APPENDIX

Appendix A

Opinion of the United States Court of Appeals for the Seventh Circuit Dated and Decided January 10, 2020

In the
United States Court of Appeals
For the Seventh Circuit

No. 19-1930

SHANIKA DAY, et al.,

Plaintiffs-Appellees,

v.

FRANKLIN WOOTEN, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:17-cv-04612 — **Tanya Walton Pratt**, *Judge*.

ARGUED NOVEMBER 6, 2019 — DECIDED JANUARY 10, 2020

Before EASTERBROOK, MANION, and BARRETT, *Circuit Judges*.

MANION, *Circuit Judge*. Terrell Day died tragically while in police custody on September 26, 2015. This occurred while his hands were cuffed behind his back after he had winded him- self during a chase following an apparent shoplifting. The au- topsy report concluded his cause of death was a lack of

oxy- gen in his blood, caused in part by his obesity, an underlying heart condition, and restricted breathing due to having his
hands cuffed behind his back. In this § 1983 excessive force action brought against the arresting officers, the district court concluded the officers were not entitled to qualified immunity because "reasonable officers would know they were violating an established right by leaving Day's hands cuffed behind his back after he complained of difficulty breathing." For the rea- sons set forth below, we disagree with the district court's con- clusion of law and accordingly reverse.

I. Background

A. Assumed Facts

Before relating the facts, we first address which facts we must accept or assume for purposes of this interlocutory ap- peal of the denial of qualified immunity. The plaintiffs argue we must accept both "the 'facts that the district court assumed when it denied summary judgment,' and … 'the plaintiff's version of the facts.'" This misstates the standard established by our case law. We are instead presented with a choice be- tween "[s]everal sources of undisputed facts [that] may frame our review" of the purely legal question presented by a denial of qualified immunity. *White v. Gerardot*, 509 F.3d 829, 833 (7th Cir. 2007). We may "take, as given, the facts that the district court assumed when it denied summary judgment." *Id.* (quot- ing *Washington v. Haupert*, 481 F.3d 543, 549 n.2 (7th Cir. 2007)). Alternatively, "we may conduct our review by 'accept- ing the plaintiff's version of the facts.'" *Id.*; *see also Jewett v. An- ders*, 521 F.3d 818, 819 (7th Cir. 2008). And finally, whether we accept the district court's assumed facts or the

plaintiff's ver- sion of the facts, we may also look to undisputed evidence in the record even if the district court did not consider it. *White*, 509 F.3d at 833 n.5; *see also Thompson v. Cope*, 900 F.3d 414, 419 (7th Cir. 2018).

Although we are free to choose either the district court's assumed facts or the plaintiff's version, it is most often appro- priate to accept the facts assumed by the district court in its denial of summary judgment. *Haupert*, 481 F.3d at 549 n.2. Accordingly, we accept the district court's statement of facts. *See Day v. City of Indianapolis*, 380 F. Supp. 3d 812, 817–21 (S.D. Ind. 2019). In a few instances, which we note, we look to un- disputed evidence not included in the district court's order but provided elsewhere in the record.

Terrell Day was eighteen years old and weighed approximately 312 pounds[1] at the time of his death, with a history of obesity and an underlying heart condition. On September 26, 2015, Day was confronted by a loss-prevention officer outside the Burlington Coat Factory at Washington Square Mall in Indianapolis after Day apparently shoplifted a watch from the store. Day returned the watch but refused to return to the store with the loss-prevention officer. A mall security officer who joined the confrontation noticed Day had a gun in his pocket. There are varying accounts of what occurred next, but it is undisputed that a chase ensued in which Day ran out of the mall, through the parking lot, and across a

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[1] Day's approximate weight was recorded in the autopsy report. (Appellant's Separate Appendix ("S.A.") at 811.)

street to a gas station. He there collapsed on a grassy slope. Law enforce- ment soon arrived in response to a radio call describing an armed shoplifter. At this point, the gun was no longer on Day's person, but was lying in the grass a few feet away and out of his reach.

Officer Denny, the second officer to arrive on scene, hand- cuffed Day behind his back with a single set of handcuffs. He testified that Day's hands came together easily behind his back. He noticed Day was overweight, sweating, and breathing heavily. Day told the officers he was having trouble breathing; Officer Denny told Day he had exerted himself by running and instructed him to take deep breaths in and out to slow his heart rate. Officer Denny otherwise did not observe any signs of distress or of Day's trouble breathing.

Officer Denny initially instructed Day to remain in an up- right seated position, which he believed to be the most comfortable position for Day and ideal for the officers' safety. However, Day would not maintain this position, but instead laid down and rolled down the slope. After two attempts to keep Day seated upright, Officer Denny instead positioned Day to lie on his side. Officer Denny believed this was the best course of action to prevent Day from asphyxiating by rolling onto his stomach. While repositioning Day, Officer Denny observed Day had defecated on himself. He attributed this to Day having over-exerted himself during the chase.

Sergeant Wooten arrived shortly after Officer Denny detained Day. Sergeant Wooten monitored Day while Officer Denny completed his investigative duties as the arresting officer. Sergeant Wooten and other officers repositioned Day several times when he rolled

onto his stomach. Day complained to Sergeant Wooten that he could not breathe; how- ever, Sergeant Wooten was skeptical of these complaints be- cause Day also claimed to have done nothing wrong and was asking to be released. All the same, Sergeant Wooten called for an ambulance to evaluate Day approximately five minutes after Day was initially detained. Sergeant Wooten observed that Day appeared to calm down and began to breathe normally.

The ambulance arrived, and two paramedics examined Day. In response to their questions, Day told the paramedics he had no preexisting medical conditions. He was able to speak to them in clear, full sentences. Their examination involved multiple tests, including listening to Day's breathing and checking his heart rate, respiratory rate, and blood oxy- gen saturation.[2] Day's hands remained cuffed behind his back throughout the examination. The paramedics concluded Day was breathing regularly and normally. Based on their examination, the paramedics believed Day did not need to go to a hospital.

At that point, the paramedics asked Sergeant Wooten to sign a release form so they could transfer custody of Day back to law enforcement. Sergeant Wooten did so. The form he signed was called a "Treatment/Transport Refusal," and is meant to be signed by a patient when he refuses to be trans- ported to the hospital after being evaluated by paramedics. However, when the paramedics determine a

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[2] The record is unclear on the duration of this examination, but at argument counsel for the officers estimated it occurred over the course of ten to fifteen minutes.

handcuffed prisoner does not need to be transported to the hospital, they have an officer sign the form as a witness of the transfer, not as a representative of the prisoner.

Officer Denny requested a "jail wagon" to transport Day to a detention facility. When the jail wagon arrived, the driver found Day unresponsive. At that point Day was lying on his back on the asphalt with his hands still cuffed behind his back. When the driver and Sergeant Wooten attempted to stand Day up, his legs straightened and his knees locked. When Day failed to respond either verbally or physically to two "sternum rubs" (a painful stimulus administered to an unresponsive subject's chest to invoke a reaction), the driver asked Sergeant Wooten to call a second ambulance.

The second ambulance arrived with a different team of paramedics, approximately forty-three minutes after the first ambulance had arrived.[3] Sometime between the departure of the first ambulance and the arrival of the second, a second pair of handcuffs was added to Day's wrists.[4] When the

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[3] The Coroner's Report records that the first ambulance arrived at "ap- proximately 1:09 PM" and the second ambulance arrived at "approximately 1:52 PM." (S.A. at 824–25.) Assuming the estimation that the first medical examination lasted approximately ten to fifteen minutes is accurate, we can surmise that roughly thirty minutes passed between the departure of the first ambulance and the arrival of the second. The exact amount of lapsed time, however, is not important for our purposes.

[4] Adding a second pair of handcuffs, by attaching one

paramedics arrived, Day's eyes were open, and he was breathing, but his pulse was weak. Day was loaded into the back of the ambulance and the paramedics began to perform CPR. After at- tempting without success to revive Day for 30 minutes, he was pronounced dead. The coroner dispatched to the scene examined Day's body and found no visible signs of trauma. However, the autopsy report listed his cause of death as "Sud- den Cardiac Death due to Acute Ischemic Change." Listed as contributory causes were "Sustained respiratory compromise due to hands cuffed behind the back, obesity, underlying cardiomyopathy."

Throughout his time in custody, Day never complained the handcuffs were too tight. Day complained of trouble breathing, but never indicated this was caused or exacerbated by the handcuffs. The first team of paramedics never asked the officers to remove or modify the handcuffs or add a second pair. In addition to the coroner's report that Day exhibited no visible signs of trauma, the autopsy report states there were no "encircling contusions" or lacerations around Day's wrists.[5] The only indication that the handcuffs were causing a respiratory issue was the autopsy report, which also identified for the first time his underlying heart condition.

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to each wrist and connecting them in the middle, is a method used on larger arrestees to make the arrestee more comfortable by lessening the restrictiveness of the handcuffs. *See, e.g.*, *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 589 (7th Cir. 1997); *Day*, 380 F. Supp. 3d at 821.

[5] (S.A. at 811.)

B. District Court Proceedings

Day's mother and father sued under § 1983 in September 2017, and the defendants moved for summary judgment. Officer Denny and Sergeant Wooten asserted qualified immunity. After considering the summary judgment motion, the district court held Officer Denny and Sergeant Wooten were not entitled to qualified immunity. The court first determined it could not hold as a matter of law the officers had not violated Day's Fourth Amendment right against unreasonable seizure. *Day*, 380 F. Supp. 3d at 824–26. The court next concluded "rea- sonable officers would know they were violating an established right by leaving Day's hands cuffed behind his back after he complained of difficulty breathing." *Id.* at 827.

In arriving at this conclusion, the district court cited an un- reported district court case to establish that officers act unreasonably by failing to consider an injury or condition when handcuffing an arrestee. *Id.* (citing *Salyers v. Alexandria Police Dep't*, 2016 WL 2894438, at *3 (S.D. Ind. May 18, 2016)). The district court also quoted a decision of this court for the proposition that using excessively tight handcuffs and yanking the arms of non-resisting, non-dangerous arrestees suspected of committing only minor crimes is clearly established as unlawful. *Id.* (quoting *Payne v. Pauley*, 337 F.3d 767, 780 (7th Cir. 2003)). Based on these cases, and the fact that Day complained of difficulty breathing and the officers "observed some signs of distress," the court held the officers' conduct was clearly established as a violation of Day's rights. *Id.* at 828. The court denied qualified immunity. The officers appealed.

II. Discussion

A. Jurisdiction

We first address jurisdiction. Appellate jurisdiction is limited to review of final decisions of the district courts. 28 U.S.C. § 1291. Although we generally may not review a district court's order until a final judgment is entered resolving all claims of all parties, the finality requirement is satisfied where a collateral order "conclusively determines a disputed question that is separate from the merits of the case and is effectively unreviewable on an appeal from the final judgment." *Jones v. Clark*, 630 F.3d 677, 679 (7th Cir. 2011) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). A summary judgment order denying qualified immunity to a public offi- cial defendant is such an order that can be immediately re- viewable "to the extent that it turns on an issue of law." *Id.* (citing *Mitchell v. Forsyth*, 472 U.S. 511, 528–30 (1985)).

The plaintiffs assert we lack jurisdiction over this appeal because the defendants, despite claiming to concede the district court's assumed facts viewed in the light most favorable to the plaintiffs, are asserting their own preferred version of facts on disputed questions. We have already discussed why the plaintiffs are wrong to argue that we and the defendants must accept the plaintiffs' version of the facts in this appeal. It is true, however, that we cannot decide disputed fact questions in a qualified immunity appeal. We only have jurisdiction "when the party seeking to invoke it makes a purely legal argument that does not depend on disputed facts." *White*, 509 F.3d at 833. Therefore, we must first determine whether the defendants' argument depends on disputed issues of fact, which would preclude our

review.

The primary factual dispute identified by the plaintiffs is whether the first team of paramedics' medical evaluation was terminated because Day was medically cleared or because Wooten refused further medical treatment. They assert the district court acknowledged this as a disputed issue by stating "Plaintiffs believe Sergeant Wooten refused hospitalization on Day's behalf, and had he not signed the Treatment/Transport Refusal form, the paramedics may have decided to transport Day to the hospital." *Day*, 380 F. Supp. 3d at 820. At argument, the plaintiffs also pointed to evidence that the paramedics may have included false information in their medical report or may have been prevented from con- ducting a full examination due to Day's hands being cuffed behind his back.

As an initial matter, the suggestion that the paramedics included false information in their report or failed to properly complete a full evaluation are irrelevant to what Officer Denny and Sergeant Wooten knew at the time of the incident. Our analysis hinges on whether reasonable officers under the circumstances would know their conduct violated a clearly established right. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015); *Sow v. Fortville Police Dep't*, 636 F.3d 293, 303 (7th Cir. 2011) (holding that, in an excessive force case, "the 'reasonableness' of the use of force is judged from the perspective of a reason- able officer on the scene"). Therefore, the only relevant question is what the paramedics communicated to the officers at the scene.

The district court recognized as undisputed that the para- medics concluded, based on their evaluation,

"Day did not need to be transported to the hospital for medical treatment." *Day*, 380 F. Supp. 3d at 820. The paramedics testified that law enforcement has no authority to refuse transport to a hospital if the medical personnel believe hospitalization is necessary. Sergeant Wooten could not terminate the examination because he had no authority to do so. The district court also found that when an officer signs for a handcuffed arrestee, he "signs this form as a witness to the transfer, not as a representative of the detainee," and that the medics require an officer to sign the form "when [they] decide that a handcuffed prisoner is not going to go to the hospital." *Id.* Thus, regard- less of the title or intended use of the form Sergeant Wooten signed, there is no genuine dispute that the paramedics concluded their evaluation because they believed Day did not need further treatment.

Moreover, even assuming a factual dispute exists regarding the termination of the examination, we need not resolve that dispute to reach our conclusion today. Even if the officers were not entitled to rely on the judgment of the medical professionals, they were still entitled to qualified immunity because there was no clearly established law to put the officers on notice that handcuffing Day under the circumstances of this case violated his constitutional rights.

The plaintiffs also dispute whether a second pair of hand- cuffs was added to Day's wrists and, if so, when it was added. But the district court assumed in its statement of facts that a second pair of handcuffs was added, and that the second pair was added before the second ambulance arrived. *Id.* at 821. Since we accept the district court's assumed facts for this ap- peal, we

assume this as well. Furthermore, as we explain below, the addition of the second pair of handcuffs does not change the outcome of this case. Accordingly, we have juris- diction to address the purely legal question presented by this appeal.

B. Denial of Qualified Immunity

We review *de novo* a district court's denial of summary judgment on a qualified immunity defense. *Rooni v. Biser*, 742 F.3d 737, 740 (7th Cir. 2014). As explained previously, we accept the facts assumed by the district court and the undisputed record evidence viewed in the light most favorable to the plaintiffs. *White*, 509 F.3d at 833 & n.5.

A public official defendant is entitled to qualified immunity unless two disqualifying criteria are met. First, the evidence construed in the light most favorable to the plaintiff must support a finding that the defendant violated the plain- tiff's constitutional right. Second, that right must have been clearly established at the time of the violation. *Stainback v. Dixon*, 569 F.3d 767, 770 (7th Cir. 2009). Courts may "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pear- son v. Callahan*, 555 U.S. 223, 236 (2009). "A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that *what he is doing* violates that right.'" *Mullenix*, 136 S. Ct. at 308 (emphasis added).

The Fourth Amendment protects an individual's right to be free from unreasonable seizures of his person. U.S. Const. amend. IV. When an officer uses greater force than reasonably necessary to make an

arrest, he violates the arrestee's Fourth Amendment right. *Payne v. Pauley*, 337 F.3d 767, 778 (7th Cir. 2003). Importantly, "the 'reasonableness' of the use of force is judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Sow*, 636 F.3d at 303.

To defeat qualified immunity, however, the right must be defined more specifically than simply the general right to be free from unreasonable seizure. The Supreme Court has stated that "[s]pecificity is especially important in the Fourth Amendment context, where … 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 con- fronts." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018).

The district court defined the rights at issue as Day's right to be free from excessively tight handcuffs and his right to have the officers consider his injury or condition in determining the appropriateness of the handcuff positioning. The court concluded that the officers' conduct violated those rights. However, there is no Seventh Circuit precedent clearly establishing that the conduct the officers engaged in violated either of those rights.

The plaintiffs point to *Payne v. Pauley*, 337 F.3d 767 (7th Cir. 2003), and identify it as the best case to clearly establish the right to be free from excessively tight handcuffs. The district court quoted and cited this case for that principle as well. In *Payne*, we established the following right: "it was unlawful to use excessively tight handcuffs and violently yank the arms of arrestees who were not resisting arrest, did not disobey the orders of a police officer, did not pose a

threat to the safety of the officer or others, and were suspected of committing only minor crimes." *Id.* at 780. In *Payne*, the plaintiff alleged (and we accepted for purposes of the appeal) that two police officers grappled and struggled over her arm for thirty minutes as they argued about who would handcuff her, jerked her arm behind her back, slammed handcuffs onto her wrist, tightened them so tight that she experienced pain and numbness in her hands, and refused to loosen them when she complained. *Id.* at 774–75. The plaintiff alleged she was treated this way even though she was not resisting and had committed no offense other than voicing disagreement with an irate officer's racist remark. *Id.*

Payne does not help the plaintiffs because it involves circumstances and conduct drastically different than this case. Day was suspected of shoplifting while armed with a gun, a much more serious offense than the plaintiff in *Payne* (who had allegedly done nothing wrong). It is also undisputed that Day was not cooperative: he repeatedly changed position de- spite the officer's instructions to remain seated upright, and he argued with the officers to let him go. More importantly, Officer Denny and Sergeant Wooten did not violently yank or jerk Day's arms and shoulders, or any of Day's person for that matter. Furthermore, the handcuffs in *Payne* were much tighter than they needed to be to accomplish the purpose of detaining the arrestee, to the point of causing visible physical injury. There is no suggestion that the handcuffs used on Day were any tighter than would have been typically used to re- strain an arrestee in similar circumstances. In fact, the coroner noted no visible signs of trauma, and the autopsy

report indicated no lacerations or contusions on Day's wrists. The rule announced in *Payne* is inapposite.

The other cases pointed to by the plaintiffs to establish a right to be free from excessively tight handcuffs—*Tibbs v. City of Chicago*, 469 F.3d 661 (7th Cir. 2006), and *Rooni v. Biser*, 742 F.3d 737 (7th Cir. 2014)—similarly fail to clearly establish that the officers' conduct violated that right. *Tibbs* recognized that, under certain circumstances, the use of excessively tight handcuffs might constitute excessive force in violation of the Fourth Amendment. 469 F.3d at 666 (citing *Payne*, 337 F.3d at 767). However, we held the officer's actions in that case were objectively reasonable where the plaintiff complained "once about his handcuffs without elaborating on any injury, numb- ness, or degree of pain." *Id.* Thus, *Tibbs* establishes that, absent any indication an officer is aware the handcuff tightness or positioning is causing unnecessary pain or injury, the officer acts reasonably in not modifying the handcuffs.

Likewise, *Rooni* establishes the right of a person "to be free from an officer's knowing use of handcuffs in a way that would inflict unnecessary pain or injury, if that person presents little or no risk of flight or threat of injury." 742 F.3d at 742. Once again, the key fact is that the officer must *know* the handcuffs will cause unnecessary pain or injury. *Rooni* focused on the importance of multiple and specific complaints by the arrestee about the nature of his pain or injury. *Id.* at 742–43 (collecting cases, distinguishing *Tibbs b*ecause "plaintiff complained the handcuffs were on too tight but did not indicate the degree of pain," and a case in which the plaintiff complained once but did not elaborate on degree or nature of pain). Because the

plaintiff complained only once that the handcuffs were too tight without further elaboration, we concluded "there was nothing that would have alerted [the officer] to the fact that a constitutional violation was looming." *Id.* at 743.

Day never complained that the tightness of the handcuffs was restricting his breathing. The record contains no evidence that there was any indication the handcuffs were the cause of Day's breathing difficulty until the autopsy report was released. Thus, Day's right "to be free from an officer's knowing use of handcuffs in a way that would inflict unnecessary pain or injury" was not violated.[6]

The closely related right asserted by the district court and the plaintiffs is the right to have the arresting officer consider the arrestee's injury or condition when handcuffing the arrestee. The district court erred, however, by relying on *Salyers v. Alexandria Police Department* for the principle that "officers act unreasonably by failing to consider an injury or condition while handcuffing an individual." *Day*, 380 F. Supp. 3d at 827. *Salyers* is an unreported district court opinion. We have conclusively stated that district court opinions cannot clearly establish a constitutional right because they are not binding precedential authority. *Mason-Funk v. City of Neenah*, 895 F.3d 504, 509 (7th Cir. 2018). Therefore,

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[6] We reach this conclusion even without relying on the additional facts that the first paramedic team found Day's breathing and oxygen levels to be good, never requested or attempted to modify Day's handcuffs, and concluded he did not need to be hospitalized for further medical treatment.

if the right relied upon in *Salyers* is a clearly established one, it must be clearly established by some other source.

Salyers relied on, and the plaintiffs direct our attention to, our 2009 decision in *Stainback v. Dixon*, 569 F.3d 767 (7th Cir. 2009). That case involved an arrestee with preexisting arm- and-shoulder injuries that were exacerbated when law enforcement handcuffed him behind his back. The arrestee in *Stainback* complained the handcuffs were hurting his shoulders, but never told the officers of his preexisting injuries. If the officers had known of the preexisting injury, we agreed "they certainly would have been obligated to consider that in- formation, together with the other relevant circumstances, in determining whether it was appropriate to handcuff" the arrestee. *Id.* at 773. However, we held the officers were entitled to qualified immunity because they did not use the handcuffs "in a manner that would clearly injure or harm a typical arrestee," and it was not apparent to the officers, nor were they informed, that the arrestee had a preexisting condition that could be aggravated by the handcuffs. *Id.* "[A] reasonable officer cannot be expected to accommodate an injury that is not apparent or that otherwise has not been made known to him." *Id.*

Thus, *Stainback* only clearly establishes the right to have a *known* injury or condition considered, together with other circumstances, by officers when handcuffing. *Stainback* fails to clearly establish that Officer Denny and Sergeant Wooten's conduct was violative. Just as the arrestee in *Stainback* complained generally of shoulder pain but never explained the effect of the handcuffs on his preexisting

injury, Day complained he was having trouble breathing but never complained that this was caused or exacerbated by his hand- cuffs as opposed to his exertion during the chase preceding his arrest. The officers (and apparently Day himself) were also unaware of Day's underlying heart condition, which also contributed to his lack of oxygen according to the autopsy report.

In *Stainback*, we acknowledged "in some cases, the fact that an act will cause pain or injury will be clear form the nature of the act itself." *Id.* at 772. We concluded, however, that it would not be clear to the officers that the arrestee's shoulder pain was caused by the act of cuffing his hands behind his back. *Id.* at 773. It is even less obvious under the circumstances of this case that Day's trouble breathing was caused by hand- cuff positioning. The record does not show this would be ap- parent to the officers at the time of the arrest.[7] Accordingly, like the right in *Payne*, *Rooni*,

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[7] The plaintiffs suggest that the addition of a second pair of handcuffs before the second ambulance arrived is evidence of the officers' awareness that the single pair of handcuffs had been restricting Day's breathing. This is entirely speculative and goes well beyond a reasonable inference to which the plaintiffs are entitled. *See White v. City of Chicago*, 829 F.3d 837, 841 (7th Cir. 2016). Adding a second pair of handcuffs indisputably pro- vides more comfort to an arrestee; there is no reason to believe the second pair was added to relieve Day's breathing as opposed to simply providing more comfort to an arrestee who, at that late point, was obviously suffering a medical trauma. In fact, the district court found the officers

and *Tibbs*, the right at issue in *Stainback* to have a *known* injury or condition considered by officers when handcuffing an arrestee is not implicated by the facts of this case.

Given the facts as assumed by the district court and the information known to the officers at the time of the arrest, the only right plaintiffs can assert would be the right of an out-of- breath arrestee to not have his hands cuffed behind his back after he complains of difficulty breathing. We find no Seventh Circuit precedent clearly establishing such a right. The cases relied upon by the district court and the plaintiffs present circumstances far different, and therefore cannot clearly establish that the officers' conduct violated Day's rights.

One further point must be addressed. The Supreme Court has stated that even in the absence of existing precedent ad- dressing similar circumstances, "there can be the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear." *District of Columbia v. Wesby*, 138

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added the second pair of handcuffs at that point "because they believed Day was having a medical problem," not because they specifically understood the handcuffs were causing his breathing difficulty. Furthermore, even if the addition of the second pair of handcuffs is evidence that the officers be- came aware that the first pair was restricting his breathing, it would then also be evidence that the officers *did* consider Day's medical condition and modified the handcuffs when it became apparent they were causing a problem. Either way, this fact does not help the plaintiffs.

S. Ct. 577, 590 (2018). This case is certainly not one of those rare obvious cases. As already discussed, the handcuffs were used in a manner that would not have harmed an average arrestee, and there is no evidence the officers were aware the handcuffs were causing Day's breathing trouble. The officers' conduct under the circumstances was not obviously unlawful.

III. Conclusion

This case arose from an unfortunate tragedy. However, the officers did not violate any clearly established right. Accordingly, the district court's judgment denying Officer Denny and Sergeant Wooten's qualified immunity defense is REVERSED and the case is REMANDED for proceedings consistent with this opinion.

Appendix B

Order of the United States District Court for the Southern District of Indiana Dated and Filed May 13, 2019

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SHANIKA DAY, Individually, and as Administrator for the Estate of TERRELL DAY; and HARVEY MORGAN, Plaintiffs, v. THE CITY OF INDIANAPOLIS; SERGEANT FRANKLIN WOOTEN, Individually, and as an IMPD Officer; and OFFICER RANDALL DENNY, Individually, and as an IMPD Officer, Defendants.	Case No. 1:17-cv-04612-TWP-TAB

ENTRY ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on a Motion for Summary Judgment (Filing No. 51) filed by Defendants City of Indianapolis ("Indianapolis"), Sergeant Franklin Wooten ("Sergeant Wooten"), and Officer Randall Denny ("Officer Denny") (collectively, "Defendants"). After Terrell Day ("Day") died while in the custody of the Indianapolis Metropolitan Police Department ("IMPD"), Shanika Day, his mother and the Administrator of his estate, and

Harvey Morgan, Day's father (collectively, "Plaintiffs"), brought this suit alleging unreasonable seizure and excessive force in violation of the Fourth Amendment to the United States Constitution, negligence under Indiana law, and loss of child's services (Filing No. 19). Defendants argue the undisputed evidence shows that neither officer violated Day's constitutional rights, they are entitled to qualified immunity, and that Plaintiffs' state law claims fail as a matter of law. (Filing No. 53 at 7.) For the following reasons, Defendants' Motion for Summary Judgment is **granted in part** and **denied in part**.

I. BACKGROUND

The following facts are not necessarily objectively true, but as required by Federal Rule of Civil Procedure 56, the facts are presented in the light most favorable to Plaintiffs as the non- moving party. *See Zerante v. DeLuca*, 555 F.3d 582, 584 (7th Cir. 2009); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The facts of this case begin with a confrontation between Day, an eighteen-year-old with a medical history of obesity, and Michael Nesbitt ("Nesbitt"), a loss-prevention officer at a Burlington Coat Factory ("Burlington") located in Washington Square Mall in Indianapolis, Indiana. On September 26, 2015, Nesbitt observed Day, and a friend enter Burlington on the store's surveillance cameras. (Filing No. 52-8 at 10.) Nesbitt believed that he recognized Day as an individual he had observed stealing from the store on two prior occasions. *Id.* at 8-9, 41. On both prior occasions, Nesbitt had asked Day to leave the store and said he would be arrested if he returned. *Id.* at 8.

While watching the stores surveillance video, Nesbitt believed he saw Day pick up a watch, put it in his pocket, and exit the store. *Id.* at 10. He followed Day out of the store to confront him about the watch and radioed mall security. Nesbitt was soon joined by mall security officer Anna Mahoy ("Mahoy") in the mall common area. Day first denied having taken anything from Burlington, but ultimately returned a watch to Nesbitt. *Id.* Nesbitt requested that Day return to the store, but Day refused and began to walk away. (Filing No. 52-9 at 10.)

Nesbitt and Mahoy's testimony differ vastly as to what happened next. Mahoy testified that she noticed the handle of what looked like a gun sticking out of Day's pocket, but she never observed him point or remove a gun, instead he just returned the watch and disagreed with returning to the story and he ran. *Id.* at 12. Nesbitt alleges that Day removed a gun from his pocket and pointed it at him, pushed Day and took cover, and Day began "running through the mall with the gun in his hand. (Filing No. 52-8 at 13.)

Nesbitt called 911 and reported the events to the operator. *Id.* While on the telephone with the 911 dispatcher, Nesbitt alleges that he observed Day unsuccessfully attempt to carjack two vehicles. *Id.* at 17-20. Mahoy's recollection of events again differs—she testified that Nesbitt chased Day out of the mall and across the parking lot toward Mitthoeffer Road and then, when Day changed course, toward 10th Street.[1] (Filing No. 52-9 at 14-17.) Mahoy did mention Day attempting to carjack anyone during her

[1] Mitthoeffer Road and 10th Street are the two main access roads bordering Washington Square Mall—Mitthoeffer to the west and 10th Street to the north. The mall is bound by Washington Pointe Drive to the east and US-40 to the south.

deposition.[2]

Nesbitt continued to chase Day into the parking lot of a Speedway gas station until Day slipped and fell on a grassy downslope (Filing No. 52-8 at 21-22.) As Day laid in the grass behind the Speedway, law enforcement arrived on the scene. Cumberland Police Department ("CPD") reserve officer John Covington ("Officer Covington") was the first officer to arrive in response to a radio call of an armed shoplifter running from the Burlington store across 10th Street to the Speedway gas station. (Filing No. 52-2 at 7.) Officer Covington encountered Nesbitt in the Speedway parking lot, and Nesbitt pointed out Day's location—laying on his back on the grassy slope just north of the gas station. (Filing No. 52-5 at 10-11.) Officer Covington parked his vehicle just east of the Speedway station, three or four car-lengths south of Day. *Id.* at 11-12. Believing Day was armed, Officer Covington drew his firearm and exited his police cruiser. *Id.* at 12. Day was on his stomach with his arms out to the side or to the top. *Id.* At 8. While waiting for other officers to arrive, Officer Covington ordered Day to show his hands and to point to his gun, which was no longer on his person. *Id.* at 13. Day complied with both orders, pointing out a gun in the grass, which was out of his reach. *Id.*, Filing No. 52-2 at 8. Officer Covington kept Day "under cover" until Officer Denny arrived on the scene, (Filing No. 52-2 at 8).

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[2] Plaintiffs dispute much of this portion of the Defendants' "STATEMENT OF MATERIAL FACTS NOT IN DISPUTE," arguing that Nesbitt is unreliable, that his narrative of events has become more fantastical each time he has reported it, and that much of his deposition is contradicted by other witnesses or by video evidence. On a summary judgment motion, the Court construes any disputed facts in Plaintiffs' favor as the non-movants.

Officer Covington then exited his vehicle, approached Day on foot. Day showed his hands and complied with the officer's orders.

Officer Denny placed Day in a single set of chain handcuffs. *Id.* at 9, 16. While handcuffing Day, Officer Denny observed that Day was overweight, sweating, and breathing heavily. *Id.* at 16, 18. Officer Denny repositioned Day so that he was "sitting on his behind" at the top of the slope with his legs out in front of him and his hands cuffed behind his back. *Id.* at 10. Day informed the officers that he was having trouble breathing. *Id.* at 13. Officer Denny told Day that he had exerted himself by running and that he should take deep breaths in and out to slow his heart rate. *Id.* Officer Denny did not observe any signs of distress, and never observed that Day was having trouble breathing.

Officer Denny instructed Day to remain seated upright in the position he had put him, believing that would be most comfortable for Day while the officers completed the investigation and effected the arrest. *Id.* at 79. Officer Denny preferred this position because, while it is comfortable for the detainee, it also makes it difficult for the detainee to stand because his hands are cuffed behind his back. *Id.* at 80. The next best position for the detainee, in Officer Denny's opinion, was to be lying on his side or back. *Id.* Officer Denny was aware of the risks posed by a standing detainee—that he could flee or attack the officers—because he had dealt with uncooperative detainees in the past. *Id.* at 80, 87-89.

As Officer Denny repositioned Day, he noticed that Day had defecated on himself. *Id.* at 10. Under the circumstances, Officer Denny believed that Day had

over-exerted himself. *Id.* at 86-88. Day was unable to follow Officer Denny's instructions about how to position himself while he was detained and in handcuffs. When Officer Denny moved Day so that he was seated upright, Day laid back onto his back and rolled down the slope a bit. *Id.* at 92-93. As he started to roll, Officer Denny sat him back up in the middle of the slope with his legs out in front of him. *Id.* Wary that Day could asphyxiate himself if he rolled onto his stomach, Officer Denny reprimanded Day to remain in an upright seated position. *Id.* at 10-11. Day did not heed Officer Denny's instructions and rolled down the rest of the hill to where the grass met the pavement. *Id.* at 11. At that point, Officer Denny decided the best course of action was to have Day lie down on his side. *Id.* at 93.

Shortly after Officer Denny detained Day, Sergeant Wooten arrived on the scene to assist. *Id.* at 100. As the arresting officer, Officer Denny had investigative duties that precluded him from personally monitoring Day after initially detaining him. *Id.* at 89-90. Sergeant Wooten or a CPD officer remained near Day to monitor him from that point forward. *Id.* at 78; Filing No. 52-4 at 58-59. The last law enforcement officer to arrive on the scene was CPD Lieutenant Roger Waggoner.

Sergeant Wooten observed Day roll from his side onto his stomach. (Filing No. 52-3 at 32.) Sergeant Wooten and the other officers repositioned Day several times when he attempted to roll onto his stomach. *Id.* at 56; Filing No. 52-2 at 94. Day complained to Sergeant Wooten that he could not breathe. (Filing No. 52-3 at 31-33.) Sergeant Wooten was skeptical of Day's complaints because Day also stated that he had done nothing wrong and was asking

for the officers to let him go. *Id.* Sergeant Wooten called for an ambulance to evaluate Day approximately five minutes after Day was initially detained. *Id.* at 31; Filing No. 52-2 at 13. As Sergeant Wooten observed him, Day appeared to calm down and began to breathe normally. (Filing No. 52-3 at 31.)

The ambulance, staffed by Douglas York ("York"), a paramedic, and James Brown ("Brown"), an emergency medical technician, arrived within several minutes. (Filing No. 52-6 at 14-15; Filing No. 52-14.) When York and Brown first encountered Day, he was lying on his back with his hands cuffed behind him. (Filing No. 52-6 at 21-22; Filing No. 52-7 at 33.) Day again complained of difficulty breathing but was able to speak to York and Brown in clear, full sentences. (Filing No. 52-6 at 25.) Although Day stated that he could not breathe, York did not observe Day to have any trouble breathing. *Id.* at 63. When asked by medics if he had any medical problems, Day stated that he did not. *Id.* at 32.

The medics conducted an evaluation which involved checking Day's vitals, obtaining his heart rate, respiratory rate, and his blood oxygen saturation. (Filing No. 52-14.) They attempted to take Day's blood pressure, but he would not allow them to. (Filing No. 52-6 at 16.) They also listened to Day's lungs with a stethoscope and found bilateral breath sounds present and clear. (Filing No. 52-14.) Based on their evaluation, the medics concluded that Day was breathing regularly and normally. *Id.*

The medics also conducted a Glasgow Coma Scale analysis on Day, which determines how oriented and responsive an individual is on a fifteen-point scale. *Id.*; Filing No. 52-6 at 35-36. Day scored a perfect

fifteen. (Filing No. 52-14; Filing No. 52-6 at 36.) During the medical evaluation Day's hands remained behind his back, but at some point, the police and medics helped him to stand. (Filing No. 52-6 at 40, 82.) Based on their medical evaluation, York and Brown believed that Day did not need to be transported to the hospital for medical treatment. *Id.* at 62- 64, 70.

When medics decide that a handcuffed prisoner is not going to go to the hospital, they have an officer sign as a witness that they are returning the prisoner back into officer custody. (Filing No. 52-2 at 94.) In order to memorialize that transfer, medics have a law enforcement officer on the scene sign a signature of release form. (Filing No. 52-11 at 3-4; Filing No. 52-2 at 95-98.) Using the screen on a tablet, the officer signs this form as a witness to the transfer, not as a representative of the detainee. *Id.* Sergeant Wooten signed the signature of release form so that law enforcement could regain custody of Day. (Filing No. 52-3 at 57-60.) Because Day was handcuffed, the officers did not request that he sign the form. *Id.* at 61.

Sergeant Wooten used his finger to sign his name in a box on a laptop screen. He explained "[i]t's a laptop, and it's got all the information on there, all the stuff. And then in the lower right corner there's a box, and they said can you sign here to release, and I said yes." (Filing No. 52-3 at 58-59.) Sergeant Wooten's signature was attached to an Indianapolis Emergency Medical Services form called "Treatment/Transport Refusal," which is meant to be signed by a patient when he refuses to be transported to the hospital after being evaluated by medics. (Filing No. 52-14 at 5.) Plaintiffs believe Sergeant Wooten refused

hospitalization on Day's behalf, and had he not signed the Treatment/Transport Refusal form, the medics may have decided to transport Day to the hospital. (Filing No. 75 at 16.)

Because Day was once again in law enforcement's custody, Officer Denny requested a "jail wagon" to transport Day to an appropriate detention facility. (Filing No. 52-2 at 35-36.) Marion County Sheriff's Deputy Steve Monday ("Deputy Monday") was the driver of the jail wagon. When Deputy Monday arrived, he spoke to Sergeant Wooten, who explained why Day was under arrest and notified Deputy Monday that Day had been evaluated by medics. (Filing No. 52-10 at 14-15.) Day was lying on his back when Deputy Monday arrived, and Deputy Monday lifted Day's leg to begin searching his shoes for contraband. *Id.* at 15. Day was generally unresponsive to Deputy Monday, and his legs fell to the ground after Deputy Monday removed his shoes and Day was unable to answer when Deputy Monday asked if he was okay. *Id.* at 15-16. When Deputy Monday and Sergeant Wooten attempted to stand Day up, Day's legs straightened, and his knees locked. *Id.* Deputy Monday considered Day uncooperative.

Deputy Monday was unsure whether Day was obstinate or was unresponsive because of a medical issue. He performed a sternum rub—the application of painful stimulus to an unresponsive subject's chest—to see whether Day would respond. *Id.* at 16. Day did not respond physically or verbally to the sternum rub, so Deputy Monday lifted his shirt and performed another one . *Id.* Although his eyes were open, and he was breathing, Day's lack of response to the sternum rubs led Deputy Monday to urge Sergeant

Wooten to call for another ambulance. Sergeant Wooten called for a second ambulance and a different team of medics was dispatched to the scene. (Filing No. 52-3 at 82; Filing No. 52-15.) At some point after the first ambulance left the scene but before the second ambulance arrived, Officer Denny put a second pair of handcuffs on Day. (Filing No. 52-2 at 38.) Using two pairs of handcuffs is meant to make the detainee more comfortable. Day was telling Officer Denny that we was having problems breathing, and Officer Denny chose to add a second pair of handcuffs because they believed Day was having a medical problem. *Id.* at 39-40.

When the second ambulance arrived, the medics asked the officers near Day to assist them in placing him on a gurney. (Filing No. 52-5 at 42.) At this point, Day's eyes were open, and he was breathing. *Id.* at 43; Filing No. 52-3 at 121. Officer Covington overheard one of the medics say that Day's pulse was very weak. (Filing No. 52-5 at 43.) Once Day was loaded into the back of the ambulance, medics performed CPR on him. *Id.*; Filing No. 52-3 at 119. If they are unable to transport someone to the hospital in stable condition, the medics are required to attempt to revive the person for thirty minutes at the scene. (Filing No. 52-2 at 15.) At 2:30 p.m., after thirty minutes of attempting to revive Day, the medics exited the ambulance and pronounced him dead. *Id.* at 16; Filing No. 52-15. Deputy Coroner Carrie England, dispatched to the scene as part of the Critical Incident Response Team, examined Day's body in the ambulance and noted that he had suffered no visible trauma. (Filing No. 52-19 at 5.) An autopsy later revealed that Day died of "Sudden Cardiac Death due to Acute Ischemic Change."

(Filing No. 52-18 at 2.) The autopsy report listed contributory causes as "Sustained respiratory compromise due to hands cuffed behind the back, obesity, underlying cardiomyopathy." *Id.*

Following Day's death, Plaintiffs brought this suit alleging unreasonable seizure and excessive force in violation of the Fourth Amendment to the United States Constitution against Officer Denny and Sergeant Wooten in both their official and individual capacities. (Filing No. 19 at 5-7.) The Complaint also alleges negligence under Indiana law against both officers and the City of Indianapolis. *Id.* at 7-8. Last, the Complaint alleges a claim of loss of child's services for the loss of monetary contribution Day would have made to the family if he had not died. *Id.* at 8- 9.

II. LEGAL STANDARD

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 489-90 (7th Cir. 2007). In ruling on a motion for summary judgment, the court reviews "the record in the light most favorable to the non-moving party and draw[s] all reasonable inferences in that party's favor." *Zerante*, 555 F.3d at 584 (citation omitted). "However, inferences that are supported by only speculation or

conjecture will not defeat a summary judgment motion." *Dorsey v. Morgan Stanley*, 507 F.3d 624, 627 (7th Cir. 2007) (citation and quotation marks omitted). Additionally, "[a] party who bears the burden of proof on a particular issue may not rest on its pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires trial." *Hemsworth*, 476 F.3d at 490 (citation omitted). "The opposing party cannot meet this burden with conclusory statements or speculation but only with appropriate citations to relevant admissible evidence." *Sink v. Knox Cnty. Hosp.*, 900 F. Supp. 1065, 1072 (S.D. Ind. 1995) (citations omitted).

"In much the same way that a court is not required to scour the record in search of evidence to defeat a motion for summary judgment, nor is it permitted to conduct a paper trial on the merits of the claim." *Ritchie v. Glidden Co.*, 242 F.3d 713, 723 (7th Cir. 2001) (citations and quotation marks omitted). "[N]either the mere existence of some alleged factual dispute between the parties nor the existence of some metaphysical doubt as to the material facts is sufficient to defeat a motion for summary judgment." *Chiaramonte v. Fashion Bed Grp., Inc.*, 129 F.3d 391, 395 (7th Cir. 1997) (citations and quotation marks omitted).

III. DISCUSSION

A. Federal Claims

1. Official Capacity Claims

Sergeant Wooten and Officer Denny move for summary judgment on the claims against them in their official capacities on two grounds. First, they argue that "[a]ctions against individual defendants

in their official capacities are treated as suits brought against the government entity itself." (Filing No. 53 at 26 (citing *Walker v. Sheahan*, 526 F.3d 973, 977 (7th Cir. 2008)).) Plaintiffs respond that their claims against the two officers in their official capacities should "merge into one claim against Indianapolis." (Filing No. 75 at 20.) Defendants reply that Plaintiffs' Amended Complaint did not plead "any factual content to allow the Court to draw a reasonable inference that Day's purported deprivation of a constitutional right was caused by an official custom, policy, or practice of the City." (Filing No. 79 at 5.)

The Court disagrees. The Plaintiffs' Complaint does allow the Court to infer that the officer Defendants were acting on City policy when they took some of the actions that support the claim. First, the Complaint alleges the officer Defendants acted unreasonably when they handcuffed Day with a single pair of handcuffs even though he was observably overweight. (Filing No. 19 at 6.) Moreover, the Complaint alleges that the officers placed Day on his back with his hands behind him and left him in that position for an extended period of time. *Id.* The Complaint also alleges that Sergeant Wooten "recklessly forged/signed Terrell Day's name to waive all medical treatment" on his behalf. *Id.* Designated evidence shows that these actions are the subject of IMPD guidelines or are common practices of the IMPD. (Filing No. 52-2 at 51, 117-119; Filing No. 52-3 at 67.) The Complaint alleges the officers committed these actions "under the color of state law, and within the course and scope of their employment as police officers". (Filing No. 19 at 5.) Those allegations support a constitutional claim against the officers in

their official capacities which, in the Seventh Circuit, is treated as a claim brought against the government entity itself. *Walker* at 977. In this case, that government entity is the city of Indianapolis.

The Defendants also seek summary judgment on the claims against the officers in their official capacities arguing the Plaintiffs "abandoned these claims" when they "acknowledged in their answers to the Defendants' contention interrogatories that they are not pursuing any *Monell* claims." (Filing No. 53 at 26 (citing Filing No. 52-12 at 6.)) In their contention interrogatories, Defendants asked:Identify whether you are making a *Monell* claim against the City stemming from the Incident. If you are making a *Monell* claim, identify with specificity the alleged policies, practices, or customs which constitute grounds for imposing entity liability under 42 U.S.C. §1983 on the City. Additionally, identify with specificity what constitutional rights were violated due to the aforementioned policy, practice, or custom. Further, identify all facts, documents, testimony, or other evidence which supports your contention that you possess a *Monell* claim. (Filing No. 52-12 at 6.) Defendants' attorney responded, "No, I am not making a Monell claim."

Contention interrogatories, allowed under Federal Rule of Civil Procedure 33(a)(2), provide parties a "useful tool to 'minimize uncertainty concerning the scope of [a plaintiff's] claims.'" *Deputy v. City of Seymour*, 2014 WL 4907911 at *5 n. 2 (S.D. Ind. Sept. 30, 2014) (citing *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 222 (7th Cir. 1996) (brackets in original)). Defendants cite caselaw in which this Court and the Seventh Circuit have reminded plaintiffs that they may not change a position they have taken in the past

or amend their complaint through later filings. *E.g.*, *Zimmerman v. Bd. Of Trus. Of Ball St. Univ.*, 940 F.Supp.2d 875, 884 (S.D. Ind. 2013); *Grayson v. O'Neill*, 308 F.3d 808, 817 (7th Cir. 2002). But they did not cite any caselaw in which a court found an argument was waived specifically because of a plaintiff's answer to a contention interrogatory.

Plaintiffs argue that they do not make a *Monell* claim, but instead they make a claim against Indianapolis as a municipality based on the city's widespread practices underlying Day's injuries. Defendants contend that this type of action against municipalities predated and was unaffected by *Monell*. (Filing No. 75 at 20.) But the Plaintiffs misinterpret *City of St. Louis v. Praprotnik*, the case they rely on for that assertion. 485 U.S. 112 (1988). *Praprotnik* applies in cases where a municipal policymaker had sought to insulate herself from liability that stems from unconstitutional city policies by delegating her policymaking authority to another official. *Id.* at In those "egregious attempts by local governments to insulate themselves from liability," a principle that has not been affected by *Monell* "ensures that the most deliberate municipal evasions of the Constitution will be sharply limited." *Id.* at 127. But Plaintiffs do not allege any such delegation occurred here. The Complaint seems to allege a straightforward *Monell* claim—city police officers, in their official capacities and following the city's policies, violated Day's constitutional rights. (Filing No. 19 at 5-6.) *Praprotnik* is irrelevant to the Plaintiffs' claim because they do not allege that any delegation of policymaking authority occurred here.

That leaves the Court with the question of whether the Plaintiffs waived their *Monell* claim by stating

clearly that they were not asserting it in response to Defendants' contention interrogatories. Although there is no case directly on point from any court in this Circuit, for a contention interrogatory to serve as a useful tool to "minimize the uncertainty of [a plaintiff's] claims," the defendant must be able to rely on the answers the plaintiff gives. *Vidimos* at 222. Here the Defendants attempted to identify the Plaintiffs' claims by asking the Plaintiffs outright if they asserted a *Monell* claim. (Filing No. 52-12 at 6.) By answering in the negative, the Plaintiffs waived any *Monell* claim their Complaint might have asserted.[3]

Therefore, summary judgment is **granted** as to the Plaintiffs' official-capacity claims against Sergeant Wooten and Officer Denny and as to any *Monell* claim against Indianapolis that the Complaint might have

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[3] Even if the Monell claim was not waived, Plaintiff has failed to designate sufficient evidence to establish that the City has a "widespread practice of signing away prisoners' rights to medical treatment" or a "practice of placing a single set of handcuffs on overweight persons and allowing them to have handcuffs on and lay on their backs for extended periods of time." (Filing No. 75 at 20). To hold a municipality liable, the plaintiff must prove that the municipality's "*deliberate* conduct . . . was the 'moving force' behind the injury alleged." *Bd. Of Cnty. Comm'rs. V. Brow,* 520 U.S. 397, 404 (1997). (emphasis in original). "That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Id.* The plaintiff carries this burden by proving that "the unconstitutional act complained of is caused by: (1) an official policy adopted and promulgated by [the municipality's] officers; (2) a governmental practice or custom that, although not officially authorized, is widespread and well settled; or (3) an official with final policy-making authority." *Thomas v. Cook Cnty. Sheriff's Dep't*, 604 F.3d 293, 303 (7th Cir. 2009).

asserted.

2. Individual Capacity Claims

Defendants Sergeant Wooten and Officer Denny seek summary judgment on Plaintiff's claims that they violated the Fourth Amendment in their individual capacities. Defendants argue that Plaintiffs' claims fail as a matter of law and that, even if they did not, the officers are entitled to qualified immunity.

a. Fourth Amendment

The Plaintiffs allege that the officer Defendants violated Day's Fourth Amendment right when they unreasonably seized Day and used excessive force to apprehend and detain him. Excessive force claims are analyzed using the Fourth Amendment's "reasonableness" standard in the context of "an arrest, an investigatory stop or any other type of seizure." *Stainback v. Dixon*, 569 F.3d 767, 771 (7th Cir. 2009). The Fourth Amendment protects against the use of force that is not "objectively reasonable." *Kinney v. Ind. Youth Ctr.*, 950 F.2d 462, 465 (7th Cir. 1991). The "right to make an arrest…necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Connor*, 490 U.S. 386, 396 (1989). However, this right is not without limits: a "police officer's use of force is unconstitutional if, judging from the totality of the circumstances at the time of the arrest, the officer used greater force than was reasonably necessary to make the arrest." *Payne v. Pauley*, 337 F.3d 767, 778 (7th Cir. 2003) (citation and quotation marks omitted).

Fourth Amendment unreasonable seizure claims, like excessive force claims, are analyzed in light of the

totality of the circumstances to determine the objective reasonableness of the seizure. To determine the reasonableness and therefore the constitutionality of a seizure, courts must "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985) (citation and quotation marks omitted). In considering this balance, whether under an excessive force or unreasonable seizure claim, the court considers the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of others, and whether the suspect was actively resisting arrest or attempting to evade arrest by flight. *Graham*, 490 U.S. at 396. Here, where the Plaintiffs allege that the officers' use of overly tight handcuffs constitutes excessive force, the Court also considers the specificity of the detainee's complaint of pain or discomfort, *Rabin v. Flynn*, 725 F.3d 628, 636 (7th Cir. 2013); the number of complaints the detainee made during the course of the arrest, *Sow v. Fortville Police Dep't*, 636 F.3d 293 (7th Cir. 2011); the injuries the detainee sustained, *Tibbs v. City of Chi.*, 469 F.3d 661, 666 (7th Cir. 2006); and the medical treatment, if any, sought by the detainee, from the handcuffing, *id.* When balancing these factors, the Court views the circumstances "from the perspective of a reasonable officer on the scene." *Graham*, 490 U.S. at 396.

Plaintiffs allege Officer Denny's and Sergeant Wooten's use of force was unreasonable because although Day was clearly obese and out of breath, they handcuffed Day with a single pair of handcuffs and allowed him to lay on his back for an extended period of time. Plaintiffs and Defendants differ on many facts

of this case. For instance, Defendants credit Burlington loss prevention officer Michael Nesbitt's testimony, and therefore assert that "Day pulled out a gun in a shopping mall, and with gun in hand, fled from Nesbitt. Shortly after Day began to flee, he pointed his gun at Nesbitt…. During Day's flight, he also unsuccessfully attempted to carjack two different people." (Filing No. 53 at 28.) Defendants point out that Nesbitt's testimony is contradicted both by video evidence, which shows that Day begins his flight from Nesbitt without a gun in his hand, (Filing No. 76-8), and by the testimony of Washington Square Mall security officer Anna Mahoy, who testified that she observed what appeared to be a gun in Day's pocket, but that he never removed it (Filing No. 52-9 at 12). Mahoy also observed law enforcement's pursuit of Day to the hill behind the Speedway gas station and did not testify that she saw Day attempt a carjacking.

As a result of this factual dispute, the parties disagree as to the severity of the crime committed, a factor the Court considers under *Graham*. Defendants contend that Day pointed a gun at the loss prevention officer and that he attempted two carjacking's. (Filing No. 53 at 28.) Plaintiffs argue that Day merely stole a $19.99 wristwatch from a department store, and then returned that watch to the loss prevention officer before being chased out of the mall. (Filing No. 75 at 22-23.) Designated evidence supports each party's version of events, and the Court will not resolve that conflict at the summary judgment stage.

It is undisputed that a gun rested inches from his Day's hand when law enforcement first apprehended him, and thus Officer Denny's first handcuffing of Day was unquestionably reasonable. But after Officer Denny had handcuffed Day and confiscated his

handgun, it is unclear whether Day was a risk to the safety of the officers or others at the scene or whether he was capable of flight. Testimony of the officers and video evidence reveals that Day was barely able to sit up. (Filing No. 52-2 at 92-93; Filing No. 76-4; Filing No. 76-16.) After he was initially handcuffed, it is not clear that any of the *Graham* factors weigh in favor of keeping Day handcuffed in an uncomfortable and possibly dangerous position.

The evidence, when construed in the light most favorable to the Plaintiffs, indicates that Day made several complaints of pain, difficulty breathing and discomfort to officers. Day never specifically complained about how tight the handcuffs were, but he complained multiple times to different officers and to the medics that he was unable to breathe. (Filing No. 52-2 at 13; Filing No. 52-3 at 31-33; Filing No. 52-6 at 25.) After he eventually died of "Sudden Cardiac Death due to Acute Ischemic Change," the autopsy noted that he had "[s]ustained respiratory compromise due to hands cuffed behind [his] back…." (Filing No. 52-18 at 2.)

Considering the facts in the light most favorable to the Plaintiffs, the Court cannot say that the officers acted reasonably as a matter of law. While the choice to handcuff Day initially may have been objectively reasonable, the officers' conduct after confiscating Day's gun could constitute an unconstitutional seizure under the Fourth Amendment. Some designated evidence indicates that Day had not committed a severe crime, that he no longer posed a danger to the officers, and that he was incapable of flight. Moreover, he complained numerous times about his difficulty breathing and ultimately died in part because his hands were cuffed behind his back, restricting his

breathing.

b. Qualified Immunity

But that conclusion does not end the Court's analysis of this claim. Officer Denny and Sergeant Wooten also contend that summary judgment is warranted because they are entitled to qualified immunity. Qualified immunity shields public officials from civil liability for acts done in their official capacity, insofar as their conduct does not violate clearly established statutory or constitutional rights to which a reasonable person would have known. *Harlow v. Fitzgerald*, 457

U.S. 800, 818 (1982). The issue of qualified immunity is a question of law for the court, not the jury. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). To determine whether qualified immunity applies, the Court must determine whether, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The Court also determines "whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* As stated by the United States Supreme Court, "[t]he judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

The Court explained in Section III.A.2.a that, based on the evidence in the record, a reasonable jury could find that Officer Denny and Sergeant Wooten

violated Day's Fourth Amendment right. But the question of whether Day's right was clearly established such that a reasonable officer would have known his conduct violated the right remains. The Court must define the right in a particularized, rather than a general sense. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

Defendants argue that there is no case establishing "a right which prohibited a non-resisting obese detainee from laying on his back and on top of his handcuffs on pavement after medical personnel informed the officers that he had no medical issues and could be transported to jail." (Filing No. 53 at 41.) "Nor is there any clearly established right for a suspect to be taken to a hospital despite being examined by medical professionals, being cleared for transport to jail, and never having requested to go to the hospital." *Id.*

Plaintiffs respond with several cases that they argue establish that "officers act unreasonably by failing to consider an injury or condition while handcuffing an individual." (Filing No. 75 at 33.) One case Plaintiffs cite is *Salyers v. Alexandria Police Dep't*, 2016 WL 2894438 (S.D. Ind. May 18, 2016). In *Salyers*, the court denied law enforcement defendants' motion for summary judgment on a Fourth Amendment excessive force claim because:

it was clearly established at the time of Salyers's arrest that when an officer is made aware that an arrestee who poses no risks of flight or safety suffers from a preexisting shoulder injury, the officer must fully consider the injury and surrounding circumstances in deciding whether it is appropriate to handcuff that arrestee behind his back or whether

such restraint would inflict unnecessary pain.

Id. at *3. Citing *Stainback* at 773 (7th Cir. 2009), the *Salyers* court said that:

a body of law has developed holding that if an officer knows of a preexisting injury or medical condition that will be aggravated by handcuffing an arrestee behind his back, the officer is 'obligated to consider that information, together with the other relevant circumstances, in determining whether it [is] appropriate to handcuff [the arrestee in such a fashion.]'

Salyers at *3 (brackets original). "If the officer fails to consider the injury or condition and handcuffs the arrestee behind his back regardless of his impairment, the clearly established law provides that the officer has acted unreasonably." *Id.* But a reasonable officer is not expected to accommodate an injury that is not apparent or has not otherwise been known to him and generalized complains of pain are not sufficient to alert an officer that handcuffing an arrestee will aggravate a preexisting condition. *Id.* at *4.

Because whether a right is clearly established "turns on a fact-sensitive examination of the dimensions of the constitutional violation, the question can be difficult to resolve as a matter of law on summary judgment where the parties' versions of events are as far apart as they are in this case." *Phelps*, 2004 WL 1146489, at *12. "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate," even if there is an issue of material fact precluding a finding that the officer's actions were reasonable. *Saucier*, 533 U.S. at 202 (2001), *receded from on other grounds*, *Pearson*,

555 U.S. at 236. But, "[w]hen the qualified immunity inquiry cannot be disentangled from disputed facts, the issue cannot be resolved without a trial." *Gonzalez v. City of Elgin*, 578 F.3d 526, 540 (7th Cir. 2009).

Here, assuming the Plaintiffs' version of events occurred, reasonable officers would know they were violating an established right by leaving Day's hands cuffed behind his back after he complained of difficulty breathing. It was "well established that it was unlawful to use excessively tight handcuffs and violently yank the arms of arrestees who were not resisting arrest, did not disobey the orders of a police officer, did not pose a threat to the safety of the officer or others, and were suspected of committing only minor crimes." *Payne v. Pauley*, 337 F.3d 767, 780 (7th Cir. 2003). While officers were not aware of Day's family history of heart problems, Day alerted officers multiple times that he was having trouble breathing. It was evident to the officers that Day was at risk of medical harm; they testified that they were constantly monitoring him to attempt to keep him in a position where he would not asphyxiate himself. The cell phone video shows that Day was unable to stand unassisted (Filing No. 76-4); he was bleeding (Filing No. 76-2, Filing No. 76-22), his lips were pale (Filing No. 52-4, at p. 35:6-8), and he was sweating, (Filing No. 52-2, at 16:21). Day was clearly overweight, winded, and complained of difficulty breathing (Filing No. 52-2, at 104:3-9). In addition, Officer Denny testified that Day "was on the verge of hyperventilating a little bit." *Id.* at 13:15-16. This evidence supports a finding that Officer Denny observed some signs of distress. And like the detainee in *Howard v. Ealing*, a case in which the District Court for the Northern District of Indiana denied an officer defendant's claim of

qualified immunity, Day did not present a risk of harm to officers during the long period in which his respiratory difficulty aggravated his cardiomyopathy. *Howard v. Ealting*, 876 F.Supp.2d 1056, 1075 (N.D. Ind. 2012) ("Although, when Taylor discovered the gun, Howard did pose a threat to the officers, once he was patted down for the second time, handcuffed, and placed in the squad car, he no longer posed a threat to the officers.") The law has clearly established this conduct as violative and therefore precludes the officers from qualified immunity.

Officer Denny and Sergeant Wooten are not entitled to qualified immunity on Plaintiffs' individual-capacity claims. Defendants' Motion for Summary Judgment as to those claims is **denied**.

B. State Law Claims

Count II of Plaintiffs' Complaint, titled "NEGLIGENCE/WRONGFUL DEATH," alleges that the Defendants were negligent in their care of Day and as a result Day passed away. (Filing No. 19 at 7-8.) To prove negligence under Indiana law, Plaintiffs must show: (1) a duty owed to the Plaintiff by the Defendant; (2) a breach of duty by allowing conduct to fall below the applicable standard of care; and (3) an injury proximately caused by the Defendant's breach. *Webber v. Butner*, – F.3d –, 2019 WL 1970306 at *3 (7th Cir. 2019). Defendants argue they cannot have committed negligence because they acted intentionally. (Filing No. 53 at 42.) That argument ignores the elements of negligence in Indiana and finds no support in Indiana or Seventh Circuit caselaw.

Defendants also argue that the Indiana Tort Claims Act ("ITCA") immunizes them from the claim.

The ITCA governs tort claims against governmental entities and public employees. *Veolia Water Indianapolis, LLC v. Nat'l Trust Ins. Co.*, 3 N.E.3d 1, 5 (Ind. 2014); Ind. Code 34- 13-3. Under ITCA, a governmental defendant is personally immune from liability for acts or omissions within the scope of his employment. Ind. Code § 34-13-3-5(b). Therefore, only Indianapolis can be liable under Plaintiffs' state law claims on the theory of *respondeat superior*. *See Ballheimer v. Batts*, 2019 WL 1243061 at *12 (S.D. Ind. March 18, 2019). Thus, Defendants' Motion for Summary Judgment is **granted** with respect to Officer Denny and Sergeant Wooten on all Plaintiffs' state law claims.

Indianapolis argues that a different section of the ITCA shields it from liability. "Pursuant to the ITCA, 'governmental entities can be subject to liability for tortious conduct unless the conduct is within an immunity granted by Section 3 of [the] ITCA.'" *Veolia Water* at 5 (quoting *Gary Cmty. School Corp. v. Boyd*, 890 N.E.2d 794, 799 (Ind. Ct. App. 2008)). The party seeking immunity bears the burden of establishing that its conduct comes within the act. *Id.* Indianapolis asserts immunity under section 3(8) of the ITCA which protects governmental entities or employees from loss resulting from "[t]he adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations)." (Filing No. 53 at 43.) Commonly referred to as "law enforcement immunity," the Indiana Supreme Court has said that "what is 'required to establish immunity [is] that the activity be one in which government either compels obedience to laws, rules, or regulations or sanctions or attempts to sanction violations thereof.'" *F.D. v. Ind. Dep't of Child Serv.*, 1 N.E.3d 131, 138 (Ind. 2013).

It is undisputed that IMPD officers were investigating a criminal offense—the parties differ over whether that offense was simple theft, armed robbery, carjacking, or some combination— when they arrested and handcuffed Day. Officers testified that they continued an investigation while Day remained handcuffed and eventually passed away. (Filing No. 52-2 at 79.) IMPD was plainly attempting to enforce the law, whether it be the laws against shoplifting or the laws against carjacking. Because Indiana Code § 34-13-3-3(8) immunizes governmental entities from liability for activities involving "the adoption and enforcement of…a law," the Court **grants** Defendants' summary judgment motion on behalf of Indianapolis as to Plaintiffs' negligence claim. To the extent Plaintiffs' wrongful death and loss of child's services[4] claims constitute separate state law claims, the same logic applies to them. Consequently, the Court **grants** summary judgment in favor of all Defendants on those claims as well.

IV. CONCLUSION

For the reasons explained above, Defendants' Motion for Summary Judgment (Filing No. 51) is

---

[4] Count III of Plaintiff's Complaint is titled "LOSS OF CHILD'S SERVICES." It alleges that as a result of Defendants' actions, Plaintiffs "suffer from the loss of Terrell Day's services and other monetary contributions," that Plaintiffs are "deprived of Terrell Day's love, companionship kindness [sic]," and that they "have incurred costs for the funeral and burial of Terrell Day, and for administering his estate." (Filing No. 19 at 9.) Count III does not cite any statute. Defendants argue that this Count and the wrongful death claim from Count II are not actual stand-alone claims under Indiana law—just categories of damages. (Filing No. 53 at 46.) Assuming wrongful death and loss of child's services constitute separate state-law claims, ITCA shields all Defendants from liability as to both.

GRANTED in part and **DENIED in part**. As to Plaintiffs' Fourth Amendment excessive force claim, the Court **grants** summary judgment in favor of the City of Indianapolis and Officer Denny and Sergeant Wooten in their official capacities but **denies** summary judgment as to Officer Denny and Sergeant Wooten in their individual capacities. The Court **grants** summary judgment in favor of all Defendants on all Plaintiffs' state law claims.

SO ORDERED.

Date: 5/13/2019

/s/ Tanya Walton Pratt
Tanya Walton Pratt, Judge
United States District Court
Southern District of Indiana

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Appendix C

Order of the United States Court of Appeals for the Seventh Circuit Denying Plaintiffs-Appellees' Petition for Rehearing Dated May 7, 2020

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

May 7, 2020

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

AMY CONEY BARRETT, *Circuit Judge*

No. 19-1930

SHANIKA DAY, et al.,

Plaintiffs-Appellees,

v.

FRANKLIN WOOTEN, et al.,

Defendants-Appellants.

O R D E R

No judge of the court having called for a vote on the Petition for Rehearing En Banc filed by Plaintiffs-Appellees on January 23, 2020, and all of the judges on the original panel having voted to deny the Petition for Rehearing,

IT IS HEREBY ORDERED that the Petition for Rehearing and Petition for Rehearing En Banc is DENIED.

Appendix D

Order of the United States Court of Appeals for the Seventh Circuit Dismissing Plaintiffs-Appellees' Cross-Appeal Dated July 3, 2019

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

July 3, 2019

Before

JOEL M. FLAUM, Circuit Judge

DIANE S. SYKES, Circuit Judge

MICHAEL Y. SCUDDER, Circuit Judge

SHANIKA DAY, et al., *Plaintiffs-Appellees*, No. 19-1972 *v.* FRANKLIN WOOTEN, et al., *Defendants-Appellants*.	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 1:17-cv-04612 Tanya Walton Pratt, Judge.

O R D E R

On consideration of the papers filed in this appeal and review of the short record,

IT IS ORDERED that this appeal is DISMISSED for lack of jurisdiction.

Plaintiffs' case continues in the district court. The district court disposed of plaintiffs' state law claims, but their Fourth Amendment claims proceed. Contrary to plaintiffs' assertions, compelling reasons

do not exist to take up plaintiffs' appeal at this time. The district court disposed of plaintiffs' state law claims based on an analysis of Indiana law, not federal law. As such, this appeal is not inextricably intertwined with defendants' appeal which involves a Fourth Amendment excessive force claim. *See Thompson v. Cope*, 900 F.3d 414, 420 (7th Cir. 2018) (qualified immunity analysis is a two- step process: whether the facts, taken in light most favorable to plaintiff, show that defendant violated a constitutional right; and whether the constitutional right was clearly established at the time).

Further, "judicial economy" is an insufficient justification to invoke the doctrine of pendant appellate jurisdiction. Rather, it must be "practically indispensable" to address the merits of the unappealable order (here, a matter of Indiana law) in order to resolve the qualified immunity appeal (a matter of federal law). *See Whitaker v. Kenosha Unified School Dist.* No. 1, 858 F.3d 1034, 1043 (7th Cir. 2017). It is not.

Appendix E

Notice of Removal to the United States District Court for the Southern District of Indiana Filed and Dated December 14, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SHANIKA DAY, Individually, and as Administrator for the Estate of TERRELL DAY; and HARVEY MORGAN, Individually, Plaintiffs, v. THE CITY OF INDIANAPOLIS and THE TOWN OF CUMBERLAND, Defendants.	Case No. 1:17-cv-04612-

NOTICE OF REMOVAL

PLEASE TAKE NOTICE that Defendant, Town of Cumberland, by counsel and pursuant to 28 U.S.C. §§1441(a) and 1446, hereby removes to this Court the state court action described herein. The grounds for removal are as follows:

1. On September 22, 2017 Plaintiff's filed a Complaint for Damages in Marion County Superior Court, Civil Division 6, under Cause Number 49D10-1709-CT-036087. A copy of the Complaint for Damage is attached hereto as Exhibit A.

2. On November 7, 2017, Plaintiff's filed a Motion for Leave to File an Amended Complaint. A

copy of the Amended Complaint for Damages is attached hereto as Exhibit B.

3. On November 29, 2017 Judge David J Dreyer, Marion Superior Court 10, granted Plaintiffs leave to file an Amended Complaint for Damages, Cause Number 49D10-1709-CT-036087. A copy of Judge Dreyer's Order is attached as Exhibit C.

4. In the Amended Complaint for Damages, the Plaintiff alleges rights violations by Defendants which can be interpreted to be violations under the Fourth and Fourteenth Amendments to the United States Constitution and it can be further interpreted that Plaintiff is pursuing this claim under 42 U.S.C. §1983.

5. This Notice of Removal has been timely filed pursuant to 28 U.S.C. §1446(b), and a copy of all process and pleadings served upon Defendants in the state court action are attached hereto.

6. This action is a civil action of which this Court has original jurisdiction under 28 U.S.C. §1331, and is one which may be removed to this Court by Defendants under 28 U.S.C. §1441.

WHEREFORE, Defendants hereby request this action removed to the United States District Court for the Southern District of Indiana.

Respectfully submitted,

/s/ David A. Izzo
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CERTIFICATE OF SERVICE

I hereby certify the foregoing NOTICE OF REMOVAL was electronically filed on this 14th day of December, 2017 through the Court's CM/ECF system, and the following parties were served via CM/ECF system and/or e-mail on the same date:

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Jennifer Lee, Esq.
nlee@nleelaw.com
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Adam S. Willfond, Esq.
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/s/ David A. Izzo
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STATE OF INDIANA	)	IN THE MARION
	)	SUPERIOR COURT
	) SS:	CIVIL DIVISION,
	)	ROOM NO:
COUNTY OF MARION	)	

SHANIKA DAY, Individually, and as Administrator for the Estate of TERRELL DAY, and HARVEY MORGAN, Individually Plaintiffs, vs. THE CITY OF INDIANAPOLIS, SERGEANT FRANKLIN WOOTEN, Individually, and as an IMPD OFFICER; OFFICER RANDALL DENNY, Individually, and as an IMPD OFFICER; THE TOWN OF CUMBERLAND; LIEUTENANT ROGER WAGGONER, Individually, and as a CUMBERLAND OFFICER; and OFFICER JOHN COVINGTON, Individually and as a CUMBERLAND OFFICER Defendant(s)	CAUSE NO.:

COMPLAINT FOR DAMAGES:

Come now the Plaintiffs, Shanika Day, individually, and as Administrator for the Estate of Terrell Day, and Harvey Morgan, Individually, by

Counsel, and for a cause of action against the Defendants, THE CITY OF INDIANAPOLIS ("CITY") SERGEANT FRANKLIN WOOTEN ("WOOTEN'), OFFICER RANDALL DENNY ("DENNY"), THE TOWN OF CUMBERLAND ("CUMBERLAND"), LIEUTENANT ROGER WAGGONER ("WAGGONER), OFFICER JOHN COVINGTON ("COVINGTON"), and alleges and states:

1. That SHANIKA DAY is the biological mother of Deceased Terrell Day, and is appointed to represent the estate and pursue any and all civil actions against the Defendants for the wrongful death of Terrell Day ("Decedent"). Said estate is filed in Marion County, Indiana, under Cause Number 49D08-1509-ES-032278.

2. That HARVEY MORGAN is the biological father of Deceased Terrell Day, and at all times material and relevant herein has resided in the City of Indianapolis, County of Marion, State of Indiana.

3. That at all times relevant and material to this cause of action, Defendant, the CITY was a municipal corporation in the State of Indiana and employer of OFFICER RANDALL DENNY and SERGEANT FRANKLIN WOOTEN

4. That at all times relevant and material to this cause of action OFFICER RANDALL DENNY and SERGEANT FRANKLIN WOOTEN were employees and/or agents of the CITY and acting under color of the law through their duties as Police Officers.

5. That at all times relevant and material to this cause of action, Defendant, TOWN OF

CUMBERLAND was a municipal town corporation in the Counties of Marion and Hancock, Town of Cumberland, State of Indiana, and employer of LIEUTENANT ROGER WAGGONER and OFFICER JOHN COVINGTON.

6. WAGGONER and COVINGTON were employees of, and acting under the color of the law through certain statutes, customs, ordinances, and official policies of the TOWN OF CUMBERLAND POLICE DEPARTMENT.

7. On September 26, 2015, Terrell Day visited the Burlington Coat Factory located on East Washington Street, in Marion County, City of Indianapolis, State of Indiana.

8. On the same date and time, Terrell Day was chased from the Burlington Coat Factory by a CUMBERLAND POLICE OFFICER, OFFICER J. COVINGTON, due to suspicion of pointing a gun at someone, and shop-lifting.

9. On the same date and time, OFFICER J. COVINGTON chased Terrell Day approximately 450 meters; that the decedent had stopped, apparently fatigued and is believed to have experienced difficulty breathing, near the rear of a gas station located at 10th and Mitthoeffer Street.

10. That Terrell Day surrendered and did not resist arrest, or pose as a threat in any way to OFFICERS WOOTEN, COVINGTON, WAGGONER, and DENNY or the public at large after his arrest.

11. That either WOOTEN, COVINGTON, WAGGONER, or DENNY handcuffed Terrell Day

placing his hands behind his back. That the Officers knew or should have known that the handcuff was tightly fitted and Terrell Day was winded and was having trouble breathing.

12. That after his arrest, Terrell Day was placed on the ground, on his back, on top of the handcuffs. That the placement by the Officers resulted in the inability to oxygenate from his winded condition.

13. Terrell Day was required to remain in a position that restricted his ability to breath for an extended period of time under the circumstances.

14. Terrell Day was already out-of-breath due to the physical activity of running, and lying in this position on the ground with his hands behind his back caused Terrell Day to lose oxygen at a greater rate of speed and unable to properly breath.

15. That it is believed that the Officers, at least one or more of them, recognized that Terrell Day was experiencing a medical emergency because emergency medical personnel was summoned to the scene to render medical assistance to Terrell Day. That Terrell Day was unable to properly stand after medical personnel arrived.

16. That medical personnel arrived to render assistance to Terrell Day. That Terrell Day was still suffering from a medical emergency, however, SERGEANT FRANKLIN WOOTEN forged Terrell Day's signature waiving his right to medical care and treatment, despite Terrell Day's obvious medical emergency of being unable to breath.

17. Due to the failure to administer medical care, Terrell Day expired shortly after the ambulance

exited the scene.

COUNT I: UNLAWFUL/UNNECESSARY PUNISHMENT

Plaintiff incorporates by reference rhetorical paragraphs one (1) through eighteen (18) above as if fully set forth herein and makes further allegations and statements as follows:

18. On September 26, 2015, WOOTEN, COVINGTON, WAGGONER, and DENNY committed one or more of the following malicious and reckless acts and/or omissions:

    a. WOOTEN, COVINGTON, WAGGONER, or DENNY, during the course of the arrest, wrongfully used excessive force in handcuffing and forcing Terrell Day to lie on his back with his hands handcuffed behind him for an extended period of time even though he was not resisting arrest or posing a threat.

    b. WOOTEN, COVINTON, WAGGONER, and DENNY did not properly assist, aide, or seek prompt medical attention for Terrell Day despite knowledge that Terrell Day was unable to breath.

    c. SERGEANT FRANKLIN WOOTEN intentionally and recklessly forged the signature of Terrell Day waiving all medical treatment despite knowledge that he was unable to breath.

19. That such acts and omission of WOOTEN, COVINGTON, WAGGONER, and DENNY constitute an unlawful, unnecessary punishment

all in violation of Terrell Day's rights under the Indiana Constitution.

COUNT II – NEGLIGENCE/WRONGFUL DEATH

Plaintiff incorporates by reference rhetorical paragraphs one (1) through twenty (20) above as if fully set forth herein and makes further allegations and statements as follows:

20. On September 26, 2015, either WOOTEN, COVINGTON, WAGGONER, or DENNY while acting under the color of state law wrongfully positioned Terrell Day on the ground while handcuffed causing him to be unable to breath, and then denied Terrell Day medical treatment while in custody, despite knowledge that Terrell Day was unable to breath.

21. WOOTEN, COVINGTON, WAGGONER, and DENNY negligently and/or intentionally deprived Terrell Day of sufficient oxygen which resulted in cardiac failure.

22. That SERGEANT FRANKLIN WOOTEN intentionally forged Terrell Day's signature waiving all right to medical treatment despite his inability to breathe or stand at the time.

23. The actions of WOOTEN, COVINGTON, WAGGONER, and DENNY in failing to provide adequate medical treatment and care for Terrell Day while in custody were reckless and negligent, and beyond all bounds of reasonable care.

24. WOOTEN, COVINGTON, WAGGONER, and DENNY failed to exercise the utmost reasonable due care and safety for Terrell Day after he was in

police custody as required by Indiana law.

25. That due to the action of the Defendants Terrell Day died an untimely death.

26. That said negligence deprived the Terrell Day of his rights secured by the laws of Indiana.

COUNT III – INADEQUATE TRAINING, SUPERVISION, AND DISCIPLINE

Plaintiff incorporates by reference rhetorical paragraphs one (1) through twenty-seven (27) above as if fully set forth herein and makes further allegations and statements as follows:

27. The CITY and THE TOWN OF CUMBERLAND are responsible for establishing the policies, procedures, customs, and usages complained about herein.

28. The CITY and the TOWN OF CUMBERLAND had an obligation and duty to Terrell Day, to properly train, supervise, and discipline the police officers of Indianapolis, and the TOWN OF CUMBERLAND including WOOTEN, COVINGTION, WAGGONER, and DENNY named herein on the use of force when conducting investigations and effecting arrests, as well as procedures in seeking immediate medical attention for persons in custody.

29. That the resulting wrongful death of Terrell Day was reasonably foreseeable as the natural consequences of the failure of the CITY and THE TOWN OF CUMBERLAND, to adequately train, investigate, and discipline its police officers.

30. That such failure to train, investigate, and

discipline its police officers demonstrates a deliberate and conscious choice by the CITY and THE TOWN OF CUMBERLAND to disregard the protected rights of its citizens of Marion County, City of Indianapolis, State of Indiana, including Terrell Day.

31. That such acts and omissions by the CITY and TOWN OF CUMBERLAND deprived Terrell Day of his rights secured by the laws of Indiana.

COUNT IV – NEGLIGENT/INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Plaintiff incorporates by reference rhetorical paragraphs one (1) through thirty-two (32) above as if fully set forth herein and makes further allegations and statements as follows:

32. Plaintiffs SHANIKA DAY and HARVEY MORGAN are the natural biological parents of Terrell Day, deceased.

33. Plaintiffs SHANIKA DAY and HARVEY MORGAN, each individually and respectfully, had a warm and loving relationship with Terrell Day, deceased, up to the time of his untimely death.

34. Plaintiffs SHANIKA DAY and HARVEY MORGAN had a protected liberty interest in the continued warm and loving relationship with Terrell Day, deceased.

35. That the reckless actions of WOOTEN, COVINGTON, WAGGONER and DENNY in failing to seek medical attention for Terrell Day, forging Terrell Day's name waiving medical treatment, and forcing him to remain on his back

while handcuffed ultimately resulted in the death of Terrell Day, deprived Plaintiffs of their protected liberty interest causing severe emotional distress.

36. That WOOTEN, COVINGTON, WAGGONER, and DENNY knew or should of known that their actions would result in the death of Terrell Day, but failed to act.

37. That as a result of the deprivation of their protected rights, the Plaintiffs, have been severely damaged.

COUNT V - LOSS OF CHILD'S SERVICES

Plaintiff incorporates by reference rhetorical paragraphs one (1) through thirty-eight (38) above as if fully set forth herein and makes further allegations and statements as follows:

38. Plaintiffs SHANIKA DAY and HARVEY MORGAN are the natural biological parents of Terrell Day, deceased.

39. Plaintiffs SHANIKA DAY and HARVEY MORGAN each separately, and respectfully, had a warm and loving relationship with their son, Terrell Day prior to his untimely death.

40. That due to the death of their son, Terrell Day, Plaintiffs SHANIKA DAY and HARVEY MORGAN have been deprived of Terrell Day's love, companionship kindness.

41. Likewise, Plaintiffs suffer from the loss of Terrell Day's services and other monetary contributions.

42. That due to the actions of the WOOTEN,

COVINGTON, WAGGONER, and DENNY, Plaintiffs have been severely damaged.

DEMAND FOR JURY TRIAL

Plaintiffs respectfully demand a jury trial in this matter for all issues triable by jury.

WHEREFORE, Plaintiff, by Counsel, respectfully requests that this Honorable Court assume jurisdiction over this cause; declare the aforementioned conduct unlawful; award actual damages to Plaintiff to compensate her for her injuries; award punitive damages to deter Defendants, and all other similarly situated, from like conduct in the future; grant Plaintiff the costs of this action and reasonable attorney fees; trial by jury; award pre-judgment and statutory interest; and for all other relief just and proper within the premises.

Respectfully Submitted,

/s/ Nathaniel Lee
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Appendix F

Final Judgment of the United States District Court for the Southern District of Indiana Entered and Dated July 1, 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SHANIKA DAY, Individually, and as Administrator for the Estate of TERRELL DAY; and HARVEY MORGAN, Individually, Plaintiffs, v. THE CITY OF INDIANAPOLIS and THE TOWN OF CUMBERLAND, Defendants.	Case No. 1:17-cv-04612-

FINAL JUDGMENT PURSUANT TO FED. R. CIV. PRO. 58

Having this day made its Entry directing the entry of final judgment, the Court now enters **FINAL JUDGMENT**.

For the reasons detailed in the Mandate of the United States Court of Appeals, Seventh Circuit (Dkt. 116), the Court now enters **FINAL JUDGMENT** in this action in favor of Defendants the City of Indianapolis, Sergeant Franklin Wooten in his official and individual capacities, and Officer Randall Denny in his official and individual capacities on each of Plaintiff's claims. Final judgment is entered and this

action is **TERMINATED**.

SO ORDERED.

Date: 7/1/2020

/s/ Tanya Walton Pratt
Tanya Walton Pratt, Judge
United States District Court
Southern District of Indiana

Roger A.G. Sharpe, Clerk of Court
By: /s/ Deputy Clerk
Deputy Clerk

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Appendix G

Affidavit of Dr. Frank P. Lloyd, Jr.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SHANIKA DAY, Individually, and as Administrator for the Estate of TERRELL DAY; and HARVEY MORGAN, Individually, Plaintiffs, v. THE CITY OF INDIANAPOLIS and THE TOWN OF CUMBERLAND, Defendants.	Case No. 1:17-cv-04612-

AFFIDAVIT OF DR. FRANK P. LLOYD, JR.

The undersigned, being duly sworn upon his oath, states as follows:

1. That the undersigned herein is over the age of eighteen (18) years and is personally familiar with the facts herein.
2. That your Affiant was the duly elected Coroner of Marion County (hereafter referred to as MCCO) between 2008 and 2016. Dr. Lee Sloan is the current elected Marion County Coroner.
3. That the MCCO investigates and determines a person's cause and manner of death, particularly in cases when the individual died under unusual

circumstances. The office consoles families, advocates for the deceased, and gives information to police and courts to prosecute suspected criminals. MCCO is located at 521 W. McCarty Street Indianapolis, IN 46225.

4. That on September 26, 2015, at approximately 3:38 p.m. MCCO was notified by the Indianapolis Metropolitan Police Department to assist in the death investigation of an 18-year-old Black Male. It was later learned that the decedent was Terrell Day. MCCO, Deputy Coroner, Carrier England arrived at the scene at approximately 3:50 pm. The location of the decedent Terrell Day was in the 10000 East 10th Street location, Indianapolis, Indiana. The decedent was transported to MCCO for investigation.

5. That MCCO conducted a death investigation regarding Terrell Day. The date of death was September 26, 2015. A postmortem examination was performed on September 28, 2015, at MCCO. The official cause of death was determined by examination of the decedent utilizing generally accepted medical and scientific methods to determine the cause and circumstances of death. Thus, a complete autopsy was performed at MCCO. Photographs were taken to document the clinical findings.

6. That during the post mortem examination, the following persons were present:

   Detective Jeff Wager (IMPD), Detective Leo George (IMPD), Ed Charters (Indianapolis-Marion County Forensic Service Agency), and Tyler Hoovis

(IUSM transitional year resident)

7. That Dr. Joye Carter performed the post mortem examination. That she departed new physician have been hired by the current administration at the MCCO.

8. That it is believed that Dr. Thomas Sosio worked at MCCO between 2008 and 2015. That he served as a Fellow, employee or student with Dr. Joye Carter's organization Biblical Dogs, Inc. between 2008 and 2015. That the organization was the pathologist's group for MCCO at the time of Terrell Day's death.

9. That at all times relevant MCCO legal representative was the City of Indianapolis Legal Department, Office of Corporation Counsel.

10. That the official cause of death of Terrell Day is set forth in MCCO's Report rendered in this matter.

11. That after conducting an investigation, reviewing the relevant evidence, including statements by IMPD, the MCCO rendered its opinion concerning the cause of death of Terrell Day. In this matter, the official cause of death of Terrell Day is as follows: *Sudden Cardiac Death due to Acute Ischemic Change: Contributory: Sustained respiratory compromise due to hands cuffed behind the back, obesity, underlying cardiomyopathy*; Manner of Death: *accident.*

12. That the clinical findings in this case was consistent with the relevant evidence collected obtained from the Indianapolis Metropolitan Police Department, additional evidence reviewed and collected and post mortem examination.

13. That the MCCO is a municipal public safety entity that is funded by the City of Indianapolis annual budget along with IMPD at all times relevant to this matter.

FURTHER, YOUR AFFIANT SAYETH NOT.

/s/ Frank A. Lloyd, Jr.
FRANK A. LLOYD, JR., M.D.

AFFIRMATION

I hereby swear and affirm under the penalties of perjury, that the foregoing representations are true and correct to the best of my knowledge, information and belief.

/s/ Frank A. Lloyd, Jr.
FRANK A. LLOYD, JR. M.D.