the nonmoving party must present specific facts showing that a genuine factual issue exists by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence… of a genuine dispute[.]" *Shreve v. Franklin Cty., Ohio*, 743 F.3d 126, 136 (6th Cir. 2014). "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Liberty Lobby*, 477 U.S. at 252.

DISCUSSION

A. Reich's Affidavit Filed in Response to Defendants' Motion for Summary Judgment

First, the Court must decide whether it is proper to accept Reich's new affidavit filed as part of Plaintiffs' Response to Defendants' Motion for Summary Judgment. [DE 61-15, Reich Aff.]. Defendants argue in their Reply that the Court should disregard the affidavit because it includes new assertions that Defendants claim contradict Reich's earlier deposition testimony. [DE 68, Reply MSJ at 3915].

Generally, "[a] party cannot create a factual dispute by filing an affidavit, after a motion for summary judgment has been made, which contradicts earlier testimony." *Dotson v. U.S. Postal Serv.*, 977 F.2d 976, 978 (6th Cir. 1992) (*per curiam*) (citing *Gagne v. Nw. Nat. Ins. Co.*, 881 F.2d 309, 315 (6th Cir. 1989)); *see also Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir. 1986); *Biechele v. Cedar Point, Inc.*, 747 F.2d 209, 215 (6th Cir. 1984). "If a witness, who has knowledge of a fact, is questioned during her deposition about that fact, she is required to 'bring it out at the deposition and [cannot] contradict her testimony in a subsequent affidavit.'" *Holt v. Olmsted Township Bd. of Trs.*, 43 F. Supp. 2d 812, 817 (N.D. Ohio 1998) (quoting Reid, 790 F.2d at 460). Put differently, "a party cannot avoid summary judgment through the introduction of self-serving affidavits that contradict prior sworn testimony." *U.S. ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 303 (6th Cir. 1998). Numerous courts have declared that self-serving affidavits without factual support in the record will not defeat a motion for summary Case 3:16-cv-00429-RGJ-CHL judgment. *See, e.g., Devine v. Jefferson Cnty., Kentucky*, 186 F. Supp. 2d 742, 744 (W.D. Ky. 2001); *Jadco Enterprises, Inc. v. Fannon*, 991 F. Supp. 2d 947, 955 (E.D. Ky. 2014); *Syvongxay v. Henderson*, 147 F. Supp. 2d 854, 859 (N.D. Ohio 2001); *Wolfe v. Village of Brice*, 37 F. Supp. 2d 1021, 1026 (S.D. Ohio 1999) ("Self-serving affidavits, alone, are not enough to create an issue of fact sufficient to survive summary judgment.") (citing *Liberty Lobby*, 477 U.S. at 251; *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995)). Such affidavits fail to create an issue of material fact. *Lanier v. Bryant*, 332 F.3d 999, 1004 (6th Cir. 2003). The affidavit need not explicitly contradict prior testimony for the Court to disregard it; it must only interject factual assertions not

disclosed during discovery. *Myers v. Huron Cty., Ohio*, No. 3:06-CV-3117, 2008 WL 271657, at *2 (N.D. Ohio Jan. 31, 2008), *aff'd*, 307 F. App'x 917 (6th Cir. 2009).

When asked at her deposition to describe the positions of Blough and the officers during the shooting, Reich testified that she was "not sure" and did not "want to guess about it." [DE 55-5, Reich Depo. at 614]. But nearly two years after the shooting and explicitly in response to Defendants' Motion for Summary Judgment, Reich and her attorneys attempted to recreate the scene in detail. [DE 61-15, Reich Aff. at 2565]. The affidavit includes measurements, photographs, and notes that position the parties based on Reich's current recollection of the events. *Id.* Among other things, the affidavit places the distance between Blough and Officer Richardson at greater than 25 feet—nearly double the distance that other witnesses testified to shortly after the shooting. [DE 61-15, Reich Aff. at 2567]. There is no other support in the record for this factual assertion.

Defendants argue that the Court should exclude this new testimony on several grounds. First, they claim that there is no newly-discovered evidence or compelling reason that merits the testimony's consideration. [DE 68 at 3905]. Second, they note that this information was not produced to Defendants prior to the close of discovery, that all expert discovery is now closed, and all liability experts have been deposed. *Id.* Defendants argue that they therefore have no opportunity to cross-examine Reich about these new assertions. *Id.* Finally, Defendants question the timing of the affidavit, labeling it "suspicious and self-serving." *Id.* at 3904, n. 1.

Reich previously testified that she did not know the distance between Blough and Officer Richardson during the shooting, and Plaintiffs fail to explain why

they waited until after the close of discovery to attempt to recreate the scene. This is improper. *See Powell-Pickett v. A.K. Steel Corp.*, 549 F. App'x 347, 353 (6th Cir. 2013) ("Because [the plaintiff] was asked specific questions about, yet denied knowledge of, the material aspects of her case, the material allegations in her affidavit directly contradict her deposition."); *White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 877 (6th Cir. 2012) (noting the rule is that a party opposing summary judgment with an affidavit that contradicts her earlier deposition must explain why she disagrees with herself). Plaintiffs had access to the same factual record as Defendants. If Reich remembered the distance between the parties after her deposition and after reading others' testimony, she was required to make this assertion before discovery closed and to update her prior testimony. *See* Fed. R. Civ. P. 37; *Myers*, No. 3:06-CV-3117, 2008 WL 271657, at *2. Instead, she waited until after discovery closed and responded to Defendants' Motion with an affidavit that aims to create a factual issue for trial. *Powell-Pickett*, 549 F. App'x at 353 ("A party may neither duck her deposition, nor hold her cards in anticipation of later advantage.") "If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir. 1986) (citation omitted). Accordingly, the Court declines to consider these new contradictory assertions in ruling on the Motion for Summary Judgment.[4]

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[4] Even if the Court accepted Reich's affidavit, her assertions about the distance of the parties would not change the Court's

B. Section 1983 Claims

Plaintiffs allege that Defendants' conduct constituted unnecessary and unwarranted lethal force in violation of the Fourth and Eighth Amendments, entitling them to damages under 42 U.S.C. § 1983. [DE 35 at 222]. "[Section] 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Graham v. Connor*, 490 U.S. 386, 393–94 (1989) (internal quotation omitted). To state a claim under Section 1983, "a plaintiff must set forth facts that, when construed favorably, establish (1) the deprivation of a right secured by the Constitution or laws of the United States (2) caused by a person acting under the color of state law." *Burley v. Gagacki*, 729 F.3d 610, 619 (6th Cir. 2013).

Defendants maintain that Blough was not deprived of a constitutional right and assert the

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ruling. Reich puts the distance between Blough and Officer Richardson at 25 feet 6 inches—more than double the estimates made by third-party witnesses shortly after the shooting. [DE 61 at 16–17]. Even so, the officers could still reasonably believe that Blough was a danger to themselves and other parties on the scene, including the 200 day-camp children at nearby Severns Valley Baptist Church, concerned residents watching the scene, and Reich herself. The Sixth Circuit has never required a particular distance between a weapon-wielding man and potential victims for an officer to reasonably believe that people are in serious physical danger. *Stevens-Rucker v. City of Columbus, OH*, 739 F. App'x 834, 842–43 (6th Cir. 2018) (finding that an officer behaved reasonably when he shot a fleeing suspect armed with a knife from twenty-five feet away). As discussed later, the relevant fact-intensive inquiry is whether, *considering the totality of the circumstances*, a reasonable officer would consider the man a serious physical threat. *Chappell v. City of Cleveland*, 585 F.3d 901, 911 (6th Cir. 2009). While the distance between the parties is relevant to this inquiry, it is not dispositive in this case.

affirmative defense of qualified immunity. "Qualified immunity protects government officials performing discretionary functions unless their conduct violates a clearly established statutory or constitutional right of which a reasonable person in the official's position would have known." *Silberstein v. City of Dayton*, 440 F.3d 306, 311 (6th Cir. 2006). It "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Thus, law enforcement's conduct is not actionable if they are exercising discretion and their determinations are reasonable. *Jeffers v. Heavrin*, 10 F.3d 380, 381 (6th Cir. 1993).

When advanced by a defendant, qualified immunity is a threshold question of law appropriately determined on a motion for summary judgment. *Harlow v. Fitzgerald*, 457 U.S. 800 (1983). "Because qualified immunity is 'an immunity from suit rather than a mere defense to liability… it is effectively lost if a case is erroneously permitted to go to trial.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Once a defendant raises the defense, the plaintiff bears the burden of showing that it does not apply. *Johnson v Moseley*, 790 F.3d 649 (6th Cir. 2015).

The Supreme Court requires courts to follow a two-pronged approach when resolving questions of qualified immunity. First, a court must decide whether a plaintiff has presented sufficient facts that violation of a constitutional right has occurred. *Pearson*, 555 U.S. at 232. Second, a court must decide whether the right at issue was "clearly established" at the time of the alleged misconduct. *Id.* Thus, qualified immunity applies unless the official's conduct violates a clearly established constitutional right. *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

Courts have discretion to decide the order in which to engage these two prongs "in light of the circumstances in the particular case at hand." *Id.* at 236.

1. Violation of a Constitutional Right

a. Fourth Amendment

First, Plaintiffs allege that Defendants violated Blough's Fourth Amendment rights because Officers Richardson and McMillen deployed excessive force in seizing Blough. [DE 35 at 217]. The Supreme Court has held that claims brought under Section 1983 involving law enforcement's use of deadly force are properly analyzed under the Fourth Amendment, which guarantees citizens the right to be secure in their persons against unreasonable seizures. *Graham*, 490 U.S. at 394. The "reasonableness" of a particular seizure depends on both when it is made and how it is carried out. *Id.* at 395 (citing *Tennessee v. Garner*, 471 U.S. 1, 7–8 (1985)). It is clear that "[t]he intrusiveness of a seizure by means of deadly force is unmatched." *Garner*, 471 U.S. at 9. "Therefore, only in rare instances may an officer seize a suspect by use of deadly force." *Whitlow v. City of Louisville*, 39 F. App'x 297, 303 (6th Cir. 2002) (citing Garner, 471 U.S. at 9).

The Fourth Amendment's reasonableness test "is not capable of precise definition or mechanical application." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). Thus, its application requires careful attention to the facts and circumstances of each 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. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.*; *see also Smith v.*

Freland, 954 F.2d 343, 347 (6th Cir. 1992) (noting that courts "must avoid substituting [their] personal notions of proper police procedure for the instantaneous decision of the officer at the scene… [and] never allow the theoretical, sanitized world of their imagination to replace the dangerous and complex world that policemen face every day.").

When analyzing excessive force claims, the Sixth Circuit has adopted the view of doing so in segments. *Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir. 1996) (holding that review of excessive force claims should be limited to officers' actions in the moments preceding the shooting). This "somewhat narrow interpretation of the Supreme Court's mandate that courts look to the totality of the circumstances in determining if excessive force was used," *Claybrook v. Birchwell*, 274 F.3d 1098, 1103 (6th Cir. 2001), is "long-standing practice" in the Sixth Circuit, even though it may lead to more excessive force cases being decided on summary judgment. *Rucinski v. Cty. of Oakland*, 655 F. App'x 338, 342 (6th Cir. 2016).

In this case, then, the relevant inquiry is whether Officers Richardson and McMillen acted reasonably during the final encounter with Blough on the resident's front yard. The undisputed facts show that during the final encounter, Reich approached Blough in the front yard and asked him to put down the knife and enter her vehicle. [DE 55-5, Reich Depo. at 613]. Blough refused and moved toward Officer Richardson at a fast pace. [DE 55-9, Richardson Depo. at 700–02]. Blough looked at Officer Richardson with the knife in a stabbing position, stopped, touched Reich, and told her to "get the fu** back." *Id.* at 700, 704; [DE 55-10, McMillen Depo. at 768]. Officer Richardson told Blough to drop the knife. [DE 55-5, Reich Depo. at 617]. Blough refused and said, "you're going to have to

kill me motherf**ker." *Id.* at 615. Officers Richardson and McMillen then fired at Blough, with two of Officer Richardson's bullets striking and eventually killing Blough. [DE 55-9, Richardson Depo. at 693; DE 55-10, McMillen Depo. at 776–77].

Analyzing these facts under the *Graham* factors, Officers Richardson and McMillen behaved reasonably during the encounter. First, Blough's crimes were serious. He was wandering around the subdivision, acting erratic, standing on a resident's yard armed with a knife, alarming nearby residents, and ignoring Officer Richardson's commands to drop the knife. [DE 55-9, Richardson Depo. at 693]. Second, Blough presented an urgent and realistic threat to both Reich and the officers. He responded to Reich's pleas by touching her and telling her to "get the fu** back." And when commanded by Officer Richardson to drop the knife, Blough strode toward the officer and said that Officer Richardson would have to kill him. Both officers could reasonably perceive this behavior as a threat to themselves and Reich. Finally, Blough was clearly resisting Case arrest—or, at a minimum, resisting Officer Richardson's command to drop the knife. Thus, the totality of the circumstances justified the officers' seizure of Blough, and the officers' response was reasonable under the circumstances. *Goodwin v. City of Painesville*, 781 F.3d 314, 321 (6th Cir. 2015) ("Ultimately, the court must determine whether the totality of the circumstances justifies a particular sort of seizure.") (citation omitted).

Further, Plaintiffs' argument that Defendants should have taken greater care due to Blough's mental illnesses is without merit. In *Rucinski*, the plaintiff was bipolar, schizophrenic, and paranoid. 655 F. App'x at 339. When his girlfriend refused to get him cigarettes, the plaintiff yelled, pulled a knife from his

pocket, and opened the blade. *Id.* His girlfriend called 911 and warned the dispatch operator that the plaintiff was "schizophrenic and was having a breakdown," had a knife, and was alone in the garage. *Id.* Three deputies arrived to do a welfare check. When one of the officers engaged the plaintiff, the plaintiff again pulled out and opened his knife, said "bring it on" or "here we go," and began walking toward the officer. *Id.* The plaintiff refused to comply with repeated commands to drop the weapon, so one officer fired her taser while the other discharged her pistol, striking and killing the plaintiff. *Id.* The Sixth Circuit held that the plaintiff's mental illness had no bearing on whether the officers behaved reasonably, noting that the plaintiff identified "no case law restricting an officer's ability to use deadly force when she has probable cause to believe that a mentally ill person poses an imminent threat of serious physical harm to her person." *Id.* at 342 (citing *Sanders v. City of Minneapolis*, 474 F.3d 523, 527 (8th Cir. 2007); *Bates ex rel. Johns v. Chesterfield County*, Va., 216 F.3d 367, 372 (4th Cir. 2000)).

Here, as in *Rucinski*, Blough had a long history of mental health issues. He suffered from chronic schizophrenia, paranoia, depression, and bipolar disorder. [DE 55-7, Comm. Record]. He was also a chronic methamphetamine and benzodiazepine user. *Id.* He had reported three previous suicide attempts, including one attempt five days prior to the shooting. *Id.* But, like in *Rucinski*, Blough can point to no case law restricting an officer's use of force when a mentally ill person poses an imminent threat. *Rucinski* makes clear that the relevant inquiry is whether a person poses a threat to law enforcement, not whether that person is mentally ill. Other circuits have held similarly. *See Sanders v. City of*

Minneapolis, Minnesota, 474 F.3d 523, 527 (8th Cir. 2007) ("The fact that [the decedent] may have been experiencing a bipolar episode does not change the fact that he posed a deadly threat against the police officers."); *Bates ex rel. Johns v. Chesterfield Cty., Va.*, 216 F.3d 367, 372 (4th Cir. 2000) ("Knowledge of a person's disability simply cannot foreclose officers from protecting themselves, the disabled person, and the general public when faced with threatening conduct by the disabled individual."); *Menuel v. City of Atlanta*, 25 F.3d 990, 996 (11th Cir. 1994) (upholding use of deadly force to apprehend a mentally ill man who had a knife and was hiding behind a door). Thus, Blough's mental illness had no bearing on whether the officers behaved reasonably and is irrelevant to Plaintiffs' Fourth Amendment claim.

Next, Plaintiffs argue that the *Graham* factors do not apply because Blough had not committed a crime. [DE 61 at 1707, 1717]. This is incorrect. As Defendants point out, Blough's actions at a minimum amount to disorderly conduct and wanton endangerment, among other crimes. [DE 68 at 3915]. The record also shows that Blough was, at a minimum, trespassing on residents' properties and resisting arrest.

But even if the *Graham* three-factor test did not apply, Plaintiffs still fail to rebut the defense of qualified immunity under the standard announced in *Estate of Hill by Hill v. Miracle*, 853 F.3d 306, 314 (6th Cir. 2017). In that case, the court developed "a more tailored set of factors [to] be considered in the medical-emergency context, always aimed towards the ultimate goal of determining 'whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them.'" *Id.* (quoting

Graham, 490 U.S. at 397). "Where a situation does not fit within the *Graham* test because the person in question has not committed a crime, is not resisting arrest, and is not directly threatening the officer, the court should ask:

> (1) Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others?
>
> (2) Was some degree of force reasonably necessary to ameliorate the immediate threat?
>
> (3) Was the force used more than reasonably necessary under the circumstances (i.e., was it excessive)?

If the answers to the first two questions are 'yes,' and the answer to the third question is 'no,' then the officer is entitled to qualified immunity." *Id*.

Here, then, even if Plaintiffs are correct that Blough was not committing a crime and was experiencing a mental-health emergency that rendered him incapable of acting rationally under the circumstances, they would still need to show that force was not reasonably necessary to address the threat or that the force actually used was more than reasonably necessary. They fail to do so.

First, Blough posed an immediate threat of serious harm to the officers and the community. He was wandering around a residential community with a knife in his dominant hand and attempting to enter private residences. Community residents felt threatened by his erratic behavior. [*See* DE 55-11, Howlett Aff. at 823; DE 55-12, Pils Statem. at 825; DE

55-13, Ray Aff. at 826; DE 55-14, D. Mills Aff. at 828]. Second, some force was reasonably necessary to ameliorate that threat because Blough refused to drop the knife, submit to police, or reenter Reich's vehicle. Finally, for the reasons described above, Officers Richardson's and McMillen's use of deadly force was not more than reasonably necessary under the circumstances. Thus, even under the test espoused in *Estate of Hill by Hill v. Miracle*, Plaintiffs fail to show a violation of Blough's Fourth Amendment rights.

b. Eighth Amendment

Next, Plaintiffs allege that Defendants' conduct violated the Eighth Amendment's prohibition on cruel and unusual punishment. [DE 35 at 222]. The Supreme Court has repeatedly held that the Eighth Amendment protects only convicted persons from excessive force. *See Whitley v. Albers*, 475 U.S. 312, 318 (1986); *Ingraham v. Wright*, 430 U.S. 651, 670 (1977); *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 243 (1983); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *see also Burgess v. Fischer*, 735 F.3d 462, 472 (6th Cir. 2013) ("The Fourth Amendment's prohibition against unreasonable seizures bars excessive force against free citizens… while the Eighth Amendment's ban on cruel and unusual punishment bars excessive force against convicted persons," and the Fourteenth Amendment's Due Process Clause applies when the citizen does not fall into either category) (internal citations omitted).

Plaintiffs have neither shown nor attempted to show that Blough was convicted of a crime at the time of the incident. To the contrary, they argue that Blough "had not committed and was not in the process of committing a crime at the time of the seizure." [DE 61 at 1729]. Further, Plaintiffs stated at the October 30, 2018 hearing that they no longer intend to pursue

an Eighth Amendment claim. [DE 76, Oct. 30, 2018 Tr., 4008:16–20]. The Eighth Amendment claim is therefore moot.

2. Clearly Established Right

Even had Plaintiffs presented sufficient facts that Defendants violated Blough's rights, Plaintiffs still fail to show that the right at issue was "clearly established" at the time of the incident. As noted above, qualified immunity applies unless the official's conduct violates a clearly established right. *Pearson*, 555 U.S. at 232. The law must be sufficiently clear that every "reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "In other words, existing precedent must have placed the statutory or constitutional question beyond debate." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (internal citation and quotation marks omitted). Specificity is particularly "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." *Kisela v. Hughes*, 138 S.Ct. 1148, 1152 (2018) (*per curiam*) (internal citation and quotation marks omitted). And lower courts should not read prior decisions too broadly in deciding whether a new set of facts is governed by clearly established law. *Id.* at 1154 (citing *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765 (2015)). "The critical question is whether the case law has put the officer on notice that his conduct is clearly unlawful." *Reichle*, 566 U.S. at 664.

Here, there are no cases directly on point. However, similar cases fail to show that Defendants violated a clearly established right. In fact, those

cases support Defendants' contention that they are entitled to qualified immunity. As discussed above, the court in *Rucinski* held that there was no violation when officers shot and killed a man armed with a knife when he walked toward the officers and said, "bring it on" or "here we go." 655 F. App'x at 339. Specifically, the court found that it was reasonable for the officers to believe that they and others were in danger, requiring a split-second decision. *Id.* at 341. It also noted that this decision was in line with prior Sixth Circuit precedent in similar cases. *See Chappell v. City of Cleveland*, 585 F.3d 901, 911 (6th Cir. 2009) (holding that, where detectives shot and killed a fifteen-year-old boy after he approached them with a knife over his head, the detectives' use of force was reasonable as a matter of law); *Rhodes v. McDannel*, 945 F.2d 117, 118 (6th Cir. 1991) (holding that an officer acted reasonably as a matter of law when he shot and killed a suspect brandishing a knife after the suspect did not comply with commands to drop the knife).

As in *Rucinski, Chappell,* and *Rhodes*, the officers here were confronted with a person brandishing a knife. The officers reasonably perceived Blough as a threat and felt compelled to make a split-second decision. Even if Officers Richardson and McMillen were mistaken in their belief that Blough was a threat, Sixth Circuit law makes clear that "[q]ualified immunity applies irrespective of whether the official's error was a mistake of law or a mistake of fact, or a mistake based on mixed questions of law and fact." *Chappell*, 585 F.3d at 907 (citing *Pearson*, 555 U.S. at 231). Accordingly, it cannot be said that Officers Richardson and McMillen were put on notice that their conduct was unlawful or violated a clearly established right under Sixth Circuit law.

3. *Monell* Claim

Plaintiffs assert that the City is liable for Officers Richardson's and McMillen's actions because it failed to "employ qualified persons for positions of authority," "properly or conscientiously train and supervise the conduct of such persons after their employment," and "promulgate appropriate operating policies and procedures" to protect Blough's constitutional rights. [DE 35 at 222]. To state a claim against a city or a county under § 1983, "a plaintiff must show that his injury was caused by an unconstitutional 'policy' or 'custom' of the municipality." Stemler, 126 F.3d at 865 (citing *Monell v. New York City Dept. of Social Servs*., 436 U.S. 658 (1978)); *see also City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989).

With no underlying constitutional violation, Plaintiffs cannot succeed on claims for supervisory or municipal liability. *McQueen v. Beecher Cmty. Schs.*, 433 F.3d 460, 471 (6th Cir. 2006). Further, Plaintiffs clarified at the October 30, 2018 hearing that they do not intend to pursue a *Monell* claim. [DE 76, Oct. 30, 2018 Tr., 4023:17–22]. Plaintiffs' *Monell* claim is thus moot.

C. State-Law Claims

1. General Negligence, Negligent Infliction of Emotional Distress, and Wrongful Death

Plaintiffs bring three related state-law negligence claims. First, Plaintiffs claim that Officers Richardson and McMillen were negligent in their treatment of Blough. [DE 35 at 222–23]. Second, Plaintiffs claim that Defendants' actions constitute negligent infliction of emotional distress for Reich. [*Id.* at 225]. Finally, Plaintiffs allege that because of Defendants'

negligence, Blough's estate is entitled to wrongful death damages under Ky Rev. Stat. Ann. § 411.130. *Id*.

Defendants respond that they are entitled qualified official immunity under Kentucky law. [DE 55 at 538]. "Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions, *i.e.*, those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee's authority." *Yanero v. Davis*, 65 S.W.3d 510, 521–22 (Ky. 2001). But "an officer or employee is afforded no immunity from tort liability for the negligent performance of a ministerial act, *i.e.*, one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts." *Id.* at 522. Thus, qualified immunity depends "on the function performed" and whether the official acted in "good faith." *Id.* at 521.

In this case, Officers Richardson's and McMillen's actions were clearly discretionary. *See Nichols v. Bourbon Cty. Sheriff's Dep't*, 26 F. Supp. 3d 634, 642 (E.D. Ky. 2014) (holding that determination of the amount of force required to effect an arrest is a discretionary act within the scope of an officer's authority); *Woosley v. City of Paris*, 591 F. Supp. 2d 913, 922 (E.D. Ky. 2008) (holding that a police officer's use of force is clearly a discretionary act within the scope of his authority as a police officer); *see also Lamb v. Holmes*, 162 S.W.3d 902, 908 (Ky. 2005) (finding that school officials' search of students was discretionary because there was no policy directly on point and the breadth of the search required judgment

within the scope of the officials' duties). As a result, "the burden shifts to the Plaintiff 'to establish by direct or circumstantial evidence that the discretionary act was not performed in good faith.'" *Nichols*, 26 F. Supp. 3d at 642 (quoting *Yanero*, 65 S.W.3d at 523).

In *Yanero*, the Kentucky Supreme Court adopted the United States Supreme Court's definition of "bad faith," which has "both an objective and subjective aspect":

> The objective element involves a presumptive knowledge of and respect for "basic, unquestioned constitutional rights." *Wood v. Strickland*, 420 U.S. 308, 322 (1975). The subjective component refers to "permissible intentions." *Id.* Characteristically, the Court has defined these elements by identifying the circumstances in which qualified immunity would not be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury…"

Yanero, 65 S.W.3d at 523 (citing *Harlow*, 457 U.S. at 815). "Thus, in the context of qualified official immunity, 'bad faith' can be predicated on a violation of a constitutional, statutory, or other clearly established right which a person in the public employee's position presumptively would have known was afforded to a person in the plaintiff's position, *i.e.*, objective unreasonableness; or if the officer or

employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive." *Id.* Put simply, "[i]f an officer 'knew or reasonably should have known that the action he took would violate a [clearly established] right of the plaintiff,' bad faith may be found to exist." *Rowan Cty. v. Sloas*, 201 S.W.3d 469, 485–86 (Ky. 2006) (quoting *Yanero*, 65 S.W.3d at 523).

Here, the Court has already determined that Officers Richardson and McMillen behaved objectively reasonable under the circumstances when seizing Blough and did not violate a clearly established right. There are thus no grounds to find that the officers "willfully or maliciously intended to harm the plaintiff," "acted with a corrupt motive," or otherwise acted in bad faith. For these reasons, Defendants are entitled to qualified official immunity under Kentucky law, and Plaintiffs' negligence claims fails.

Plaintiffs' wrongful death claim fails for similar reasons. Under Kentucky law, if the death of a person results from injury inflicted because of another's negligence, the deceased's estate may recover damages. Ky Rev. Stat. Ann. § 411.130. "A wrongful-death claim 'is, at its core, a tort claim based upon negligence.'" *Gambrel v. Knox Cty., Kentucky*, No. CV 17-184-DLB, 2018 WL 1457296, at *13 (E.D. Ky. Mar. 23, 2018) (quoting *Patton v. Bickford*, 529 S.W.3d 717, 729 (Ky. 2016)). Having found no evidence of negligence and determined that Defendants are thereby protected by qualified official immunity, Plaintiffs are not entitled to wrongful-death damages. *See Whitlow*, 39 F. App'x at 308.

2. Negligent Hiring, Training, and Supervision

Similarly, Plaintiffs allege that Chief Schiller failed to adequately hire, train, and supervise Officers Richardson and McMillen. [DE 35 at 223]. As previously noted, The Court granted an Agreed Order of Partial Dismissal on all claims pertaining to Chief Schiller on August 18, 2017 [DE 38]. Plaintiffs do not allege that any of the other defendants failed to adequately hire, train, and supervise Officers Richardson and McMillen, so this claim is dismissed in its entirety.[5]

3. Common Law Battery

Plaintiffs also allege that Officers Richardson and McMillen committed common law battery upon Blough. [DE 35 at 223–24]. A battery is "any unlawful touching of the person of another, either by the aggressor himself, or by any substance set in motion by him." *Richardson v. Bd. of Educ. of Jefferson Cty. Kentucky*, No. 3:04-CV-386R, 2006 WL 2726777, at

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[5] Plaintiffs' claim would fail even if they did allege that other defendants failed to adequately hire, train, and supervise. "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). *See also Whitlow*, 39 F. App'x at 302 ("[I]f Whitlow suffered no constitutional violation, then Plaintiff's claims against Louisville and Hamilton alleging that their lack of training and failure to supervise the individual officers resulted in Decedent's death, must fail. In other words, Plaintiff's claims against the city are dependent upon the existence of a constitutional violation by its officers."); *Scott v. Clay Cnty., Tenn.*, 205 F.3d 867, 879 (6th Cir. 2000) ("[O]ur conclusion that no officer-defendant had deprived the plaintiff of any constitutional right a fortiori defeats the claim against the County as well.").

*11 (W.D. Ky. Sept. 22, 2006) (citing *Vitale v. Henchey*, 24 S.W.3d 651, 657 (Ky. 2000)). If police action is reasonable under Section 1983, a plaintiff cannot succeed on a common law battery claim. *Atwell v. Hart Cty., Ky.*, 122 F. App'x 215, 219 (6th Cir. 2005) (citing *Fultz v. Whittaker*, 261 F. Supp. 2d 767, 783 (W.D. Ky. 2003)). This Court has already determined that Officers Richardson and McMillen acted reasonably under the circumstances when seizing Blough. For those same reasons, the battery claim must be dismissed.

4. Outrage and Intentional Infliction of Emotional Distress

Finally, Plaintiffs claim that "Defendants' treatment of Mr. Blough and Ms. Reich was so beyond the bounds of human decency that it exemplifies the tort of outrage." [DE 35 at 224]. Plaintiffs separately allege intentional infliction of emotional distress upon Reich. *Id.* at 224–25. Courts generally treat claims of outrage and intentional infliction of emotional distress interchangeably. *Powell v. Cornett*, No. 3:11-CV-00628-H, 2013 WL 1703746, at *1 (W.D. Ky. Apr. 19, 2013) (citing *Atwell*, 122 F. App'x at 219). Under Kentucky law, outrage and intentional infliction of emotional distress are premised upon extreme and outrageous conduct intentionally or recklessly causing emotional distress. Atwell, 122 F. App'x at 219 (citing Craft v. Rice, 671 S.W.2d 247, 251 (Ky. 1984)). A plaintiff must prove that a defendant's sole intent was to cause extreme emotional distress to the plaintiff. *Rigazio v. Archdiocese of Louisville*, 853 S.W.2d 295 (Ky. App. 1993) (holding that boys sexually abused by priests had no claim for outrage because the priests molested them to satisfy their own sexual appetites, not to inflict harm on the boys).

In analyzing the claims brought under § 1983, the Court has already concluded that the actions taken by Officers Richardson and McMillen were objectively reasonable in light of Blough's noncompliance and belligerence. Accordingly, his state-law claims for outrage and intentional infliction of emotional distress must similarly be dismissed.

CONCLUSION

For the reasons set forth above, and being otherwise sufficiently advised, **THE COURT HEREBY ORDERS** that Defendants' Motion for Summary Judgment [DE 55] is **GRANTED**. This is a final and appealable order.

APPENDIX C

No. 18-6296

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMANDA N. REICH; ELISE DAVIDSON, SUCCESSOR ADMINISTRATRIX OF THE ESTATE OF JOSHUA STEVEN BLOUGH, Plaintiffs-Appellants, v. CITY OF ELIZABETHTOWN, KENTUCKY; MATTHEW McMILLEN; SCOTT RICHARDSON, Defendants-Appellees.	)	ORDER

BEFORE: MOORE, COOK, and THAPAR, 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

(Handwritten signature)

Deborah S. Hunt, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO: 3:16-CV-429-CRS

ELISE DAVIDSON, Administrator of the Estate of Joshua Steven Blough, ET AL — PLAINTIFFS

v. AFFIDAVIT OF AMANDA REICH

CITY OF ELIZABETHTOWN, KENTUCKY, ET AL — DEFENDANTS

Comes now the Affiant, Amanda Reich, after being duly sworn, and states as follows:

1. That I am a plaintiff in the above referenced civil action.

2. That I am an eyewitness to the events of July 7, 2015 which form the subject matter of this civil action and which occurred at and adjacent to the intersection of 100 Fontaine Drive and Burr Oak Court, Elizabethtown, Kentucky and, as such, I have personal knowledge of what occurred.

3. That since July 7, 2015 I did not return to the scene of the incident due to the severe emotional and mental trauma I suffered witnessing the shooting death of my fiancé, Joshua Blough. I could not bear the anxiety it would cause to return to the scene. In fact, since the incident, on numerous occasions, I intentionally drove around the neighborhood where the incident took place to avoid the anxiety it would cause me to suffer. On those occasions I drove out of the way to reach my intended destination since the more direct route would have taken me past the scene of the incident.

4. However, on April 7, 2018 and April 12, 2018 I returned to the scene of the incident with my attorneys to assist with the prosecution of this civil action and respond to a motion for summary judgment filed by the defendants' attorneys.

5. Upon returning to the scene on April 7, 2018, and again on April 12, 2018, and with the aid of photographs of the scene taken by Kentucky State Police investigators (copies of which are attached hereto and incorporated by reference in this Affidavit), I was able to accurately recall where I was positioned at the time Joshua Blough was shot. I was also able to accurately recall where Joshua Blough was positioned when he was first shot. I was also able to accurately recall where Officer Richardson was positioned when he fired his shots at Joshua Blough. I was also able to accurately recall where Officer McMillen was positioned when he fired his shot at Joshua Blough.

6. I returned to the scene of the incident on April 12, 2018 with my attorneys, Matthew W. Stein, Rob Astorino, Jr. and John A. Whatley, and at that time I was of sound mind with a clear memory of the events of July 7, 2015. I identified the location where each of the four people involved, Joshua Blough, Officer Richardson, Officer McMillen and myself, were positioned when the shots were fired. An orange cone was placed at each location of the position for each person. Joshua Blough's position was marked as cone "A". Officer Richardson's position was marked as cone "B". Officer McMillen's position was marked as cone "C" and my position was marked as cone "D". Photographs were taken of the four cones from various angles by John A. Whatley. These photographs are attached hereto and incorporated by reference in this Affidavit.

7. I used a Channel Lock 100-foot tape measure and accurately measured the distance between the positions of Joshua Blough and Officer Richardson; Joshua Blough and Officer McMillen; Joshua Blough and Amanda Reich; Officer Richardson and Amanda Reich; Officer Richardson and Officer McMillen; and, Officer McMillen and Amanda Reich.

8. The measurements were taken from the middle of each cone. I observed where each measurement began and ended. John A. Whatley photographed each measurement and I wrote down each measurement on a separate piece of paper, which is attached hereto and incorporated by reference in this Affidavit.

9. The following information is the result of my memory, observations of KSP photographs, personal observations of the scene and measurements taken at the scene. This information is true and accurate to the best of my knowledge and belief:

a. Distance between cone "A" Joshua Blough and cone "B" Officer Richardson 25 feet, 6 inches.
b. Distance between cone "A" Joshua Blough and cone "C" Officer McMillen 36 feet, 4 inches.
c. Distance between cone "A" Joshua Blough and cone "D" Amanda Reich 34 feet, 6 inches.
d. Distance between cone "B" Officer Richardson and cone "D" Amanda Reich 24 feet, 3 inches.
e. Distance between cone "B" Officer Richardson and cone "C" Officer McMillen 33 feet, 5 inches.

f. Distance between cone "C" Officer McMillen and cone "D" Amanda Reich 57 feet, 3 inches.

a. Further Affiant sayeth naught.

(Handwritten signature)
AMANDA REICH

COMMONWEALTH OF KENTUCKY)
) SS
COUNTY OF JEFFERSON)

Subscribed, sworn, and acknowledged before me by Amanda Reich, on April 13, 2018.

(Handwritten signature)
NOTARY PUBLIC-STATE AT LARGE

My commission expires: February 1, 2020