APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-1101

Sok Kong, Trustee for Next-of-Kin of Map Kong, Decedent

Appellee

v.

City of Burnsville, et al.

Appellants

Appeal from U.S. District Court
for the District of Minnesota

(0:16-cv-03634-SRN)

ORDER

The petition for rehearing en banc is denied. The petition for panel rehearing is also denied.

Chief Judge Smith and Judges Shepherd, Kelly, Erickson, and Grasz would grant the petition for rehearing en banc.

GRASZ, Circuit Judge, with whom ERICKSON, Circuit Judge, joins, dissenting from the denial of rehearing en banc.

I respectfully dissent from the court's refusal to rehear this case en banc.In my view, this case deserves reconsideration for three reasons.

First and foremost, we must ensure the consistent application of settled precedent, particularly with respect to how we review denials of qualified immunity

at the summary judgment stage. In such circumstances, we must accept the "'district court's findings of fact to the extent they are not blatantly contradicted by the record,' and if the district court fails to make a finding necessary for our legal review, 'we determine what facts the district court, in nonmoving party, *likely* assumed.'" *Walton v. Dawson*, 752 F.3d 1109, 1116 (8th Cir. 2014) (first quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007); and then quoting *Johnson v. Jones*, 515 U.S. 304, 320 (1995)).

I do not believe this standard was properly applied here. The panel distinguished this case from *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995) by claiming Mr. Kong "posed a threat to citizens." *Kong v. City of Burnsville*, No. 19-1101, slip op. at 9 (8th Cir. 2020). From where was this fact derived? Not from the district court, which found "a genuine dispute of material fact . . . as to whether Mr. Kong posed a significant and immediate threat of serious injury or death to the surrounding public." *Kong v. City of Burnsville*, No. 16-cv-03634, 2018 WL 6591229, at *14 (D. Minn. Dec. 14, 2018) (cleaned up). Did the record blatantly contradict the district court's finding? The opinion does not say, though the evidence of Mr. Kong's frightened flight "*away* from pedestrians and the officers" cuts against such a conclusion. *Id.* And as Judge Kelly pointed out in her dissent, a jury could presumably reject as unreasonable the officers' belief that Mr. Kong posed such a threat. *Kong*, slip op. at 19 (Kelly, J., dissenting); *see also Rahn v. Hawkins*, 464 F.3d 813, 817–18 (8th Cir. 2006) (explaining the jury's duty to determine an officer's reasonableness in a use-of-deadly-force case), *overruled on other grounds by Rivera v. Illinois*, 556 U.S. 148 (2009); *Wallace v. City of Alexander*, 843 F.3d 763, 769 (8th Cir. 2016) ("Given

the record before the district court, *a fact finder* could reasonably conclude that Wallace no longer posed a significant threat. . . .") (emphasis added). The court should reexamine this case to prevent the steady erosion of our summary judgment standard.

Second, we ought to rehear this case to further consider what constitutes an "immediate threat." Has the panel opinion broadened "immediate threat" to include all situations in which someone flees with a knife when occupied vehicles are in the general vicinity? Answering this question seems important, given the similar facts in *Ludwig*, in which we denied qualified immunity to officers who shot a man as he fled with a knife. 54 F.3d at 473–74. It is hard to justify expanding our definition of "immediate threat" in a situation where our analysis directly turns on how we have resolved prior, similar cases (e.g., when determining whether a right has been "clearly established").

Finally, the en banc court should address the first prong of the qualified immunity analysis. That is, we should determine whether the officers violated the Fourth Amendment when they shot the fleeing Mr. Kong fifteen times in the back and side when no pedestrians were nearby. The panel did not address the constitutional issue, stating only that, "[e]ven if the facts showed that the officers had violated Kong's Fourth Amendment right, the law . . . did not clearly establish the right." *Kong*, slip op. at 7. I do not question the panel's authority to skip this analytical step. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). But I worry about the impact bypassing this inquiry has on the public's perception of the justice system's efficacy and law enforcement's accountability, both of which are critical for a society governed by the rule of law.

In my view, we should do what we permissibly can to strengthen confidence in the rule of law and the judicial system.

July 30, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19-1101

Sok Kong, Trustee for Next-of-Kin of Map Kong, Decedent

Plaintiff - Appellee

v.

City of Burnsville; Maksim Yakovlev, in his individual and official capacity; John Mott, in his individual and official capacity; Taylor Jacobs, in his individual and official capacity

Defendants – Appellants

Appeal from the United States District Court
for the District of Minnesota

Submitted: February 11, 2020
Filed: May 29, 2020

Before LOKEN, BENTON, and KELLY, Circuit Judges.

BENTON, Circuit Judge.

Map Kong was fatally shot by police in Burnsville, Minnesota. His next-of-kin's Trustee, Sok Kong, sued the City of Burnsville and the officers who shot him—

Maksim Yakovlev, John Mott, and Taylor Jacobs—under 42 U.S.C. § 1983 and state law. The district court denied the defendants' motion for summary judgment invoking qualified immunity and official immunity. They appeal. Having jurisdiction under 28 U.S.C. § 1291, this court reverses and remands.

I.

This court states "the facts that the district court specifically found were adequately supported, along with those facts that the district court likely assumed." *Brown v. Fortner*, 518 F.3d 552, 557-58 (8th Cir. 2008). "When there are questions of fact the district court did not resolve, we determine the facts that it likely assumed by viewing the record favorably to the plaintiff as in any other summary judgment motion." *Id.* at 558. *See also Tolan v. Cotton*, 572 U.S. 650, 657 (2014); *Walton v. Dawson*, 752 F.3d 1109, 1116 (8th Cir. 2014). However, this court does not adopt the plaintiff's version if it is "blatantly contradicted by the record." *See Scott v. Harris*, 550 U.S. 372, 380 (2007). Almost all the facts here come from the body cameras of four officers. *Kong v. City of Burnsville*, 2018 WL 6591229, at *1 (D. Minn. Dec. 14, 2018).

At 6:16 am on March 17, 2016, dispatch alerted officers Taylor Jacobs and John Mott about "suspicious activity" in a McDonald's parking lot. *Id.* at *2. The dispatcher said a man had been parked there for over half an hour, "jumping up and down inside his car," "waving a knife back and forth." *Id.* The dispatcher added it was unknown if he was alone in the car. *Id.*

The sun had not risen when officers Jacobs and Mott arrived around 6:22 am at the McDonald's. *Id.* at

*3. It faced the frontage road and the four-lane highway; weekday traffic moved steadily, interrupted by stop signs on the frontage road and stoplights on the highway. *Id.*

Kong sat in the driver's seat, windows rolled up, rocking back and forth, slashing a large knife through the air in front of him. *Id.* The officers pointed their firearms and flashlights at him, repeatedly shouting "drop the knife" and "let me see your hands." *See id.* at *4. Officer Jacobs told Kong he was under arrest. *Id.* Kong did not comply or cease his "abnormal" motions. *Id.* at *3–4. Both officers later stated that, at the scene, they thought Kong was high on methamphetamines. *Id.* at *3.

Officer Lynrae Tonne arrived, parking in the space facing Kong's car to block him in from the front. *See id.* at *4. Kong continued to "occasionally burst into frantic fits of gyrations and knife waving." *Id.* Awaiting backup, the officers discussed what to do next. *Id.* Officer Jacobs called for a medic to be staged nearby. *Id.* He also asked if anyone was "laying down or hurt or injured in the back" of Kong's car. *See id.* The officers could not see through the fogged back windows. *See id.* at *5. Officer Jacobs said, "I'm just afraid he's got a gun in the car." *See id.* at *4.

McDonald's customers continued to drive through, immediately behind Kong's car. The officers' body cameras recorded 13 vehicles moving through the parking lot during the encounter with Kong. *Id.* at *3. Officer Jacobs moved his vehicle behind Kong's car to block him in (also slowing the drive-through traffic). *See id.* at *4. Officer Mott radioed that any additional units should completely block off traffic entering the parking lot. *Id.* at *5.

Sergeant Maksim Yakovlev arrived, parking his vehicle at the frontage entrance, lights flashing, but not completely blocking it. *Id.* Officer Jacobs told him Kong was "contained," but the officers should consider breaking a window and tasing him in case "he hops out of that car." *Id.* Sergeant Yakovlev suggested they "figure out if he's by himself there first." *Id.* Officer Jacobs then broke Kong's back passenger window, instructing the others, "Look for any guns." *See id.*

Officer Jacobs next broke Kong's front passenger window. *Id.* at *6. The officers repeatedly yelled, "Drop the knife." *Id.* Kong did not respond. Officer Jacobs yelled, "Taser, taser," firing his taser at Kong. *Id.* Kong squealed—high pitched, distressed. *Id.* He did not drop his knife or stop bouncing up and down in his seat. *Id.* Kong then swung his knife closer to the broken passenger-side window where officer Jacobs stood. *Id.* Jacobs tased him again. *Id.* Kong fell back in his seat. *Id.*

Right after the second tasing, Kong stumbled out the driver-side door, falling to the pavement. *Id.* He quickly stood up, knife in hand, and began running across the parking lot toward the frontage road and highway, away from the officers and McDonald's. *Id.* Within seconds, officers Mott, Jacobs, and Yakovlev shot him from the back and side, firing at least 23 bullets. *Id.* Fifteen bullets hit Kong, killing him instantly around 6:29 am. *Id.*

As the officers fired their guns, a customer's vehicle exited the parking lot about 30 feet away. *Id.* at *7. Kong ran in the general direction of the vehicle, although not at it in particular. *Id.* Kong ran toward the frontage road and highway. *Id.* During the shooting, a few cars passed by along the frontage road, 100 feet

away. *See id.* Steady traffic continued on the highway beyond. *Id.*

The Trustee sued the City of Burnsville and officers Yakovlev, Mott, and Jacobs. The Trustee asserts claims under (1) 42 U.S.C. § 1983 for excessive force and (2) Minnesota law for negligent failure to follow Burnsville police department policies. The district court denied the defendants' motion for summary judgment. They appeal.

II.

The officers assert qualified immunity against the Section 1983 claim. They are entitled to qualified immunity unless (1) the facts show a violation of a constitutional right, and (2) the right was clearly established at the time of the misconduct. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009). This court reviews de novo the denial of qualified immunity. *Raines v. Counseling Assocs., Inc.*, 883 F.3d 1071, 1074 (8th Cir. 2018).

A.

The Trustee argues that this court lacks jurisdiction over the qualified immunity issue. A denial of summary judgment on qualified immunity is appealable "to the extent that it turns on an issue of law." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). *See also Felder v. King*, 599 F.3d 846, 848 (8th Cir. 2010). Although this court cannot find facts, it may determine whether the undisputed facts support the district court's legal conclusions. *Brown*, 518 F.3d at 557; *Raines*, 883 F.3d at 1074. This court views disputed facts most favorably to the plaintiff, including all reasonable inferences. *Wallace v. City of Alexander*, 843 F.3d 763, 767-68 (8th Cir. 2016).

The Trustee contends that the qualified immunity issue requires this court to resolve disputed facts. Courts of appeals may review the legal issues whether conduct violated the Fourth Amendment or clearly established law. *Plumhoff v. Rickard*, 572 U.S. 765, 773 (2014). While this court cannot review whether a factual dispute is genuine, it may review the purely legal question whether a factual dispute is material. *Thompson v. Murray*, 800 F.3d 979, 983 (8th Cir. 2015). A nonmaterial difference in facts does not prevent appellate review. *See Malone v. Hinman*, 847 F.3d 949, 953-54 (8th Cir. 2017). Here, this court can decide the legal issues without resolving disputed facts, using the facts the district court specifically found adequately supported, and those it likely assumed by viewing the record favorably to the plaintiff, unless blatantly contradicted by the record. *See Brown*, 518 F.3d at 557-58; *Scott*, 550 U.S. at 380. This court has jurisdiction to review the qualified immunity issue.

B.

The Trustee argues that the defendants violated Kong's Fourth Amendment right to be free from unreasonable seizure when they shot him. *See Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (holding "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment"). "[T]he question whether an officer has used excessive force 'requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018)*, quoting Graham*

v. Connor, 490 U.S. 386, 396 (1989). Reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* "[T]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* Qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." *Id.*

"[W]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Id., quoting Garner*, 471 U.S. at 11. A fleeing suspect must thus pose "an immediate and significant threat of serious injury or death to the officer or to bystanders." *Wallace*, 843 F.3d at 769.

Even if the facts showed that the officers had violated Kong's Fourth Amendment right, the law at the time of the shooting—March 17, 2016—did not clearly establish the right. For a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *Kisela*, 138 S. Ct. at 1152; *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). The law must provide "fair warning" to officials that conduct is unconstitutional. *Tolan*, 472 U.S. at 656. "Specificity is especially important in the Fourth Amendment context, where the [Supreme] Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Kisela*, 138 S. Ct. at 1152 (alteration added), *quoting Mullenix v.*

Luna, 136 S. Ct. 305, 308 (2015). "Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." *Id.* at 1153. "An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Id., quoting Plumhoff*, 572 U.S. at 778-79.

Two years after Kong's 2016 shooting, the Supreme Court held that its case law did not clearly establish that officers acted unreasonably by shooting a woman who stood calmly with a kitchen knife by her side six feet from a bystander. *See Kisela*, 138 S. Ct. at 1152. Although the Burnsville defendants could not rely on *Kisela* for guidance, the Court's analysis of its own pre-2016 precedent is instructive. Like Kong, the woman shot in *Kisela* was not suspected of any felony, and police responded to a report she was "acting erratically" with a knife. *See id.* at 1151, 1153. During the encounter, she did not raise the knife toward the police or others. *See id.* Like Kong, she did not acknowledge the officers' presence or obey their commands to drop the knife. *See id.* Holding that *Kisela* was "far from an obvious case in which any competent officer would have known that shooting" the woman would violate her rights, the Court relied only on cases decided before March 2016, when Kong was shot. *See id.* at 1152-53.

The Court also held that case law of the relevant circuit did not clearly establish the right. *See id.* at 1153-54 (analyzing the Ninth Circuit opinion below). Denying qualified immunity, the Ninth Circuit had

relied on a case where a sniper positioned safely on a hilltop shot a man in the back as he retreated into a cabin. *Id.* at 1154, *analyzing Harris v. Roderick*, 126 F.3d 1189, 1202-03 (9th Cir. 1997) (holding sniper violated clearly established law by shooting unarmed man who made no aggressive move at the time of the shooting). The Court held that "a reasonable police officer could miss the connection between the situation confronting the sniper" in *Harris* and the situation in *Kisela*. *Id.*

Similarly, this court's case law at the time of Kong's shooting did not place the question of his right beyond debate. The Trustee argues the officers should have known that shooting Kong was an unreasonable seizure under the *Ludwig* case. *See Ludwig v. Anderson*, 54 F.3d 465, 473 (8th Cir. 1995) (denying qualified immunity to officers who fatally shot Ludwig as he fled with a knife). Ludwig may have been running away from bystanders when shot, with the nearest bystander 150 feet away. *Id.* at 473. This court also assumed Ludwig did not physically threaten a police officer. *Id.* at 473-74. Shot at a distance when posing no threat to officers or citizens, Ludwig was like the unarmed man shot in *Harris*, which the Supreme Court rejected as distinct from the woman in *Kisela* standing calmly with a knife near a bystander. *See Kisela*, 138 S. Ct. at 1154.

In contrast to Ludwig, Kong ran toward bystanders, including a woman driving only 30 feet away. *Kong*, 2018 WL 6591229, at *7. Other cars were parked in the McDonald's lot, with at least one pedestrian visible among them on the body-camera footage. The steady flow of vehicles through the parking lot meant that citizens might quickly approach or step out of their vehicles. And, a few cars passed by along

on the frontage road, only 100 feet away, with steady traffic on the highway beyond. *See id.* While pointing their handguns at Kong's car, the officers continually warned each other about "crossfire" hitting an officer or citizen, in or out of a vehicle, by firing at the wrong angle. If the officers waited, a car might block their line of fire or bystanders get too close for them to fire. In fact, a bullet that missed Kong lodged in the bumper of a vehicle pulling out of the parking lot 30 feet away. *Id.* When Kong began running through the occupied parking lot, toward the frontage road and highway, the officers "were forced to make a split-second judgment in circumstances that were tense, uncertain, and rapidly evolving." *Id.* at *18. Although Kong may not have threatened an officer with his knife, he posed a threat to citizens. This situation differs from *Ludwig*, where this court did not mention nearby traffic or "citizens who *might* be in the area" and endangered by crossfire. *See Mullenix*, 136 S. Ct. at 309-10 (emphasis in original); *Ludwig*, 54 F.3d at 473-74. A reasonable officer could miss the connection between the situation confronting officers in *Ludwig* in the woods and the situation with Kong in the McDonald's parking lot.

Cases decided by this court after *Ludwig* make clear that, at the time of Kong's shooting, officers could use deadly force to stop a person armed with a bladed weapon if they reasonably believed the person could kill or seriously injure others. *See Hayek v. City of St. Paul*, 488 F.3d 1049, 1055 (8th Cir. 2007) (samurai sword); *Hassan v. City of Minneapolis*, 489 F.3d 914, 919 (8th Cir. 2007) (machete); *Estate of Morgan v. Cook*, 686 F.3d 494, 498 (8th Cir. 2012) (knife). Though Kong appeared high on meth, the cases establish that mental illness or intoxication does not reduce

the immediate and significant threat a suspect poses. *See, e.g., Hassan*, 489 F.3d at 919 (mental illness); *Estate of Morgan*, 686 F.3d at 498 (intoxication). True, the Burnsville officers' training and department policy advised that "taking no action or passively monitoring the situation may be the most reasonable response to a mental health crisis." However, acting contrary to training "does not itself negate qualified immunity . . . so long as a reasonable officer could have believed that his conduct was justified." *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777 (2015). *See generally Davis v. Scherer*, 468 U.S. 183, 194 (1984) ("Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision."); *Cole v. Bone*, 993 F.2d 1328, 1334 (8th Cir. 1993) (same, for police department policy). At any rate, the Burnsville policy says, "Nothing in this policy shall be construed to limit an officer's authority to use reasonable force when interacting with a person in a crisis."

Even if the officers caused Kong to leave his car by confronting him, they would reasonably believe the law allowed them to shoot him if he posed an immediate and significant threat. Even if officers "created the need to use" deadly force by trying to disarm a mentally ill person, the reasonableness of force depends on the threat the person poses during the shooting. *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995). In *Schulz*, a mentally ill man isolated himself in his parents' basement. *Id.* at 645. Although he initially presented no threat and had committed no crime, officers removed his hatchet and tried to subdue him. *Id.* at 646. The suspect attacked with an ax, forcing an officer to shoot him. *Id.* This court upheld exclusion of

evidence that the officers "created the need to use force." *Id.* at 649.

Likewise, in *Hayek*, officers acted reasonably although their acts led a mentally ill man to attack them with a samurai sword. *Hayek*, 488 F.3d at 1054-55 (upholding qualified immunity for fatal shooting). Though Hayek had committed no crime, officers decided to remove him from his home because his mentally unstable behavior showed he might harm his mother, when she returned to the home. *Id.* at 1055. When he resisted being handcuffed, they chased him back into the home with a police dog. *Id.* at 1053. Hayek attacked an officer with a samurai sword, forcing the other officers to shoot him in response to his threatening and violent behavior. *Id.* at 1053, 1055.

In *Hassan*, officers tried to disarm a man walking down the middle of the street carrying a machete and a tire iron. *Hassan*, 489 F.3d at 917. He ignored repeated commands to drop his weapons. *Id.* Seeing pedestrians in the direction he was headed, an officer tased him twice. *Id.* Running into the parking lot of a strip mall, the man raised his machete toward an officer (although he obeyed commands to stop). *Id.* He moved toward officers despite being tased. *Id.* at 918. He continued to approach officers, making slashing motions with his machete and hitting a police car with it. *Id.* Officers shot him fatally. *Id.*

Based on *Schulz*, *Hayek*, and *Hassan*, a reasonable officer would have believed the law permitted shooting Kong. Like the officers in *Schulz* and *Hayek*, the Burnsville officers tried to disarm Kong to prevent him from causing harm, even if he initially posed no immediate threat to others. *See Schulz*, 44 F.3d at 646; *Hayek*, 488 F.3d at 1055. When Kong left his car,

the threat he posed justified lethal force, even if officers caused him to leave his car. *See Hayek*, 488 F.3d at 1055. Like the man in *Hassan*, Kong's unpredictable behavior with his weapon made him dangerous even if he had not yet harmed anyone. *See Hassan*, 489 F.3d at 919. *Cf. Swearingen v. Judd*, 930 F.3d 983, 988 (8th Cir. 2019) (holding that the law as of 2014 did not clearly establish a right when knife-wielding suspect posed threat of serious injury or death, even though he had not committed a violent crime against a person). Just as in *Hassan*, repeated commands and tasing did not cause Kong to drop his knife. *See Hassan*, 489 F.3d at 919. The encounter occurred in a McDonald's parking lot with citizens in the vicinity, like the strip mall parking lot in *Hassan*. *See id.* While *Hassan* involved pedestrians, the McDonald's parking lot had at least one pedestrian and several citizens in cars. *See id.* at 917.

The Trustee emphasizes that Kong, like Ludwig, may not have committed a violent felony. *See Ludwig*, 54 F.3d at 473-74; *Kisela*, 138 S. Ct. at 1152*, quoting Graham*, 490 U.S. at 396 (one factor for excessive force is "the severity of the crime at issue"). The district court found a material dispute of fact whether Kong committed a violent felony by shaking the knife in the car and moving the blade closer to officer Jacobs. *Kong*, 2018 WL 6591229, at *12. Viewing the facts most favorably to the Trustee, Kong did not commit a violent felony. *Id.*

However, 17 years after *Ludwig*, in *Estate of Morgan*, this court held that a knife-wielding man posed an immediate and significant threat even though he did not commit a violent felony. *See Estate of Morgan*, 686 F.3d at 497. Officers responded to a domestic dis-

turbance at Morgan's house. *Id.* at 495. Morgan appeared intoxicated. *Id.* He stumbled on the porch, falling into a recliner, trying to conceal a kitchen knife by his side. *Id.* at 495-96. An officer pointed a gun at him from six to twelve feet away, ordering him repeatedly to drop the knife. *Id.* at 496. Morgan stood up, holding the knife pointed downward at his side. *Id.* He then raised his right leg as if to take a step in the officer's direction. *Id.* The officer shot him fatally. *Id.* This court held the officer acted reasonably because he had probable cause to believe Morgan posed a threat of imminent, substantial bodily injury. *Id.* at 497.

Like Morgan, Kong did not attack an officer with his knife before being shot. *See Kong*, 2018 WL 6591229, at *6 (assuming facts most favorably to Kong). Neither Morgan nor Kong threatened officers verbally. *See Estate of Morgan*, 686 F.3d at 495-96; *Kong*, 2018 WL 6591229, at *5–6. Both men appeared under the influence of a substance. *See Estate of Morgan*, 686 F.3d at 495; *Kong*, 2018 WL 6591229, at *3. Based on *Estate of Morgan*, a reasonable officer would have believed the law permitted shooting Kong even without a violent felony.

Existing precedent of the Supreme Court and this circuit did not provide fair warning to the Burnsville officers that shooting Kong under these circumstances was unreasonable. The district court erred in denying the officers qualified immunity.

III.

The Trustee claims the defendant officers were negligent under state law for not following Burnsville police department policies, and that the City of Burnsville, as their employer, is vicariously liable for the officers' negligence. "The basic elements of a negligence

claim are: (1) existence of a duty of care; (2) breach of that duty; (3) proximate causation; and (4) injury." *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007).

The officers assert the defense of official immunity, and the City of Burnsville asserts vicarious immunity. The parties agree that the defendant officers' conduct was discretionary. *See Smith v. City of Brooklyn Park*, 757 F.3d 765, 775 (8th Cir. 2014) ("Under Minnesota law, the decision to use deadly force is a discretionary decision."); *Maras v. City of Brainerd*, 502 N.W.2d 69, 77 (Minn. Ct. App. 1993) (same). For discretionary conduct, government officials are entitled to official immunity unless "guilty of a willful or malicious wrong." *Vasallo ex rel. Brown v. Majeski*, 842 N.W.2d 456, 462 (Minn. 2014). *See also Elwood v. Rice Cty.*, 423 N.W.2d 671, 677 (Minn. 1988). An official shows malice only by "intentionally committing an act that the official has reason to believe is legally prohibited." *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 663 (Minn. 1999). *See also Wertish v. Krueger*, 433 F.3d 1062, 1067 (8th Cir. 2006) (applying Minnesota law). This determination "contemplates less of a subjective inquiry into malice . . . and more of an objective inquiry into the legal reasonableness of an official's actions." *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 571 (Minn. 1994). *See also Smith*, 757 F.3d at 775.

This court reviews de novo the denial of official and vicarious immunity on summary judgment. *Gordon v. Frank*, 454 F.3d 858, 864, 866 (8th Cir. 2006).

A.

The Trustee argues that this court lacks jurisdiction over the defendants' official immunity defense. An appellate court may review a summary judgment

of official immunity based on facts the district court found adequately supported or likely assumed. *See Smith*, 757 F.3d at 775. *See also Vasallo*, 842 N.W.2d at 462, 465; *Elwood*, 423 N.W.2d at 679 (granting official immunity because there was no genuine issue of fact). Here, the record, including the district court's factual findings and the officers' body-camera recordings, allows this court to review the denial of summary judgment. *Cf. Fedke v. City of Chaska*, 685 N.W.2d 725, 728 (Minn. Ct. App. 2004) (relying on video evidence to grant official immunity). This court has jurisdiction over the official immunity issue.

B.

The Trustee argues that the officers committed a willful or malicious wrong by willfully disregarding the Burnsville police department's policy on crisis intervention for persons "who may be experiencing a mental health or emotional crisis."

The policy says, "Nothing in this policy shall be construed to limit an officer's authority to use reasonable force when interacting with a person in crisis." The officers acted reasonably when they tried to disarm Kong in his car to prevent him from harming himself or others. *See Reuter v. City of New Hope*, 449 N.W.2d 745, 748, 750 (Minn. Ct. App. 1990) (granting official immunity to officers who tried to forcibly remove woman from car and restrain her because her erratic behavior convinced them she would harm herself or her children). A reasonable officer would have believed deadly force was necessary to stop Kong from endangering bystanders when he ran through the parking lot with a large knife. *See Hassan*, 489 F.3d at 920 (applying Minnesota law). Therefore, the officers did not violate the policy. *See id.* ("Because the

facts establish the officers' use of deadly force was reasonable, a reasonable fact finder could not conclude the officers' conduct was willful or malicious.").

Even if the officers negligently disregarded the policy, malice requires a higher standard—intentional wrongdoing. *See Vasallo*, 842 N.W.2d at 465 ("Malice is not negligence. It is the intentional doing of a wrongful act . . . the willful violation of a known right."); *Kelly*, 598 N.W.2d at 663 (holding that reckless acts did not show requisite intent for malice). Here, the evidence shows that, even if the officers acted negligently, they did not intentionally disregard the policy—as shown by comparing their acts to the policy.

The policy states that officers responding to a call involving a person in a crisis should request available backup and specialized resources if necessary. They should secure the scene and clear the immediate area. If circumstances reasonably permit, officers should consider and employ alternatives to force. They should use de-escalation techniques, such as taking no action or passively monitoring the situation, as appropriate. They should turn off flashing lights or sirens if feasible without compromising safety. Also, they should attempt to determine if weapons are present. Officers should take into account the person's potential inability to understand commands or appreciate the consequences of actions. They also should employ tactics to preserve the safety of all participants.

Officer Jacobs requested specialized resources, calling for a medic to stage nearby. *See Kong*, 2018 WL 6591229, at *4. The officers tried to secure the scene by blocking Kong's car and parking a patrol at the

parking lot's entrance (even if unsuccessful in stopping customers from driving through). *See id.* at *4–5. They requested backup to secure the scene. *Id.* at *5. Initially they employed alternatives to force, giving verbal commands Kong ignored. *Id.* They passively monitored Kong when they first arrived. *See id.* at *3. The officers turned off their sirens, and most turned off their flashing lights (with one vehicle's lights flashing to (partly) block incoming traffic). *See id.* The officers attempted to determine if firearms were present by breaking the fogged-up rear window. They took into account Kong's seeming inability to understand commands by using the taser to disarm him. *See id.* at *4, *6. Kong could have harmed himself or others with the knife, and his behavior suggested he needed medical or psychiatric treatment. Trying to disarm him was a tactic to preserve the safety of all participants.

Far from intentionally disregarding the policy, the officers' acts show they tried to follow it. Once Kong started running through the parking lot with the knife, the officers reasonably believed lethal force was necessary. The policy allows officers to use reasonable force. Because they did not willfully disobey the policy, the officers are entitled to official immunity.

The City of Burnsville is thus entitled to vicarious official immunity. "Vicarious official immunity is usually applied where officials' performance would be hindered as a result of the officials second-guessing themselves when making decisions, in anticipation that their government employer would also sustain liability as a result of their actions." *Schroeder v. St. Louis Cty.*, 708 N.W.2d 497, 508 (Minn. 2006). Failing to grant immunity to the City of Burnsville would create a disincentive for the City to have policies on officers' interactions with persons undergoing a mental health

crisis. *See id.* (granting immunity to avoid creating a disincentive for county to create policies on road-grading). *See also Anderson v. Anoka Hennepin Indep. Sch. Dist. 11.*, 678 N.W.2d 651, 664 (Minn. 2004) ("The court applies vicarious official immunity when failure to grant it would focus stifling attention on an official's performance to the serious detriment of that performance."); *Hayek*, 488 F.3d at 1057 (granting vicarious official immunity to city for officers' discretionary acts violating policy on emotionally disturbed persons).

The district court erred in denying the defendants summary judgment for the Trustee's state-law negligence claim.

* * * * * * *

The judgment of the district court is reversed, and the case remanded for further proceedings consistent with this opinion.

KELLY, Circuit Judge, dissenting.

In my view, the district court correctly denied defendants' motion for summary judgment after viewing the evidence in the light most favorable to the Trustee and deciding that a reasonable jury could find defendants violated Kong's clearly established right to be free from excessive force. I also believe the district court correctly denied defendants summary judgment on the Trustee's state-law claims. Accordingly, I respectfully dissent.

I.

Officers are not entitled to qualified immunity if "(1) they violated a federal statutory or constitutional

right, and (2) the unlawfulness of their conduct was clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (cleaned up). The Trustee claims the officers violated Kong's clearly established right to be free from excessive force when they shot him as he fled his parked car. In assessing this claim, we ask whether the officers' actions were "'objectively reasonable' in light of the facts and circumstances confronting them." *Graham v. Connor*, 490 U.S. 386, 397 (1989). Three factors guide this inquiry: "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officer or others, and [3] whether the suspect is actively fleeing or resisting arrest."[1] *Wallace v. City of Alexander*, 843 F.3d 763, 768 (8th Cir. 2016) (cleaned up); see *Graham*, 490 U.S. at 395. Critically, the use of "deadly force against a fleeing suspect who does not pose a significant and immediate threat of serious injury or death to an officer or others is not permitted." *Capps v. Olson*, 780 F.3d 879, 886 (8th Cir. 2015).

The district court determined that defendants are not entitled to qualified immunity on the Trustee's excessive-force claim. Viewing the facts in the light most

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[1] As to the third factor, this court has distinguished between a suspect "fleeing arrest" and a suspect "engaging in a hostile and intense physical struggle." *Wallace*, 843 F.3d at 769 (cleaned up). The mere act of fleeing arrest does not permit deadly force "unless the suspect poses an immediate and significant threat of serious injury or death" to the officer or others. *Id.* (cleaned up). Defendants do not suggest Kong was engaged in a physical struggle when he was shot. Rather, the undisputed facts show he was running away from the officers at the relevant time. As a result, the key factor in this case is whether the officers reasonably believed Kong posed an immediate and significant threat of serious injury or death when they shot him. See *id.*

favorable to the Trustee, the court decided that a reasonable officer would not believe Kong had committed a violent felony or posed a "significant and immediate threat of serious injury or death" at the time he was shot. Applying the factors above, the court concluded that a jury could find the officers' use of deadly force was objectively unreasonable in violation of the Fourth Amendment.

I agree with this analysis. Defendants contend that the record conclusively shows the officers reasonably believed Kong had committed multiple violent felonies before he exited his car, which supported their decision to use deadly force. But when the officers arrived on the scene, Kong was not suspected of a serious crime. Dispatch simply reported "suspicious activity" in the McDonald's parking lot. Kong was inside his parked car, rocking back and forth in the driver's seat and waving a knife in an unfocused manner. He did not respond to the officers and said nothing during the entire incident. Kong moved the knife in Officer Jacobs's direction after he was first hit with a taser. But viewing this situation in the light most favorable to the Trustee, a reasonable officer would see this as an involuntary response to the intense electric current, rather than as evidence of an intent to assault or terrorize, as defendants now claim. And when Kong ultimately exited his car after being tased twice, he ran *away* from the officers and bystanders near the restaurant. A witness inside the restaurant stated that Kong looked "scared" as he ran from his car.

Given the officers' familiarity with their department's crisis-intervention policy, a reasonable officer in their position would have recognized the totality of

the circumstances showed Kong was likely experiencing a mental-health crisis rather than committing violent felonies. This is supported by their post-shooting interviews with the Minnesota Bureau of Criminal Apprehension, in which none of the four officers claimed Kong had assaulted Jacobs or committed any other violent felony before they decided to shoot. Viewing the record in the light most favorable to the Trustee, the "severity of the crime at issue" does not support the reasonableness of the officers' deadly force. *See Graham*, 490 U.S. at 395; *Wallace*, 843 F.3d at 768.

I also agree with the district court that a jury could find the officers were unreasonable in their belief that Kong posed "a significant and immediate threat of serious injury or death to an officer or others." See *Capps*, 780 F.3d at 886. To determine whether a fleeing suspect poses a significant and immediate threat, an officer should consider "both the person's present and prior conduct." *Wallace*, 843 F.3d at 768. Still viewing the evidence in the light most favorable to the Trustee, a reasonable officer would have recognized that Kong was in the midst of a mental-health crisis and did not pose an immediate threat of serious injury or death. Kong was non-confrontational during the entire encounter. Indeed, he was running away from the officers and other pedestrians when he was shot. And while Kong carried a knife, a reasonable officer would have known he did not pose a significant and immediate threat to anyone else in the vicinity because those people were driving inside their cars. Kong was moving away from the officers and was unlikely to confront, much less harm, any other person.

In sum, viewing the record in the light most favorable to the Trustee—as we must on summary judgment—a reasonable officer would not have believed Kong posed a significant and immediate threat of serious physical harm to the officers or the public. Thus, the use of deadly force was objectively unreasonable under the circumstances and amounted to excessive force. *See Wallace*, 843 F.3d at 768; *Capps*, 780 F.3d at 885.

II.

The court concludes that even if the officers used excessive force when they shot Kong, they are nevertheless entitled to qualified immunity because they did not violate a clearly established right. *Ante* at 7. I respectfully disagree.

Like the district court, I believe defendants violated Kong's clearly established right to be free from excessive force, as set out in *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995). The officers in *Ludwig* responded to a call concerning an "emotionally disturbed person" camped behind a restaurant with civilians nearby. *Id.* at 467. Officers attempted to arrest Ludwig for engaging in threatening behavior, prompting him to pull a knife and flee. *Id.* at 468. The officers chased him to a nearby street and formed a semicircle around him while pointing their guns and ordering him to drop the knife. *Id.* Ludwig continued to "switch[] the knife from hand to hand . . . as if [he] might throw the knife." *Id.* He "did not lunge at any police officer," although one officer stated otherwise at his deposition. *Id.* at 469. Then, despite knowing that mace might further perturb an "emotionally disturbed person," an officer maced Ludwig. *Id.* This caused him to immediately turn and run "towards [a street] where

[the officers] could see pedestrians." *Id.* Soon after Ludwig began to run, the officers shot and killed him. *Id.* Although he was running away from the officers, and the nearest visible bystanders were "across the street approximately 150 feet" away, officers believed deadly force was needed to "stop Mr. Ludwig from possibly attempting to get across the street, which he would then be in contact with other citizens that were in . . . [an] apartment building [and] could do harm." *Id.*

On these facts, this court decided the officers were not entitled to qualified immunity because "material questions of fact remain as to whether Ludwig's actions at the time of the shooting, even if dangerous, threatening, or aggressive, 'posed a threat of serious physical harm.'" *Id.* at 473 (cleaned up) (quoting *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985)). We explained that a reasonable jury could decide the officers violated the Fourth Amendment by shooting Ludwig after they "suspected him initially of being homeless and emotionally disturbed, and, later, of misdemeanor criminal activity which arguably placed no one in immediate harm." *Id.* at 474.

The court today concludes that our decision in *Ludwig* did not fairly warn defendants that their actions violated the Constitution because, unlike Ludwig, "Kong ran toward bystanders, including a woman driving only 30 feet away." *Ante* at 9. But officers shot Ludwig as he ran towards a street where the officers "could see pedestrians." *Ludwig*, 54 F.3d at 469. While Ludwig might not have been running directly towards the pedestrians when he was shot, the officers feared he would "attempt[] to get across the street, which he would then be in contact with other citizens," who

were between 50 and 150 feet away.[2] *Id.* at 469, 473 n.6.

Although "clearly established law should not be defined at a high level of generality[,] it is not necessary . . . that the very action in question has previously been held unlawful," so long as precedent evinces "a fair and clear warning of what the Constitution requires." *Thompson v. City of Monticello*, 894 F.3d 993, 999 (8th Cir. 2018) (cleaned up). In my view, Ludwig clearly established that it is objectively unreasonable to use deadly force against a fleeing person who is likely experiencing a mental-health crisis and holding a knife if that person has not committed a violent felony, is moving away from officers, and does not pose a significant and immediate risk of serious harm. Because a reasonable jury could decide the officers violated this clearly established right when they shot Kong, I would affirm the district court's denial of qualified immunity. *See Thompson*, 894 F.3d at 1000.[3]

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[2] The court cites several subsequent cases to bolster its conclusion that the right at issue here was not clearly established. *Ante* at 9 (citing *Estate of Morgan v. Cook*, 686 F.3d 494, 497–98 (8th Cir. 2012); *Hassan v. City of Minneapolis*, 489 F.3d 914, 919 (8th Cir. 2007); *Hayek v. City of St. Paul*, 488 F.3d 1049, 1054–55 (8th Cir. 2007)). However, Kong, unlike the decedents in Morgan, Hassan, and Hayek, did not pose a significant and immediate threat of serious injury when he was shot; therefore, those cases are not comparable.

[3] I would also affirm the denial of official immunity on the Trustee's state-law claim. Official immunity applies unless the officers committed "a willful or malicious wrong." See State by *Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 569 (Minn. 1994) (quoting *Elwood v. Rice Cty.*, 423 N.W.2d 671, 677 (Minn. 1988)). This depends on "the legal reasonableness of [the officers'] actions." *Id.* at 571. Viewing the record in the light most favorable to the Trustee, the officers were objectively unreasonable in their

I respectfully dissent.

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use of force, as explained above. Therefore, the district court correctly denied official immunity. *See Maras v. City of Brainerd*, 502 N.W.2d 69, 78 (Minn. Ct. App. 1993) (denying official immunity at summary judgment because the officer's "intentional" decision to shoot a person brandishing a knife, whom he deemed a threat, along with the officer's "aware[ness] of state and city policy regarding the use of deadly force," were "sufficient to let the jury decide whether his actions constituted a willful or malicious wrong").

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Sok Kong, Trustee for Next-of-Kin of Map Kong, Decedent, Plaintiff, v. City of Burnsville; Maksim Yakolev, in his individual and official capacity; John Mott, in his individual and official capacity; and Taylor Jacobs, in his individual and official capacity, Defendants.	Case No. 16-cv-03634 (SRN/HB) **MEMORANDUM OPINION AND ORDER**

Richard E. Student and Steven J. Meshesher, Meshbesher & Associates, P.A., 10 South Fifth Street, Suite 225, Minneapolis, MN 55402 for Plaintiff.

Patrick C. Collins and Joseph E. Flynn, Jardine Logan & O'Brien PLLP, 8519 Eagle Point Boulevard, Suite 100, Lake Elmo, MN 55042 for Defendants.

SUSAN RICHARD NELSON, United States District Judge

A little before 6:30 AM, on Thursday, March 17, 2016, Burnsville city police officers encountered a 38-

year-old man named Map Kong in the parking lot of a local McDonalds. Mr. Kong was seated in his Pontiac hatchback, high on methamphetamines, shaking erratically, and, most distressingly, waving around a large knife. Around seven minutes later, three of the officers shot and killed Mr. Kong. What happened during those seven minutes was captured on video, and prompted this litigation.

Mr. Kong's family, Plaintiff here, contends that the video evidence shows police officers unreasonably using deadly force against a confused man in the midst of a mental health crisis, in contravention of the Fourth Amendment, as well as committing violations of the Fourteenth Amendment and Minnesota state negligence law. The City of Burnsville and the three officers who shot Mr. Kong, Defendants here, disagree. They argue that the video evidence shows police officers reasonably responding to a dangerous man on the verge of injuring nearby civilians.

The Court is now tasked with deciding whether to grant Defendants' summary judgment motion, in which Defendants argue that, given the video evidence and the generous protections afforded by federal and state immunity doctrines, the Court should rule in their favor as a matter of law. Plaintiff vigorously opposes the motion, arguing that, when the video evidence is construed in Mr. Kong's favor, as it must be, qualified immunity cannot be determined as a matter of law, and the case must therefore go before a jury.

For the following reasons, the Court will grant in part and deny in part Defendants' motion. Specifically, the Court grants Defendants' motion with respect to Plaintiff's Fourteenth Amendment medical

indifference claim, but denies Defendants' motion with respect to Plaintiff's Fourth Amendment excessive force claim and Plaintiff's state law negligence claim.

I. BACKGROUND

In relaying the facts of this contentious case, the Court relies on three key principles. First, because excessive force claims are "judged from the perspective of the reasonable officer on the scene, rather than with 20/20 vision of hindsight," the Court must focus on only the information the defendant officers had available to them in the moments leading up to the shooting. *Graham v. Connor*, 490 U.S. 386, 396 (1989); *accord Tatum v. Robinson*, 858 F.3d 544, 549 (8th Cir. 2017). Second, because this case is in a summary judgment posture, the Court must "not resolve genuine disputes of fact in favor of" Defendants, and it "must view the evidence in the light most favorable to" Plaintiff, including by drawing all "reasonable inferences . . . in [Plaintiff's] favor." *Tolan v. Cotton*, 572 U.S. 650, 656-57, 660 (2014) (per curiam); *accord Wealot v. Brooks*, 865 F.3d 1119, 1125 (8th Cir. 2017). Third, although the Court need not accept Plaintiff's version of events to the extent it is "blatantly contradicted" by video evidence, *Scott v. Harris*, 550 U.S. 372, 380 (2007), "inconclusive" video evidence must still be construed in Plaintiff's favor, *Raines v. Counseling Assocs., Inc.*, 883 F.3d 1071, 1074-75 (8th Cir. 2018); *accord Thompson v. City of Monticello*, 894 F.3d 993, 998-99 (8th Cir. 2018).

A. Factual Description of the Shooting

This is the rare officer-involved shooting case in which the entire incident is captured on the four present officers' body cameras. As such, in describing the

shooting, the Court relies principally on video evidence. The Court will supplement its description of this footage with facts gleaned from the officers' post-shooting Minnesota Bureau of Criminal Apprehension (BCA) interviews as well as various deposition testimony.

Because Officer John Mott's body camera appears to best capture the entirety of the incident, the Court will generally cite to that footage. (*See* Defs.' Ex. H [Doc. No. 38-6] ("Mott Body Camera").) Still, because each of the officers' body cameras offers a unique and important perspective, the Court will cite to other footage when necessary. (*See* Defs.' Ex. J [Doc. No. 38-8] ("Jacobs Body Camera"); Defs.' Ex. N [Doc. No. 38-10] ("Tonne Body Camera"); Defs.' Ex. Q [Doc. No. 38-12] ("Yakovlev Body Camera").)

For ease of understanding, the Court will break down the shooting into four discrete segments: (1) the officers' initial encounter with Mr. Kong; (2) the officers' decision to break Mr. Kong's car windows after their commanding officer, Sergeant Maksim Yakovlev, arrived; (3) the officers' use of a taser on Mr. Kong; and (4) the officers' use of deadly force on Mr. Kong. At the outset, though, the Court again emphasizes that most of the events described below took place over the course of only seven minutes.

1. The Officers Encounter Mr. Kong in His Car After Receiving a 9-1-1 Call and Consider Their Options

At 6:16 AM, on Thursday, March 17, 2016, a customer at the Burnsville McDonalds near State Highway 13 called 9-1-1. (*See* Defs.' Ex. G [Doc. No. 38-5] ("Incident Recall Report").) The customer calmly told the operator that the police "should send a car down"

because "a guy" was "jumpin' back and forth" inside his car in the parking lot, and had a "knife in his hand" that "he's been waving back and forth." (Defs.' Ex. D [Doc. No. 38-3] ("9-1-1 Call Transcript"); *see also* Defs.' Ex. C [Doc. No. 38-2] (audio recording of call).) The customer then clarified that the car was not running, and that the man had been "carrying on" like this for at least a half an hour. (9-1-1 Call Transcript at 2.) The customer also noted that he was not sure if somebody else was in the car. (*Id.* at 1.)

A dispatcher simultaneously relayed to police officers in the area that "suspicious" activity was occurring at the Burnsville McDonalds off Highway 13. (Defs.' Ex. F [Doc. No. 38-5] at 1 ("Transcript of Police Department Radio Traffic"); *see also* Defs.' Ex. E [Doc. No. 4] at 00:10-00:30 ("Audio Radio Traffic).) Namely, "a male in the vehicle in the lot who is jumping up and down inside his car . . . unknown if he is alone . . . he may be waving a knife back and forth inside the car." (*Id.*) Shortly thereafter, the dispatcher added that the "vehicle ha[d] been there for more than half an hour," and that an employee had seen the knife. (*Id.* at 2:09 to 2:18.) The officers did not receive information that the "suspicious" individual had directly threatened anyone at the McDonalds, or that he had committed a crime.[1]

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[1] For the sake of thoroughness, the Court notes four more preliminary facts it gleaned from the record. First, the "suspicious" individual's name was Map Kong, a 38-year-old Cambodian-American male residing in Chaska, Minnesota. (*See* Defs.' Ex. EE [Doc. No. 41] ("Hennepin County Medical Examiner's HCME Report").) Second, Mr. Kong had a history of intermittent mental health and substance abuse issues. (*See* Defs.' Ex. T [Doc. No. 40] at 4-5 ("Expert Report of Dr. Stacy Hail").) Third, according to an interview with Mr. Kong's neighbor, Mr. Kong came over to the

In response to this dispatch, Burnsville city police officers John Mott and Taylor Jacobs arrived in separate vehicles at the McDonalds parking lot around 6:22 AM. (*See* Incident Recall Rep.) Officer Mott had been a police officer for around eight years. (Defs.' Ex. L [Doc. No. 38-9] at 8 ("Mott Deposition").)[2] Further, because Officer Mott had taken a "40-hour week long crisis intervention training" course five years prior, the City considered him a "Crisis Intervention Training (CIT) member." (*Id.* at 30, 70-71.) Per the Burnsville Police Department's "Crisis Intervention Policy" (also known as Policy No. 423, or CIT Policy), a CIT member should be the lead officer when dealing with someone "who may be experiencing a mental health or emotional crisis,"[3] and should attempt to follow the

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neighbor's home around 10:00 PM the night before the shooting, acting "crazy" and claiming that "he was being followed by a female who was trying to hurt him." (*See* Defs.' Ex. NN [Doc. No. 38-18] at 3-4 ("Dakota County Memorandum on Kong Shooting").) Because the neighbor "had never seen Mr. Kong behave this way," he offered to take him ot the hospital. (*Id.*) Instead, however, Mr. Kong acted "scared and fled the residence," not wearing socks or shoes. (*Id.*) Fourth, according to security camera footage, Mr. Kong parked int eh McDonalds lot around 1:00 AM, after having gone through the drive-thru. (*See* Defs.' Ex. W [Doc. No. 38-16] at 19 ("Expert Report of Forensic Video Solutions").) There is no evidence that Mr. Kong left his car at any point from then until the moments before his death.

However, because this information was not available to the officers at the time of the shooting, the Court will not rely on it in evaluating the reasonableness of Defendants' actions.

[2] All deposition and interview citations are to the deposition or interview page number, rather than the ECF page number.

[3] Signs that a person may be in a "mental health crisis" include: "delusions or hallucinations," "manic or impulsive behavior, extreme agitation, lack of control," and "lack of fear." (CIT Policy at 1-2.)

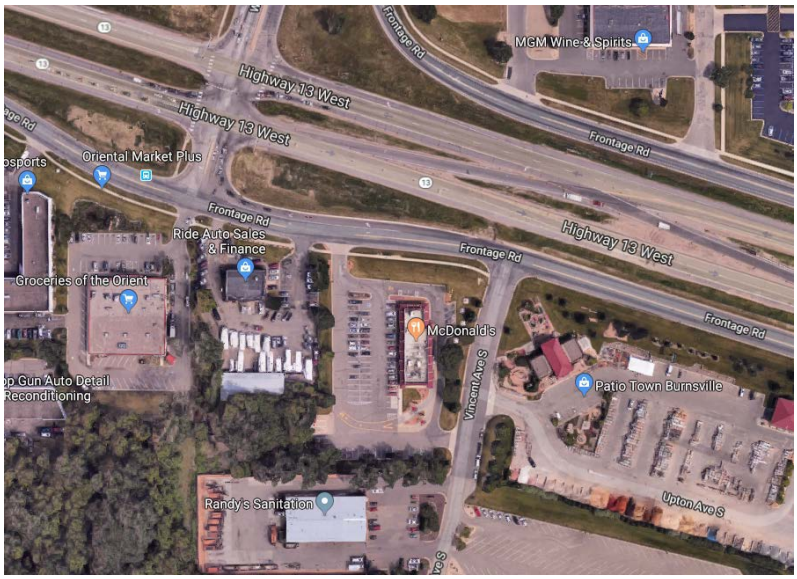
"de-escalation" steps outlined by the policy, with the goal of "resolv[ing] the incident by the safest and least confrontational means possible." (Defs.' Ex. RR [Doc. No. 38-19] at 2 ("CIT Policy").) These steps include requesting backup officers and specialized resources, turning off flashing lights, acknowledging a person's potential inability to understand commands, securing the scene and clearing the immediate area, and, if possible, "passively monitoring the situation" and/or using alternatives to force. (*Id*.) Officer Jacobs had been a police officer for four years, and, although he was not a CIT member, he was familiar with the Burnsville police department's CIT policy. (*See* Defs.' Ex. M [Doc. No. 38-9] at 6, 37-38 ("Jacobs Deposition").)

Upon parking, Officer Jacobs took down Mr. Kong's license plate number, but did not request any further information connected to the license plate number. (*See* Defs.' Ex. J [Doc. No. 38-8] at 0:40-0:44 ("Jacobs Body Camera"); *see also* Jacobs Dep. at 9 (stating that, although he could have asked dispatch for additional information connected to a license plate, he did not do so in this case).) Then, because the sun had not yet risen, Officers Jacobs and Mott approached Mr. Kong's blue Pontiac hatchback with flashlights (and firearms) drawn. (*See* Mott Body Camera at 1:20-1:25.)[4]

In the body camera footage, one can see steady weekday morning traffic in the background, both on the Frontage Road directly abutting the McDonalds, and, more particularly, on Highway 13, which lay a short distance from the parking lot. (*See, e.g.*, *id.* at

[4] Both of the officers' body camera were on from the moment they arrived.

00:50-1:00.) Further, over the course of this encounter, one can see cars turning into the McDonalds parking lot en route to the drive-thru. (*See* Defs.' Ex. W [Doc. No. 38-16] at 19 ("Expert Report of Forensic Video Solutions") (noting that, over the course of the incident, 13 civilian vehicles moved in and out of the parking lot).) However, one cannot see any pedestrians walking around, possibly because of the early morning hour and the fact that the surrounding properties are all commercial/industrial in nature. (*See* Defs.' Br. in Support of Summ. J. ("Defs.' Br.") [Doc. No. 37] at 5 (displaying screenshot of area from Google Maps, which the Court replicates below).)



When Officers Mott and Jacobs reached the vehicle, they encountered a very agitated Mr. Kong. Specifically, Mr. Kong was seated in the drivers' seat with the windows rolled up, and he was rocking back and forth while slashing a large knife through the air in front of him, as if he was fighting an invisible person.

(*See, e.g.*, Mott Body Camera at 1:40-1:45.) In an interview taken hours after the incident, Officer Mott aptly described Mr. Kong's motions as "frantic" and "abnormal." (Defs.' Ex. JJ [Doc. No. 38-18] at 7 ("Mott BCA Interview"); *see also* Defs.' Ex. KK [Doc. No. 38-18] at 11 ("Jacobs BCA Interview") (stating that, when he first saw Mr. Kong, he "looked like he was in some sort of distress").) At their depositions, both officers also stated that, at the time, they thought Mr. Kong was under the influence of methamphetamines or bath salts. (*See* Mott Dep. at 21; Jacobs Dep. at 10.) Nonetheless, both officers also contended at their depositions that, at the time, they did not believe this was a "mental health situation," in which the aforementioned CIT policy would apply. (*See* Mott Dep. at 21, 64-70, 72-73; Jacobs Dep. at 14, 25-26, 38.)

With their firearms and flashlights pointed directly at Mr. Kong, the officers immediately (and repeatedly) began yelling at Mr. Kong to "drop the knife" and show his hands, but to no avail. (*See* Mott Body Camera at 1:20-2:10.) Officer Jacobs also informed Mr. Kong that he was under arrest. (*Id.* at 1:34.) Although Officer Jacobs did not tell Mr. Kong what he was under arrest for at the time, at his deposition Officer Jacobs clarified that he could have arrested Mr. Kong for "disorderly conduct, threats of violence . . . obstruction." (Jacobs Dep. at 10; *see also* Defs.' Br. at 23 (providing statutory citations).)[5]

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[5] Specifically, Officers Mott and Jacobs believed Mr. Kong had committed (or was committing) felony terroristic threats (Minn. Stat. § 609.713), gross misdemeanor obstruction of justice (Minn. Stat. § 609.50), and misdemeanor disorderly conduct (Minn. Stat. § 609.72).

About 30 seconds after Officers Mott and Jacob first approached Mr. Kong, a third Burnsville city police officer, Officer Lynrae Tonne, arrived. (*See* Mott Body Camera at 2:10 (car pulling up), 2:40 (joining officers).) Officer Tonne had been a police officer for around 18 years, and, like Officers Jacobs, was familiar with the CIT policy, but not a CIT team member. (*See* Defs.' Ex. P [Doc. No. 38-11] at 6, 30 ("Tonne Deposition"); Defs.' Ex. LL [Doc. No. 38-18] at 3 ("Tonne BCA Interview").) At Officer Mott's direction, Officer Tonne parked her squad car immediately in front of Mr. Kong's vehicle. (*See* Mott Body Camera at 2:10-2:12.)

Because verbal commands and pointed handguns were not causing Mr. Kong to drop the knife (or having any effect on him at all), the three officers began discussing alternative options. In between continued shouts of "drop the knife!", Officer Mott suggested "bust[ing] a window" and "tas[ing] him," to which Officer Jacobs said, "we can hold off a little bit here, but we can bust the window and tase him if you want." (Mott Body Camera at 2:30-2:48.) "If he gets out," Officer Jacobs added, "I'll go lethal." (*See id*. at 2:48-2:50; Jacobs Dep. at 11 (explaining that, to police, "go lethal" means having one's handgun out and ready to fire).) The officers then contemplated how best to surround Mr. Kong's car so as to taser him without risking "cross fire," which prompted Officer Mott to comment, "this is going to go badly either way." (Mott Body Camera at 3:22.) At one point, Officer Jacobs observed that Mr. Kong might have a gun in the car, too. (*Id*. at 4:56.)

Still, for roughly another three minutes, the officers did not take further action against Mr. Kong. Instead, they held their ground around the car and

watched Mr. Kong occasionally burst into frantic fits of gyrations and knife waving, as he had been doing since the officers arrived. (*See generally id.* at 3:20-6:20.) At no point did Mr. Kong attempt to exit the car or engage with the officers. Perhaps because of this, Officer Tonne stated, "he's contained for now, so let's just wait until other people get here." (*Id.* at 4:10-4:16.) However, the officers did not discuss this "containment" option, or any other tactical decisions, at length.

Moreover, during this three-minute pause Officer Jacob called for a "stage medic" and then moved his squad car behind Mr. Kong's vehicle, so that Officer Tonne's car and his car would block Mr. Kong in from the front and back. (*Id.* at 5:40; *see also* Jacobs Body Camera at 3:54; Audio Radio Traffic at 10:04.) Although there was no discussion at the time as to why Officers Jacobs called for a medic, at his deposition Officer Jacobs stated that "staging medics [at the scene] is something I commonly do . . . if I see somebody that's under the influence of what I believe to be methamphetamines." (Jacobs Dep. at 15-16.) He also expressed concern about "a potential victim in the car." (*Id.*)[6]

Around the same time, Officer Mott requested that any additional units "completely block off traffic com-

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[6] Although Officer Jacobs did not inform the dispatcher of any mental health concerns, the dispatcher who conveyed Officer Jacobs's request to the medic treated the situation as a "possible psych hold." In other words, she thought Mr. Kong's "behaviors would indicate the medics are being requested because of possible psycho[logical] issues," based on the 9-1-1 call notes she had in front of her. (Pl.'s Ex. C [Doc. No. 49-3] at 7, 11-12 ("Kristeen Kennedy Deposition").)

ing into the McDonalds parking lot." (Mott Body Camera at 5:50-5:54; Audio Radio Traffic at 11:24.) However, neither officer appeared to confirm when medics and/or additional units would arrive.

2. After Seargeant Yakolev Arrives, the Officers Decide to Break Two of Mr. Kong's Car Windows to See If Anyone Else Is Inside

This momentary lull in activity concluded when Sergeant Maksim Yakovlev arrived on the scene. (*See* Tonne Body Camera at 3:50; *see also* Incident Recall Rep. (noting that Sergeant Yakovlev ("Stat BV/45S39") arrived at 6:30 AM).) Sergeant Yakovlev had been a police officer for 13 years, including a sergeant for four of those years, and was familiar with the department's CIT policy. (*See* Defs.' Ex. S [Doc. No. 38-13] at 6-7, 30 ("Yakovlev Deposition").)

After parking his brightly-lit squad car at the Frontage Road entrance to the McDonalds (albeit without completely blocking off the entrance), Sergeant Yakovlev approached his fellow officers and asked whether Mr. Kong was "cutting himself or what," to which Officers Jacobs replied "no, he's just swinging the knife around." (Jacobs Body Camera at 5:40-5:45.) Officer Jacobs then assessed the situation for Sergeant Yakovlev: "So, our options so far, he's contained, we can bust the window and pop him with a Taser, 'cause if he hops out of that car . . . ." (*Id*. at 5:45-5:55.) Officer Mott added that, while it looked as though Mr. Kong was by himself, they could not see the backseat. (*Id*. at 6:03-6:05.)

In response, Sergeant Yakovlev suggested that the officers "figure out if he's by himself there first." (Yakovlev Body Camera at 1:55-2:00.) After circling

around toward the passenger side of Mr. Kong's car (the side of the car farther away from Frontage Road), and finding those windows just as fogged up as the ones on the drivers' side, Sergeant Yakovlev and Officer Mott instructed Officer Jacobs to "bust out [Mr. Kong's] back window" with his baton, while still "watch[ing] the cross-fire." (*Id.* at 2:30-2:30.)

As the officers surrounded the Pontiac even more closely, Mr. Kong continued to frantically gyrate back and forth in his seat, knife in hand. (*See* Mott Body Camera at 7:00-7:20.) The officers did not discuss what they would do if Mr. Kong was, in fact, alone in his vehicle, or what they would do if Mr. Kong "hopped out of the car," as Officer Jacobs had alluded to a moment earlier. Rather, as Officers Jacobs began swinging his baton into Mr. Kong's car window, the three other officers stood in an L-shaped formation around the car, guns aimed at Mr. Kong.[7]

3. The Officers Twice Taser Mr. Kong, Who Is Still Sitting Inside His Car

At this point, everything began to move very quickly. Immediately after Officer Jacobs successfully smashed Mr. Kong's passenger-side windows, Officers Tonne and Mott again began yelling at Mr. Kong to

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[7] After the fact, Officer Mott explained the officers' strategy as follows: "Our game plan was to get him to drop the knife and come out of the vehicle with no weapons in his hands so we could figure out what the deal was and so he wasn't presenting a threat to all the people that were around us." (Mott. Dep. at 48-49.) "As long as he [was] in that car we [were] not going to be able to make the situation safe," Officer Mott emphasized. (*Id.*) Officer Mott also stated that, given the presence of civilians in the area, breaking the car window and deploying a taser presented "the fastest, safest way to try to come to a good resolution of this." (*Id.* at 52.)

"drop the knife!" (*See* Mott Body Camera at 7:40-7:45.) At the same time, and without further discussion, Officer Jacobs exclaimed "taser, taser," and fired his taser at Mr. Kong. (*Id*. at 7:45; *see also* Jacobs Dep. at 22, 39 (asserting that "taser, taser" functioned as a warning for both Mr. Kong and his fellow officers).) Although Mr. Kong made various high-pitched, distressed squealing noises in response to this activity, the taser did not cause him to either drop his knife or cease bouncing up and down in his seat. (*See, e.g.*, Mott Body Camera at 7:42, 7:55.) Further, although Mr. Kong had not moved to exit his vehicle at this point, Sergeant Yakovlev, standing near the front of the car, closest to Mr. Kong, repeatedly said "he's coming out" and readied his firearm. (*See* Yakovlev Body Camera at 2:56-2:58; *see also* Forensic Video Analysis Ex. Rep. at 17 (noting that Sergeant Yakovlev stood about ten feet from Mr. Kong's car).)

About ten seconds later, as Officer Jacobs prepared to fire a second taser round at Mr. Kong (presumably because the first one did not have the desired effect), Mr. Kong swung his knife closer to the broken passenger-side window. Mr. Kong then fell back in his seat as the second taser shot hit him. (*See* Mott Body Camera at 8:03-8:07; Tonne Body Camera at 5:38-5:40; *see also* Defs.' June 1, 2018 Letter [Doc. No. 56] (providing further detail on this point).) Defendants describe this moment as an "assault" on Officer Jacobs, in which Mr. Kong "violently swung and lunged his large knife out of the broken passenger side window at [Officer] Jacobs." (Defs' Br. at 13; *see also id*. at 23 (citing Minn. Stat. § 609.221, subd. 2 (first degree felony assault on a police officer).) Plaintiff, by contrast, interprets Mr. Kong's motion as part and parcel of the "the erratic arm motions he had been making prior to the taser

deployment," or, "at most," a defensive reaction "to the taser cartridge and/or wire at the moment the taser is deployed for a second time." (*See* Pl.'s Br. in Opp'n to Defs.' Summ. J. Mot. [Doc. No. 48] at 10 ("Pl.'s Br.").)

4. The Officers Shoot and Kill Mr. Kong as He Attempts to Flee His Car

In either event, right after the second taser round hit Mr. Kong, Mr. Kong stumbled out of the driver-side door and fell to the pavement. (*See* Yakovlev Body Camera at 3:15; Mott Body Camera at 8:06-8:08.) However, he quickly stood up, knife in hand, and began running north toward Frontage Road, away from the officers and away from the McDonalds. (*See* Yakovlev Body Camera at 3:16-3:21; Mott Body Camera at 8:09-8:12.) One onlooker from inside the restaurant, a McDonalds employee named Guadalupe Sandoval, stated that, when Mr. Kong fled his car, he looked "scared." (*See* Defs.' Ex. Y [Doc. No. 38-17] at 14 ("Sandoval Deposition") (explaining that, after the officers tased Mr. Kong, "he opened the door scared and ran").)[8]

Then, without further discussion or warnings, Officers Mott, Jacobs, and Yakovlev shot Mr. Kong from the back and side, ultimately firing at least 23 bullets within a span of three seconds. (*See* Dakota Cty. Mem. at 7 (number of bullets); Forensic Video Solutions Ex. Rep. at 25 (timespan).) 15 bullets hit Mr. Kong, killing him instantly. (*See* Dakota County Memorandum at 8; *see also* Mott Body Camera at 10:00-10:05 (finding

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[8] Ms. Sandoval also recorded a cellphone video of the final seconds of the shooting from inside the restaurant. (*See* Defs.' Ex. V [Doc. No. 38-15] ("Sandoval Cell Phone Video").) However, in the Court's view, the body camera videos provide a far clearer visual of the shooting.

no pulse upon checking Mr. Kong's body).) Officer Mott later stated that this was the first time he had discharged his weapon in the line of duty. (*See* Mott BCA Interview at 14.)[9]

At the time of the shooting, the video evidence shows a tan civilian vehicle exiting the McDonalds, driven by a woman named Patricia Unterschuetz, around 30 feet northwest of Mr. Kong. (*See* Forensic Video Solutions Ex. Rep. at 17-18; Yakovlev Body Camera at 3:11-3:13.) Indeed, one of the officer's bullets lodged into Ms. Underschuetz's back bumper as she pulled out of the parking lot. (*See* Defs.' Ex. BB [Doc. No. 38-17] ("Pictures of Bullet in Ms. Unterschuetz's Vehicle"); Defs.' Ex. X [Doc. No. 38-17] at 20-23 ("Unterschuetz Deposition") (explaining that she did not realize a bullet hit her car until later that day).) Moreover, steady traffic on Highway 13 is visible in the background, as are a few cars driving along Frontage Road. (*See, e.g.*, Mott Body Camera at 8:12-8:20; Tonne Body Camera 5:55-6:05.)

However, apart from the officers and the McDonalds' customers and employees in the store, all of whom Mr. Kong was moving away from at the time of his death, no pedestrians are visible in the video. (*Accord* Mott Dep. at 38 (confirming that, at the time of the incident, he did not recall Mr. Kong running toward "any pedestrians not in vehicles").) Further, although Defendants argue that Officer Mott and Tonne's body cameras show Mr. Kong "sprinting toward [Ms.] Unterschuetz with a long knife in his right

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[9] Although Officer Tonne did not fire her weapon, she has consistently stated that she only did so because she was not in a good shooting position, and that her fellow officers were justified in using deadly force against Mr. Kong. (*See, e.g.*, Tonne Dep. at 15.)

hand," (Defs.' Letter June 1, 2018 Letter at 2), when one views the videos in the light most favorable to Plaintiff, it appears that Mr. Kong is simply running in the direction of Frontage Road, and away from the officers tasing him, rather than at Ms. Underschuetz's vehicle in particular. (*See, e.g.*, Mott Body Camera at 8:10.)

Still, in both their BCA interviews and depositions, all four officers contended that when Mr. Kong ran from his car, knife in hand, he posed an imminent threat of "great bodily harm or death" to both themselves and the surrounding public. (*See*Defs.' Br. at 17 (collecting record citations).) For instance, Officer Mott stated that, even if Mr. Kong was not poised to attack any one person or car, deadly force was justified because "there was cars constantly coming and going," including "traffic just basically across the parking lot on Highway 13." (Mott Dep. at 37; *see also* Yakovlev Dep. at 21 (stating that, regardless of Mr. Kong's intent, Mr. Kong had the "opportunity and means" to harm "people that are on Highway 13 and the Frontage Road and in that general area, including my officers").) More specifically, Sergeant Yakovlev worried that, "if [Mr. Kong] would've got close enough to that traffic, then he could either carjack a car or stab somebody or run in the traffic and get hit himself." (Defs.' Ex. MM [Doc. No. 38-18] at 20 ("Yakovlev BCA Interview").)[10]

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[10] At oral argument, Defendants' counsel amplified this fear: "COURT: And what risk did Mr. Kong pose to [civilians] with a knife if they are in a vehicle? COUNSEL: He could easily have opened the door and stabbed them. He could highjack them. We have carjackings that happen all the time." (May 25, 2018 Hr'g Tr. at 12-13.)

Ms. Sandoval, the aforementioned McDonalds employee, and Kimberly Starinskis, a McDonalds drive-thru customer who exited the premise seconds before the shooting, also said that, at the time, they feared for the safety of everyone around Mr. Kong. (*See* Sandoval Dep. at 15, 19; Defs. Ex. HH [Doc. No. 38-18] at 23-24 ("Starinskis Deposition").)[11]

5. The Aftermath

Almost immediately after the officers shot Mr. Kong another Burnsville police officer, detective Sergeant Gast, arrived on the scene, followed by three more police officers in the ensuing minutes. (*See generally* Yakovlev Body Camera at 3:40-10:00; Yakovlev Dep. at 12-14; Incident Recall Rep. (showing that Sergeant Gast arrived at 6:31 AM, followed by other officers at 6:34, 6:38, and 6:46).) Some of these officers were from the neighboring Savage, Minnesota police department, which Sergeant Yakovlev had radioed for assistance after Mr. Kong's death. (*Id.*)[12]

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[11] Although, in fairness, Ms. Sandoval also said she felt fear "because [the police] shot [Mr. Kong] and [she] had never seen anyone die in front of [her]." (Sandoval Dep. at 15.) And Ms. Starinskis admitted that her fear stemmed from seeing Mr. Kong's movements in his car as she drove by, rather than from Mr. Kong's dash from his car. (Starinskis Dep. at 34-35.)

[12] Although Sergeant Yakovlev attests that no other officers were available from the Burnsville Police Department the morning of March 17, (*see* Defs.' Ex. SS [Doc. No. 38-20] at 2-3 ("Affidavit of Sergeant Maksim Yakovlev")), it is not clear why the officers did not try to call upon other departments, like the Savage Police Department, prior to breaking into Mr. Kong's vehicle (*See* Yakovlev Dep. at 12-14 (stating that "we can request help from . . . Savage, Minnesota State Patrol, Eagan Police Department, Apple Valley Police Department, Bloomington").)

Medics arrived about five minutes after the shooting, at 6:35 AM, and carried away Mr. Kong's body. (*See* Yakovlev Body Camera at 9:44; Incident Recall Rep.) A post-mortem toxicology test confirmed that Mr. Kong was under the influence of amphetamines and methamphetamines at the time of his death. (*See* Dakota Cty. Mem. at 8.)

Per County policy, the Dakota County Attorney's office empaneled a grand jury to consider filing criminal charges against Officers Jacobs, Mott, and Yakovlev. (*See* Defs.' Ex. NN [Doc. No. 38-18] ("Dakota County Press Release").) However, on June 21, 2016, the County Attorney announced that the grand jury had concluded that the officers' use of deadly force was justified under Minnesota law. (*Id*.)

B. Procedural History

1. Claims and Defenses at Issue

A few months later, on October 26, 2016, the court-appointed trustee for Mr. Kong's next-of-kin, which include Mr. Kong's "two sons, his parents, and his nine siblings," filed this lawsuit. (*See* Compl. [Doc. No. 1] ¶ 4.) In it, the trustee (hereinafter "Plaintiff") asserted Section 1983 claims against Officers Mott, Jacobs, and Yakovlev (hereinafter "Defendants") for (1) use of excessive force against Mr. Kong, in violation of the Fourth Amendment and (2) deliberate indifference to Mr. Kong's objectively serious medical needs, in violation of the Fourteenth Amendment. Plaintiff also asserted a state law negligence claim against Defendants for failing to adhere to various Burnsville Police Department policies during their encounter with

Mr. Kong, particularly the aforementioned CIT Policy. (*Id.* ¶ 55.)[13]

Defendants jointly answered on December 2, 2016. (*See* Answer [Doc. No. 10].) In their Answer, Defendants asserted various defenses, including qualified immunity. (*See id.* ¶¶ 57-59.)

2. Dueling Expert Reports Produced During Discovery

During discovery, both sides produced expert witness reports, in addition to the depositions and video evidence described above.

Defendants produced four expert reports. First, Forensic Video Solutions provided more detailed factual information concerning the distance between various people and objects in the McDonalds' parking lot, the limitations of body cameras, and the timing of the officers' gunshots. (*See* Forensic Video Solutions Ex. Rep.) Second, Dr. Stacy Hail, an emergency medical physician and medical toxicologist, opined that law enforcement officers would not be expected to know the difference between methamphetamine intoxication and acute psychosis due to mental illness, and that medics could not have assisted Mr. Kong at the time of his death because Mr. Kong presented "a danger to himself and others" and the scene was not secure. (*See* Defs.' Ex. T [Doc. No. 40] at 15 ("Dr. Hail

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[13] Although Plaintiff also asserted claims against the City of Burnsville for "failure to train" and for direct municipal negligence, Plaintiff later agreed to dismiss those claims. (*See* Mar. 13, 2018 Stipulation for Dismissal [Doc. No. 32].) However, Plaintiff still seeks to hold the City of Burnsville vicariously liable under the remaining negligence claim. (*Id.*) For ease of reference, though, the Court will continue to refer to the three officer Defendants as "Defendants."

Expert Report").) Third, Steven Wickelgren, the Clinical Director of Minnesota's CIT Officers' Association, opined that, given Mr. Kong's "uncertain" and "unpredictable" behavior, the officers "acted safely and used appropriate de-escalation and CIT tactics." (*See* Defs.' Ex. II [Doc. No. 38-18] at ECF 20 ("Wicklgren Expert Report").) Fourth, Stuart Robinson, a law enforcement expert, opined that the officers' use of deadly force was proper, and consistent with "accepted law enforcement standards" and "commonly instructed law enforcement training and practice." (*See* Defs.' Ex. OO [Doc. No. 38-18] at 3 ("Robinson Expert Report").)

For their part, Plaintiff produced two expert reports. First, D.P. Van Blaricom, a law enforcement expert, opined that the officers "failed to make a reasonable approach to [Mr. Kong], who was demonstrably experiencing a psychotic episode," and that it was "objectively unreasonable" to "fatally shoot" Mr. Kong under the circumstances. (*See* Pl.'s Ex. A [Doc. No. 49-1] at 13, 17 ("Blaricom Expert Report").) Second, Dr. James Alsdurf, a psychologist, opined that, at the time of his death, Mr. Kong was exhibiting "such disorganized thinking and feeling" that his actions "offered an objective need for medical attention." (*See* Pl.'s Ex. B [Doc. No. 49-2] at 4 ("Alsdurf Expert Report").)

3. Defendants Move for Summary Judgment

Following discovery, on April 13, 2018, Defendants moved for summary judgment on all three of Plaintiff's claims. Specifically, Defendants contend that, as a matter of law, "there were no Fourth or Fourteenth Amendment violations, the Officers are entitled to qualified immunity," and, with respect to the negligence claim, "the Defendants are entitled to official

and vicarious official immunity." (Defs.' Br. at 3.) Plaintiff filed an opposition brief on May 4 (*see* Pl.'s Br.), and Defendants replied on May 11 (*see* Defs.'s Reply Br. [Doc. No. 50]). The Court heard oral argument on May 25. Shortly thereafter, Defendants submitted a letter further elaborating on certain aspects of the body camera evidence, and Plaintiff responded. (*See* Defs.' June 1, 2018 Letter; Pl.'s June 4, 2018 Letter [Doc. No. 57].)

II. DISCUSSION

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). As the Court noted above, in reviewing Defendant's motion for summary judgment, the Court must "not resolve genuine disputes of fact in favor of" Defendants, and it "must view the evidence in the light most favorable to" Plaintiff, including by drawing all "reasonable inferences . . . in [Plaintiff's] favor." *Tolan*, 572 U.S. at 656-57, 660. As the Eighth Circuit recently re-affirmed, this principle holds equally true in officer-involved shooting cases captured on video. *See Raines*, 883 F.3d at 1074-75 (finding a genuine factual dispute existed where "the video evidence" was "inconclusive as to whether or not [the knife-wielding plaintiff] advanced on the officers in a manner that posed a threat of serious physical harm to an officer").

With this standard in mind, the Court addresses each of Plaintiff's claims in turn.

A. Plaintiff's Section 1983 Claims

1. Qualified Immunity

Two of Plaintiff's claims – their Fourth Amendment claim and their Fourteenth Amendment claim –

arise under 42 U.S.C. § 1983. Section 1983 allows plaintiffs to sue state and local government officials who allegedly violate their constitutional rights for money damages. However, the defense of qualified immunity "protects government officials from incurring civil liability" under Section 1983 if the official's "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wealot*, 865 F.3d at 1124-25 (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). To determine if qualified immunity applies, a court must ask two questions: "(1) whether the facts the plaintiff has presented, when viewed in his favor, show that the conduct of the officer violated a constitutional right, and (2) whether that constitutional right was clearly established at the time of the incident such that a reasonable officer would have known his or her actions were unlawful." *Neal v. Ficcadenti*, 895 F.3d 576, 580 (8th Cir. 2018).

Courts have discretion to decide the order in which to engage these two prongs. *See Pearson*, 555 U.S. at 236. But under either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment. *See Wealot*, 865 F.3d at 1124.

2. Excessive Force Under the Fourth Amendment

a. Whether There Was a Fourth Amendment Violation

1. The Law

The Fourth Amendment of the U.S. Constitution protects individuals against "unreasonable searches and seizures." U.S. Const. amend. IV. Excessive force

claims are "seizures" subject to the reasonableness requirement of the Fourth Amendment. *See Graham v. Connor*, 490 U.S. 386, 395 (1989). Because "reasonableness" is an objective standard, "an officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Id.* Rather, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.*

Considering whether a police officer acted "objectively reasonably," then, "requires balancing 'the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the subject posed an immediate threat to the safety of the officers or to others, and [3] whether the suspect was actively resisting arrest or attempting to evade arrest by flight." *Wealot*, 865 F.3d at 1125 (citing *Graham*, 490 U.S. at 396). Further, because "[t]he intrusiveness of a seizure by means of deadly force is unmatched," *Tennessee v. Garner*, 471 U.S. 1, 9 (1985), "the use of deadly force against a fleeing suspect who does not pose a significant and immediate threat of serious injury or death to an officer or others is not permitted," *Capps v. Olson*, 780 F.3d 879, 886 (8th Cir. 2015). This distinction between using deadly force on a non-compliant subject versus other forms of force makes sense because, "even when officers are justified in using *some* force, they violate suspects' Fourth Amendment rights if they use *unreasonable* amounts of force." *Tatum v. Robinson*, 858 F.3d 544, 550 (8th Cir. 2017) (emphasis added).

However, in reviewing an officer's actions, a court must keep in mind that "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Church v. Anderson*, 898 F.3d 830, 833 (8th Cir. 2018) (quoting *Graham*, 490 U.S. at 396-97). And, as the Court noted above, courts must judge the reasonableness of an officer's use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.

2. Analysis

The Fourth Amendment "objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional." *Frederick v. Motsinger*, 873 F.3d 641, 645-46 (8th Cir. 2017) (quoting *Cty. of L.A. v. Mendez*, 137 S. Ct. 1539, 1546 (2017)). Plaintiff here only argues that Defendants' use of deadly force was an unconstitutional seizure. As such, the Court will only consider Defendants' actions in the seven minutes leading up to Mr. Kong's death, such as Defendants' decision to break Mr. Kong's car windows and taser him, insofar as it is alleged that those actions, and the information Defendants gleaned during that time period, rendered Defendants' ultimate decision to shoot and kill Mr. Kong unreasonable. *See Gardner v. Buerger*, 83 F.3d 248, 253-54 (8th Cir. 1996) (holding that, although plaintiffs "must present evidence that the seizure itself, not its prologue, was unreasonable before [they] can get to a jury with [their] § 1983 claim," evidence about the "surrounding circumstances" may be relevant to the "ultimate question" of "whether the use of deadly force was reasonable").

On this inquiry, the Court finds that, even taking into account the "tense" and "uncertain" nature of Defendants' encounter with Mr. Kong, *Church*, 898 F.3d at 833, two genuine disputes of material fact preclude the Court from deeming the officers' use of deadly force objectively reasonable as a matter of law: First, there is a material dispute as to whether Mr. Kong had committed a violent felony before the officers shot him (*i.e.*, by "assaulting" the officers), such that the officers reasonably would have thought him likely to hurt others. Second, there is a material dispute as to whether the fleeing Mr. Kong posed a significant and immediate threat of serious injury or death to the surrounding public, simply because he was holding a knife and running in the general direction of highway car traffic.[14]

a. Whether Mr. Kong Committed A Violent Felony Before the Shooting

In determining whether deadly force was objectively reasonable, courts may consider whether "[t]he record conclusively demonstrate[s] that [a decedent] committed [a] violent felony" before being shot. *Wallace v. City of Alexander*, 843 F.3d 763, 768 (8th Cir.

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[14] Plaintiff also disputes whether Defendants provided Mr. Kong with sufficient warnings before resorting to deadly force. *See Garner*, 471 U.S. at 11 (holding that, in deadly force cases, officers must give a suspect "some warning" before shooting, if "feasible"). However, because the Eighth Circuit has interpreted this warning requirement as being satisfied by an officer merely pointing a gun at someone holding a knife and commanding them to drop the knife, and because it is not disputed that Defendants gave such a warning (repeatedly) here, the Court finds no dispute of material fact on this issue. *See, e.g.*, *Loch v. City of Litchfield*, 689 F.3d 96, 967 (8th Cir. 2012).

2016). In *Wallace*, for instance, a police officer claimed at her deposition that an individual committed an "aggravated assault" by pointing a gun directly at her, prior to her use of deadly force. *Id.* (citing state law that pointing a gun at someone constituted aggravated assault). However, because the officer had not said that the decedent pointed a gun directly at her in an earlier, post-shooting interview, the Eighth Circuit found that a jury could "credit [the officer's] first statements over the subsequent versions and conclude that [the decedent] had not committed a violent felony before he himself was seized with force." *Id.*; *compare with Brossart v. Janke*, 859 F.3d 616, 625 (8th Cir. 2017) (finding repeated use of a taser reasonable where "the undisputed summary judgment record" and a later state court conviction showed that the plaintiff "made two threats of violence to law enforcement officers," both of which constituted felonies under state law).

Here, Defendants argue that the video evidence and the officers' deposition testimony clearly show that the officers "had reason to believe Mr. Kong committed multiple felonies before he exited the vehicle." (Defs.' Br. at 23-24.) Specifically, Defendants argue that Mr. Kong committed "felony terroristic threats" (Minn. Stat. § 609.713) and "first degree felony assault" (Minn. Stat. § 609.221, subd. 2) shortly before his death. (*Id.* at 23.)

With respect to "felony terroristic threats," Defendants argue that the video shows Mr. Kong "violently lung[ing], bang[ing], and slic[ing] his knife against the thin glass window that separated [him] from the officers in a public parking lot with many people nearby," which purportedly communicated a threat to the officers and others. (*Id.*)

With respect to "first degree felony assault," and as described above, Defendants argue that the video shows Mr. Kong "reach[ing] across the passenger seat and violently lung[ing] his long knife through the open window at [Officer] Jacobs." (*Id.*) Moreover, three of the four officers specifically mentioned this moment in their depositions, and emphasized its importance in their ultimate decision to use deadly force. (*See* Mott Dep. at 79 (stating that Mr. Kong "slashed out and tried to stab Officer Jacobs," and that, "if he's willing to do that toward a police officer it's reasonable to say he's willing to do that to someone else"); Tonne Dep. at 26 (claiming that deadly force would have been justified even if Mr. Kong was not running toward people because "he was already basically assaulting us"); Yakovlev Dep. at 36 (asserting that he did not need to give a command to shoot because "after [Mr. Kong] swiped at my officer with the knife I felt that he was a threat of deadly force to our officers and people around").

By contrast, Plaintiff argues that, for one, the officers had no reason to believe Mr. Kong was threatening anyone from within the confines of his car. (*See* Pl.'s Br. at 3-5.) Rather, Plaintiff argues, the video evidence simply shows Mr. Kong "waving his arms and moving his body in a continuous and erratic fashion," albeit while holding a knife. (*Id.* at 9.)

Moreover, with respect to the alleged assault on Officer Jacobs, Plaintiff argues that Mr. Kong "did not in fact in attempt to strike [Officer] Jacobs," and that, at worst, Mr. Kong "react[ed] defensively to the taser cartridge and/or wire at the moment the taser [was] deployed for a second time." (*Id.* at 10.) Further, Plaintiff contends that, after the alleged assault, the video

shows Defendants "carry[ing] on as they had been previously." (*Id.* at 11; *see also* Blaricom Ex. Rep. ¶ 23(g) (opining that "reasonable officers responding to and evaluating this incident would not have concluded that [Mr. Kong] was threatening them," in part because Mr. Kong's reaction to Officer Jacobs's taser "was no different than the behavior he had previously been displaying").) Plaintiff also notes that, in their post-shooting BCA interviews, none of the four present officers claimed that Mr. Kong assaulted Officer Jacobs prior to their use of deadly force. (*Id.* at 10-11.)

The Court finds that, just as in *Wallace*, a material dispute of fact exists as to whether Mr. Kong committed either felony terroristic threats or first-degree felony assault in the moments before his death. *See Wallace*, 843 F.3d at 768. As relevant here, a person commits felony terroristic threats when they "threaten, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror." Minn. Stat. § 609.713. "A communication constitutes a threat if, in context, it would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *State v. Smith*, 825 N.W.2d 131, 135 (Minn. Ct. App. 2012). In *Smith*, for instance, the court found that a person committed felony terroristic threats when, in the midst of a heated argument, the person waved a knife at somebody four feet away from them and demanded money. *Id.*

Viewing the record in the light most favorable to Plaintiff, a reasonable juror could find that Mr. Kong did not commit felony terroristic threats. Record evidence suggests that, "in context," Mr. Kong's erratic knife waving within the confines of his car did not evince an intent to "act according to its tenor." *Smith*,

825 N.W.2d at 135. As the 9-1-1 caller (calmly) informed the police, Mr. Kong had been waving the knife around in his car, uninterrupted, for at least 30 minutes before the officers arrived. *See supra* at 4-5 (noting that Officers Jacob and Mott received this information). And, even after the officers arrived, Mr. Kong at no point attempted to communicate to, much less target, anyone outside the car.

Next, a person commits first-degree felony assault by "using or attempting to use deadly force" against a police officer performing their duties. Minn. Stat. § 609.221, subd. 2. "Deadly force" means acting with "the purpose of causing, or which the actor should reasonably know creates a substantial risk of causing, death or great bodily harm." *Id.* § 609.066, subd. 1. An officer has probable cause to believe someone assaulted them if, for instance, the person stands near the officer and makes "a quick movement toward [the officer] with knives in hand while uttering words to the effect that he wished to engage [the officer] in combat [*i.e.*, "bring it on, f*****"]." *State v. Trei*, 624 N.W.2d 595, 597-98 (Minn. Ct. App. 2001).

Viewing the record in the light most favorable to Plaintiff, a jury could find that, unlike the defendant in *Trei*, Mr. Kong did not knowingly "attempt to use deadly force" against Officer Jacobs. Minn. Stat. § 609.221, subd. 2. The video certainly shows Mr. Kong swinging his knife closer to Officer Jacobs, although not clearly *through* the broken car window. (*See, e.g.*, Mott Body Camera at 8:03-8:07.) As such, it is not clear whether Mr. Kong "violently lunged his long knife through the open window at [Officer] Jacobs" with any kind of intent to harm, as Defendants claim (Defs.' Br. at 23), or whether Mr. Kong was simply continuing the erratic, unfocused motions he had been

making since the start of the encounter. (*See, e.g.*, Tonne Body Camera at 5:36-5:39; Yakovlev Body Camera at 3:10-3:12.) Indeed, in the video, one cannot see the officers reacting to this particular lunge in real time. (*Id.*) Moreover, as a general matter, "merely brandishing or pointing knives is a less significant 'attempt' to use force than would be the case with firearms." *State v. Evans*, 2005 WL 353988, at *6 (Minn. Ct. App. 2005).

This dispute over the video evidence is exacerbated by the fact that, just as in *Wallace*, and contrary to the officers' depositions, in the BCA interviews taken immediately after the shooting none of the four officers mentioned this moment, much less described it as essential to their decision to shoot Mr. Kong. *See Wallace*, 843 F.3d at 768; *see also Henderson v. City of Woodbury*, --- F.3d ---, 2018 WL 6185947, at *5 (8th Cir. Nov. 28, 2018) (holding, in a deadly force case, that a material dispute of fact exists when officers' "uniform deposition testimony" is contradicted by even a single officer's "more or less contemporaneous testimony").

For these reasons, a material dispute of fact exists as to whether Mr. Kong committed a violent felony in the minutes before his death.

b. Whether Mr. Kong Posed an Imminent Threat of Death or Grave Bodily Harm to the Surrounding Public When He Fled His Vehicle Holding a Knife

The next, and more important, reasonableness factor for the Court to consider is whether, at the time of

his death, Mr. Kong "pose[d] a significant and immediate threat of serious injury or death" to the surrounding public. *Capps*, 780 F.3d at 886. In surveying the (admittedly limited) Eighth Circuit case law involving the use of deadly force against a knife-wielding individual, the salient inquiry for this factor appears to be whether the decedent was advancing toward the officers or nearby bystanders at the time of the shooting. *Compare, e.g.*, *Estate of Morgan v. Cook*, 686 F.3d 494, 497 (8th Cir. 2012) (officer reasonably used deadly force where knife-wielding plaintiff, standing only twelve feet from the officer, "stood up and moved toward" the officer) and *Hassan v. City of Minneapolis*, 489 F.3d 914, 919 (8th Cir. 2007) (officer reasonably used deadly force where plaintiff "aggressively brandished a machete and a tire iron while approaching officers in a threatening manner," and "moved toward" civilians on the public street "more than once") *with Ludwig v. Anderson*, 54 F.3d 465, 469, 473-74 (8th Cir. 1995) (officer potentially acted unreasonably when using deadly force against a knife-wielding plaintiff running away from officers, where the nearest bystanders were "across the street" and at least 150 feet away); *see also City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775 (2015) (noting, in passing, that officers were justified in using deadly force against a knife-wielding individual who "kept coming at the officers until she was only a few feet away from a cornered [defendant officer]"). Moreover, in considering whether a fleeing person posed a deadly threat to the surrounding public, a reasonable officer is expected to consider "both the person's present and prior conduct," based on the information available to them. *Wallace*, 843 F.3d at 768.

Here, Defendants argue that, at the time of his death, Mr. Kong "clearly posed an immediate threat to the physical safety of the officers and bystanders at the scene," because (a) Mr. Kong "aggressively brandished a long knife in a public parking lot," (b) Mr. Kong "refused numerous orders to drop his knife even after he was tased," (c) Mr. Kong "used the long knife in a threatening manner by violently lunging and swinging it out the open passenger window at [Officer] Jacobs," (d) "bystanders were in the vicinity," including "in the parking lot, inside and outside the restaurant, on the Frontage Road, and on Highway 13," and (e) Mr. Kong was "sprinting" towards civilians, and Ms. Unterschuetz in particular, when he exited his vehicle. (Defs.' Br. at 27-28.)

By contrast, Plaintiff argues that, far from posing a deadly threat to the officers or the public, in the minutes leading up to his death, Mr. Kong "displayed many of the signs of a mental health crisis described in" the City's CIT policy, did not "attempt[] or threaten[] to commit a crime of violence," and appeared "visibly frightened." (Pl.'s Br. at 28.) Moreover, when he fled his vehicle, Plaintiff contends that Mr. Kong did "not run toward any bystanders" and did "not attempt to turn to face [the] officers." (*Id.* at 29.) Indeed, "[d]uring the entire encounter," Plaintiff emphasizes, Mr. Kong "never exhibited an intent to harm any bystanders or officers." (*Id.*)

Viewing the facts in the light most favorable to Plaintiff, as the Court must at this stage, the Court finds that a genuine dispute of material fact exists as to whether Mr. Kong "pose[d] a significant and immediate threat of serious injury or death" to the surrounding public at the moment Defendants opened

fire. *Capps*, 780 F.3d at 886. Most importantly, because the video evidence does not "blatantly contradict" Plaintiff's narrative that Mr. Kong was running *away* from pedestrians and the officers at the time of his death, the Court must credit that version of events. *Scott*, 550 U.S. at 380; *Thompson*, 894 F.3d at 998-99; *see also supra* at 15-16 (describing the relevant video evidence). And to the extent Mr. Kong was approaching *moving vehicles* on Frontage Road or Highway 13 with a knife in his hand, such as Ms. Untersheutz's vehicle, the Court finds that a reasonable juror might not credit Defendants' fear that Mr. Kong was poised to "either carjack a car or stab somebody," absent the use of deadly force. (Yakovlev BCA Interview at 20; *see also* Hr'g Tr. at 12-13.) This is particularly so in light of Mr. Kong's behavior during the seven minutes prior to his death, which a reasonable juror might interpret as scared and confused, rather than violent and confrontational. (*Accord* Sandoval Dep. at 14.) As the Eighth Circuit noted in *Wallace*, there is a difference between shooting someone merely "fleeing arrest" versus shooting someone "engaging in a 'hostile and intense' physical struggle." *Wallace*, 843 F.3d at 659 (quoting *Parks v. Pomeroy*, 387 F.3d 949, 957-58 (8th Cir. 2004)). Moreover, as the Court detailed above, there is a factual dispute as to whether Mr. Kong assaulted or threatened the police officers prior to his flight, such that the officers would have thought Mr. Kong reasonably likely to "try to stab" someone in his vicinity. (*See* Mott Dep. at 79.)

The limited Eighth Circuit case law concerning the use of deadly force against knife-wielding persons further buttresses this conclusion. Indeed, in the case with the most analogous facts to this one, *Ludwig v. Anderson*, the Eighth Circuit reversed a district court

for granting summary judgment to the defendant officers. There, police officers were dispatched to handle an "emotionally disturbed person" (Ludwig) who was camped behind a Wendy's restaurant and concerning civilians in the area. 54 F.3d at 467. Shortly after the officers arrived, the officers attempted to arrest Ludwig for engaging in threatening behavior, which prompted Ludwig to pull out a knife and flee from the officers. *Id.* at 468. The officers chased Ludwig to a nearby street and formed a semicircle around him, all while pointing their guns at him and ordering him to drop the knife. *Id.* Ludwig did not obey the officers, and continued to "switch[] the knife from hand to hand," "as if [he] might throw the knife." *Id.* During this time, Ludwig "did not lunge at any police officer or run towards any police officer," although one officer later stated otherwise at his deposition. *Id.* at 469. Then, despite knowing that mace might further perturb an "emotionally disturbed person," an officer maced Ludwig, which caused Ludwig to "immediately turn[] and run towards [the street] where [the officer] could see pedestrians." *Id.* The officers then shot and killed Ludwig. *Id.* Although Ludwig was running away from the officers, and the nearest visible bystander was "across the street approximately 150 feet from Ludwig," the officers believed deadly force was needed to "stop Ludwig from possibly attempting to get across the street, which he would then be in contact with other citizens that were in the project, or the apartment building, in that area and he could do harm." *Id.* The present officers "uniformly contend[ed] that deadly force was justified." *Id.* at 473.

On these facts, the District Court found that "it was objectively reasonable for [the officers] to believe that Ludwig posed a serious and immediate danger of

physical harm to bystanders in the vicinity." *Id*. at 472. The Eighth Circuit, however, reversed, finding that "material questions of fact remain as to whether Ludwig's actions at the time of the shooting, even if dangerous, threatening, or aggressive, 'posed a threat of serious physical harm.'" *Id*. at 473 (quoting *Garner*, 471 U.S. at 11-12)). In particular, the Eighth Circuit noted that Ludwig was emotionally disturbed, and that the Police Department had a policy which emphasized using lesser force on such persons when they had not committed a dangerous felony. *Id*. at 472. Moreover, the Eighth Circuit added, there were fact questions over how much of a threat Ludwig posed to bystanders in the area, based on both Ludwig's behavior toward the police and the "number and location" of bystanders. *Id*. at 473-74. In sum, the Eighth Circuit ruled that a reasonable juror could find that the officers "fatally shot Ludwig after St. Paul police suspected him initially of being homeless and emotionally disturbed, and, later, of misdemeanor criminal activity which arguably placed no one in immediate harm." *Id*. at 474.

Likewise here, a reasonable juror could find that, even with a knife, Mr. Kong did not pose a "threat of serious physical harm" to either the pedestrians or officers he was running away from, or the moving vehicles he was running in the general direction of. *Garner*, 471 U.S. at 11-12. In making this determination, a juror might take into account everything Defendants had observed in their seven-minute interaction with Mr. Kong, including the fact that Mr. Kong arguably appeared to be enduring a "mental health crisis," as defined by the City's CIT policy, and accordingly could not fully comprehend the situation at hand. (*See*

CIT Policy at 1-2 (detailing the "possible signs of mental health issues or crises," several of which Mr. Kong displayed here).)[15] Indeed, like the St. Paul Police Department policy at issue in *Ludwig*, the Burnsville CIT policy cautions officers to use alternatives to deadly force when dealing with emotionally disturbed persons, if possible. *Compare supra* at 6 *with Ludwig*, 54 F.3d at 472. "Although these police department guidelines do not create a constitutional right, they are relevant to the analysis of constitutionally excessive force." *Ludwig*, 54 F.3d at 472 (cleaned up). This is not to say that Mr. Kong's emotionally disturbed state would *ipse dixit* render Defendants' decision to shoot him unreasonable. *See Frederick*, 873 F.3d at 647 (holding, in the context of using deadly force on a mentally ill person, that "the relevant inquiry is whether [the decedent] posed a threat, not what prompted the threatening conduct"); *accord* CIT Policy at 2 ("Nothing in this policy shall be construed to limit an officer's authority to use reasonable force when interacting with a person in crisis."). Rather,

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[15] At their depositions, the officers uniformly contended that, at the time, they believed Mr. Kong was on high on methamphetamines, rather than in the midst of a mental health crisis. (*See supra* at 8-9; *accord* Tonne Dep. at 11, 30-31; Yakovlev Dep. at 22-23, 31-32.) However, when it comes to the CIT policy, this may be a distinction without a difference. As Defendants' own medical expert points out, "acute psychosis due to mental illness and methamphetamine intoxication" "are clinically indistinguishable." (Dr. Hail Ex. Rep. at 13; *accord* Wicklgren Ex. Rep. ¶ 23 (noting that police should respond to "psychotic behaviors" caused by "mental health" issues and/or "drug ingestion" in "the same" manner).) Moreover, an experienced police dispatcher who heard the facts from the 9-1-1 call assumed that this might be a mental health situation. (*See* Kennedy Dep. at 7, 11-12.) Accordingly, a reasonable juror might find the CIT policy's guidance relevant here, as it was in *Ludwig*.

Mr. Kong's mental condition (and accordant inability to understand the situation at hand) is simply one fact among many that may call into question the reasonableness of Defendants' belief that Mr. Kong posed a serious physical threat to bystanders when he fled from his vehicle, such that deadly force (as opposed to a lesser form of force) was necessary. *See Ludwig*, 54 F.3d at 472 (noting that "Ludwig's status as an emotionally disturbed person" did not "entitle[] him to any additional, clearly established constitutional rights," but, rather, would be "relevant to the trial court's determination of objective reasonableness in the substantive portion of this trial").

Other Eighth Circuit cases involving the use of deadly force against knife-wielding persons are readily distinguishable. As the Court noted above, the common thread among cases where the court has ruled for the police at summary judgment is that the decedent moved *toward* officers or pedestrians at the time of death, usually in a threatening manner. Consider *Hassan v. City of Minneapolis*, the case arguably next closest to this one, after *Ludwig*. There, the police shot and killed a mentally ill man brandishing a machete and tire iron following a mid-afternoon 11-minute confrontation in "the middle of [a residential] street" and then in a "shopping mall parking lot." 489 F.3d at 917. During this confrontation, the man repeatedly "ran at" and slashed at officers and "moved toward citizens more than once." *Id.* at 917-19. The man also made comments like "that ain't enough," after the officers hit him with a taser. *Id.* at 917. The officers finally shot the man, following five failed taser hits, when he "moved toward the officers" while "making slashing motions with his machete" and "hit[ting] the trunk of the squad car [which the officers were

standing next to] with his machete." *Id.* at 918. The officers in that case had also undergone CIT training. *Id.* at 917-18. On these facts, both the District Court and the Eighth Circuit found that the officers' use of deadly force was not unreasonable because, even if the man was mentally ill, he "posed a significant and immediate threat of death or serious physical injury to the officers and to the public." *Id.* at 919.

Schneider v. City of Minneapolis, No. 03-cv-3510 (JMR/FLN), 2006 WL 1851128 (D. Minn. June 30, 2006), is also instructive. There, the police entered an apartment on a domestic disturbance call and encountered a "highly disturbed" woman "yell[ing] something about Satan" and charging toward them with a long knife. *Id.* at *1. The officers quickly exited the apartment and held the door shut, as the woman "repeatedly attempted to open the door." *Id.* After the woman stopped pushing on the door, the officers re-entered the apartment. *Id.* at *2. Once inside, the officers again encountered the woman in her bedroom, where she was holding a knife and calling the police "Nazis and pigs." *Id.* at *3. The woman ignored the officers' commands that she drop the knife, and instead "advanced to the bedroom doorway," just feet from the officers. *Id.* Two officers simultaneously shot and killed her. *Id.* On these facts, the Court granted summary judgment to the defendant officers, finding that, even though the woman was mentally ill, it was "objectively reasonable" to use deadly force on "an epithet-screaming woman advancing on them with a knife." *Id.* at *6-7.

Plaintiff's behavior in this case was certainly frightening and unpredictable, like the decedents in *Hassan* and *Schneider*. However, when one views the video evidence in the light most favorable to Plaintiff,

Mr. Kong posed a far less imminent threat of "death or serious bodily injury" to bystanders (or the officers) when Defendants opened fire on him. Not only was Mr. Kong moving away from the officers and pedestrians at the time of his death, but his (arguably) confused and frantic behavior during the seven-minute lead-up to the shooting falls far closer to the emotionally distraught behavior in *Ludwig* than the menacing behavior displayed in *Hassan* and *Schneider*.

For these reasons, a genuine dispute of material fact also exists as to whether Mr. Kong "pose[d] a significant and immediate threat of serious injury or death" to the surrounding public at the time of the shooting. *Capps*, 780 F.3d at 886.[16]

b. Whether Defendants Violated Clearly Established Law

1. The Law

Of course, even if material disputes of fact preclude the Court from deeming Defendants' use of deadly

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[16] Although the parties discussed other cases involving mentally ill knife-wielding plaintiffs in their briefs, those cases are not helpful to determining whether the officers' use of deadly force was objectively reasonable under the Fourth Amendment. *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) discussed only the "clearly established" prong of the qualified immunity analysis, and hence provides no guidance on the reasonableness of an officer's use of deadly force. Additionally, *Frederick v. Motsinger*, cited repeatedly by Defendants, involved the reasonableness of using a *taser* on a mentally disturbed person wielding a knife in public, which is not at issue here. 873 F.3d at 646. Indeed, in *Frederick*, the plaintiff conceded that the officers were justified in shooting and killing the decedent (after the taser proved ineffective) because the undisputed video evidence showed the decedent "charg[ing] toward" the police officer "with her knife in a stabbing position." *Id*. at 645. Suffice it to say, that was not the case here.

force objectively reasonable as a matter of law, the Court must still find in Defendants' favor if the constitutional right Defendants allegedly violated was not "clearly established" as of March 17, 2016. *Neal*, 895 F.3d at 582. This requirement insures that law enforcement officers have "fair warning" that their treatment of a person may be unconstitutional at the time of the incident. *Id*. (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). In recent years, moreover, the Supreme Court has emphasized, repeatedly, that courts must not "define clearly established law at a high level of generality." *Kisela*, 138 S. Ct. at 1152; *White v. Pauly*, 137 S. Ct. 548, 552 (2017); *Sheehan*, 135 S. Ct. at 1776. In other words, because "the general rules [surrounding the use of deadly force] set forth in *Garner* and *Graham* do not by themselves create clearly established law outside an obvious case," courts should look for "existing precedent" that "squarely governs the specific facts at issue." *Kisela*, 138 S. Ct. at 1153 (cleaned up). However, "it is not necessary . . . that the very action in question has previously been held unlawful," so long as precedent evinces "a fair and clear warning of what the Constitution requires." *Thompson*, 894 F.3d at 999 (cleaned up).

2. Analysis

The Court understands that this is a demanding standard.[17] However, viewing the facts in the light

[17] Indeed, the standard is so demanding that, in recent years, jurists and academics from across the ideological spectrum have called the historical and legal underpinnings of this "clearly established" inquiry into question. *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871-72 (2017) (Thomas, J., concurring); *Zadeh v. Robinson*, 902 F.3d 483, 498-500 (5th Cir. 2018) (Willett, J., concurring); William Baude, *Is Qualified Immunity Unlawful?*, 106

most favorable to Plaintiff, Eighth Circuit law provided Defendants "a fair and clear warning of what the Constitution require[d]" when confronted with this situation. *Thompson*, 894 F.3d at 999. The "squarely governing" precedent is *Ludwig v. Anderson*, which the Court described at some length above. *See supra* at 32-34. That case, which has been cited over 475 times since 1995, established that, without more, it is not constitutionally reasonable to use deadly force against a fleeing, emotionally disturbed person armed with a knife, if that person had not previously attacked anybody, if that person is moving away from the officers and other nearby pedestrians, and if that person does not pose an imminent threat of death or grave bodily harm to others. If anything, this case may have been clearer cut than *Ludwig*, in that Ludwig was running toward a nearby "apartment building" of bystanders, while holding a knife, whereas Mr. Kong was only running toward *moving vehicles* on a busy highway. *See Ludwig*, 54 F.3d at 469. Suffice it to say, a knife poses a far greater threat to a pedestrian than a driver. *Cf. Reyes v. Bridgewater*, 362 Fed. App'x 403, 407 (5th Cir. 2010) (denying qualified immunity and noting that "[t]he immediacy of the risk posed by a man armed with a kitchen knife at his side is far less than that of a man armed with a gun" because "a gun can kill instantaneously at a distance" whereas a man with a knife "would have had to first either advance toward [another] or at least raise the knife before he could inflict any harm").

Cal. L. Rev. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797 (2018).

Although Defendants point out various factual differences between this case and *Ludwig*, these differences are either irrelevant or would require the Court to view the facts in the light most favorable to Defendant. (*See* Defs.' Reply Br. at 2 (stating that, unlike Ludwig, Mr. Kong "sprinted *toward* people with a knife," "repeatedly swung . .. his knife against the windows *toward* the Officers," and "lunged his knife out the broken passenger window *toward* [Officer] Jacobs").) As the Court explained above, a reasonable juror could find that Mr. Kong did not assault or threaten the officers before his flight, and that Mr. Kong did not pose an imminent threat of death or grave bodily harm to the surrounding public when he did flee. *See Tolan*, 572 U.S. at 657 ("[C]ourts must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions.").

All told, because the factual differences between *Ludwig* and this case do not "leap from the page," the Court declines to grant Defendants qualified immunity at this juncture. *Cf. Kisela*, 138 S. Ct. at 1154 (finding that law was not clearly established when the "differences between" the purportedly governing precedent "and the case before us leap from the page") (citing *Sheehan*, 135 S. Ct. at 1776).

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The Court acknowledges that Mr. Kong did not respond to Defendants' repeated commands to drop his knife, and that he fled his car with a weapon in hand. *See Wealot*, 865 F.3d at 1125 (noting that whether a person "was actively resisting arrest or attempting to evade arrest by flight" is relevant to the objective reasonableness analysis). The Court also acknowledges

that Defendants were "forced to make [a] split-second judgment" in "circumstances that [were] tense, uncertain, and rapidly evolving." *Church*, 898 F.3d at 833. However, given both the Eighth Circuit precedent and the significant disputes of material fact detailed above, the Court cannot resolve this Fourth Amendment claim as a matter of law. The facts surrounding Mr. Kong's death are in dispute, as is evident from the video evidence. It should be for a jury to decide whether the officers acted reasonably under the circumstances.

For these reasons, the Court denies Defendants' summary judgment motion with respect to Plaintiff's Fourth Amendment claim.

3. Deliberate Indifference to Mr. Kong's Medical Needs Under the Fourteenth Amendment

1. The Law

The Due Process Clause of the Fourteenth Amendment prohibits state and local government officials from depriving "any person" of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV. This Clause "generally confer[s] no affirmative right to governmental aid." *DeShaney v. Winnebago Cty. Dep't Soc. Servs.*, 489 U.S. 189, 196 (1989). However, "when the State takes a person into its custody and holds him there against his will," the Clause "impos[es] . . . a corresponding duty to assume some responsibility for his safety and general well-being." *Id.* at 199-200; *accord Estelle v. Gamble*, 429 U.S. 97 (1976) (holding, under the Eighth Amendment, that the State must provide prisoners with adequate medical care). This is so because, "when the State by the

affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." *DeShaney*, 489 U.S. at 200.

In line with these general principles, the Eighth Circuit has held that an "arrestee," in the police's custody, "has a right to be free from deliberately indifferent denials of emergency medical care." *Bailey v. Feltmann*, 810 F.3d 589, 593 (8th Cir. 2016).[18] "'Custody' in this context must be something more than an individual's reasonable belief that he is not free to leave, as is the case under the Fourth Amendment." *Gladden v. Richbourg*, 759 F.3d 960, 965 (8th Cir. 2014). "Rather, custody is effected for purposes of the Fourteenth Amendment only when the state 'so restrains an individual's liberty that it renders him unable to care for himself.'" *Id.* (quoting *DeShaney*, 489 U.S. at 200)). This is a "high standard." *Id.*; *accord Dodd v. Jones*, 623 F.3d 563, 567 (8th Cir. 2010).

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[18] Admittedly, in this circuit, "it is an open question whether the standard of the Fourth or the Fourteenth Amendment applies to medical care claims of *arrestees*." *Ryan v. Armstrong*, 850 F.3d 419, 425 n.2 (8th Cir. 2017) (emphasis added). However, because Plaintiff did not invoke the Fourth Amendment in their briefing or complaint, the Court proceeds on the understanding that the Fourteenth Amendment, and its accordant "custody" standard, governs this claim. *See Carpenter v. Gage*, 686 F.3d 644, 650 (8th Cir. 2012) ("Carpenter cites authorities applying due process analysis, and he does not invoke the Fourth Amendment, so we consider his argument on that basis."); *see also Bailey*, 810 F.3d at 593 (declining to resolve this question even when the plaintiff did invoke the Fourth Amendment).

If a person is in the police's custody, that person may state a Due Process claim if he "demonstrate[s] that he suffered an objectively serious medical need, and that the [officers] had actual knowledges of those needs but deliberately disregarded them." *Carpenter*, 686 F.3d at 650. "This showing requires a mental state akin to criminal recklessness." *Barton v. Taber*, 820 F.3d 958, 965 (8th Cir. 2016). For instance, the Eighth Circuit recently found that two officers were deliberately indifferent to a seriously ill pretrial detainee's medical needs "when they allowed him to scream, howl, and bang against his cell door for eight hours without attempting to talk to him or seek medical intervention." *Ryan*, 850 F.3d at 426.

2. Analysis

Here, Plaintiff argues that Defendants took Mr. Kong into custody when Officers Jacobs and Tonne blocked his car in. (Pl.'s Br. at 32-34 (citing *U.S. v. Turley*, 161 F.3d 513, 514-15 (8th Cir. 1998).)[19] Then, Plaintiff continues, Defendants deliberately ignored Mr. Kong's obvious need for medical attention when they broke his car window and tasered him, instead of waiting for the medics that Officer Jacobs had summoned (and who arrived approximately six minutes after the shooting, along with additional police officers). (*Id.* at 34-37.) "Such actions," Plaintiff contends, "caused Mr. Kong to exit his vehicle, where he was no longer amenable to medical evaluation, observation, and ultimately treatment." (*Id.* at 36.)

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[19] In their briefs, both parties use the phrase "seized" rather than "taken into custody." However, because this claim is being analyzed under the Fourteenth Amendment, the Court will use the latter phrase.

Defendants, by contrast, argue that Mr. Kong was not taken into custody until his death. (Defs.' Br. at 37-39) And even if Mr. Kong was in custody during the seven-minute encounter, Defendants assert, there is no case law, much less "clearly established" case law, that would have put officers on notice that they had a constitutional duty to provide medical care to someone in Mr. Kong's position. (*Id.* at 39.)

The Court finds Defendants' actions in the lead-up to Mr. Kong's death troubling, to say the least. However, the Court declines to consider the merits of Plaintiff's Due Process claim because, even viewing the facts in the light most favorable to Plaintiff, qualified immunity plainly protects the officers from suit. *See Pearson*, 555 U.S. at 237 (encouraging courts to decide qualified immunity defenses on the "clearly established "prong" when "it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right"). The Court cannot find precedent, from this Circuit or any other, that would have informed the officers that Mr. Kong was in their custody for Fourteenth Amendment purposes, such that they had an affirmative duty to provide him medical care. *See Kisela*, 138 S. Ct. at 1153 (instructing courts to look for "existing precedent" that "squarely governs the specific facts at issue"). Indeed, in its research, the Court cannot find any medical indifference case with facts similar to this one.

In every case involving deliberate indifference to an arrestee's medical needs that the Court has found (or which Plaintiff has cited in their brief), the plaintiff was physically placed under arrest and/or held in a jail or squad car before the deliberate indifference claim arose. *See, e.g.*, *Barton*, 820 F.3d at 964-65; *Bailey*, 810 F.3d at 593-94; *Carpenter*, 686 F.3d at 650-51;

accord DeShaney, 489 U.S. at 200 (suggesting that the right to medical care would only arise during "incarceration, institutionalization, or other similar restraint on personal liberty"). Here, although Officer Jacobs technically placed Mr. Kong under arrest early on in the encounter, *see supra* at 9, Mr. Kong remained in his car until seconds before his death, and never submitted to Defendants' physical authority. Therefore, even if Defendants could see that Mr. Kong was in need of emergency medical assistance, the law did not clearly state that the officers had a duty to provide him that assistance until after he was "restrained," and "unable to care for himself." *DeShaney*, 489 U.S. at 200; *cf. Carpenter*, 686 F.3d at 651 ("Before the deputies could consider responding to Carpenter's medical needs, they had to subdue him and secure the premises.").

This situation is somewhat analogous to *Dodd v. Jones*. There, police officers responded to a car accident and found an injured driver (who had been driving drunk) lying in the middle of the road. *See* 623 F.3d at 565. The officers did not move the driver for fear of further injuring him. *Id*. Instead, the officers began investigating the accident scene. *Id*. Six minutes later, though, another drunk driver came along and ran over the injured driver. *Id.* at 566. After this happened, the officers arrested both drivers for drunk driving. *Id*. at 565-66. The injured driver brought a Due Process medical indifference claim against the officers, arguing that he was in their custody from the moment the officers arrived and that, by not attempting to block traffic or set road flares, the officers were deliberately indifferent to his medical needs. *Id*. However, the Eighth Circuit found it "doubt[ful]" that the officers "took [the driver] into

custody and held him against his will so as to trigger the corresponding duty described in *DeShaney*." *Id*. at 567. "The absence of a clearly established duty for the officers to protect [the injured driver] under these circumstances," the Eighth Circuit concluded, "is sufficient grounds to affirm the district court's grant of summary judgment in a qualified immunity case." *Id*.

Defendants certainly exercised more force to hold Mr. Kong "against his will" than the officers in *Dodd*, and arguably should have paid more careful attention to Mr. Kong's mental condition while they had him surrounded. *Id*. However, because the officers never actually took Mr. Kong into custody during their seven-minute encounter with him, the same "absence of a clearly established duty" applies here. *Id*.

The only contrary authorities Plaintiff cites for the proposition that Defendants should have known that Mr. Kong was in their custody for Fourteenth Amendment purposes are Fourth Amendment "seizure" cases. *See, e.g.*, *Turley*, 161 F.3d at 515 (holding that "blocking" a person's "truck with the squad car resulted in a Fourth Amendment seizure"). However, as the Court noted above, the Eighth Circuit has made clear that "custody" under the Fourteenth Amendment is a much higher bar than a "seizure" under the Fourth Amendment, for the policy reasons set forth in *DeShaney*. *See Gladden*, 759 F.3d at 965. Because this case law is inapposite, the law did not offer Defendants "a fair and clear warning of what the Constitution require[d]" in this situation. *Thompson*, 894 F.3d at 999.

For these reasons, the Court grants Defendants qualified immunity with respect to Plaintiff's Fourteenth Amendment claim.

B. Negligence

1. The Law

"The basic elements of a negligence claim are (1) a duty; (2) a breach of that duty; (3) that the breach of duty be the proximate cause of plaintiff's injury; and (4) that plaintiff did in fact suffer an injury." *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 157 (Minn. 1982). However, "[t]he doctrine of official immunity protects from personal liability a public official charged with duties that call for the exercise of judgment or discretion unless the official is guilty of a willful or malicious wrong." *Rico v. State*, 472 N.W.2d 100, 106-07 (Minn. 1991). Official immunity under Minnesota law is not the same as qualified immunity under Section 1983. *See Elwood v. Rice Cty.*, 423 N.W.2d 671, 677 (Minn. 1988). Under Minnesota law, "whether official immunity applies turns on: (1) the conduct at issue; (2) whether the conduct is discretionary or ministerial . . . ; and (3) if discretionary, whether the conduct was willful or malicious." *Vassallo ex rel. Brown v. Majeski*, 842 N.W.2d 456, 462 (Minn. 2014).

Where it is agreed that the conduct at issue was discretionary, as is the case here, only the third consideration applies. (*See* Pl.'s Br. at 42 (conceding that the Police Department policy in question is discretionary).) "In determining whether an official has committed a malicious wrong," courts must consider "whether the official has intentionally committed an act that he or she had reason to believe is prohibited." *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 571 (Minn. 1994). This is "less of a subjective inquiry into malice," and "more of an objective inquiry into the legal reasonableness of an official's actions." *Id.*; *accord*

Hayek v. City of St. Paul, 488 F.3d 1049, 1056 (8th Cir. 2007). In other words, because "malice" in this context "does not refer to the question of whether [an] official was acting with animus," "an allegation of actual malice is not necessary." *Gleason v. Metro. Transit Operations*, 563 N.W.2d 309, 317 & n.3 (Minn. Ct. App. 1997). As such, "[w]hether an officer acted maliciously is usually a question of fact for the jury." *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 664 n.5 (Minn. 1999); *see, e.g.*, *Anderson v. City of Hopkins*, 805 F. Supp. 2d 712, 724-25 (D. Minn. 2011); *Mattson v. Becker Cty.*, No. 07-cv-1788 (ADM/RLE), 2008 WL 3582781, at *10 (D. Minn. Aug. 12, 2008); *Gleason*, 563 N.W.2d at 319; *Soucek v. Banham*, 503 N.W.2d 153, 161 (Minn. Ct. App. 1993); *Maras v. City of Brainerd*, 502 N.W.2d 69, 78 (Minn. Ct. App. 1993).

If a court determines that an official is not entitled to official immunity, "vicarious official immunity will not protect [a municipality that is also named as a defendant]." *Brown v. City of Bloomington*, 706 N.W.2d 519, 524 (Minn. Ct. App. 2005) (citing *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 316 (Minn. 1998)).

2. Analysis

Plaintiff's negligence claim here centers around the Burnsville Police Department's CIT Policy. (*See supra* at 6 (hereinafter "the Policy").) Put simply, Plaintiff contends that (1) Defendants had a duty to adhere to the Policy, given Mr. Kong's plainly distressed behavior; (2) Defendants breached that duty by breaking Mr. Kong's windows and escalating the situation, in direct contravention of the "de-escalation" tactics delineated in the Policy; and (3) Defendants' actions

proximately caused Mr. Kong's death. (*See* Pl.'s Br. at 42-43.)

In response, Defendants only raise an official immunity defense. Because both parties agree that the Policy is discretionary, Defendants primarily contend that the evidence definitively shows that they did not "intentionally commit[] an act that [they] had reason to believe [was] prohibited" by the Policy. *City of Mounds View*, 518 N.W.2d at 571. More specifically, Defendants argue that they did not know Mr. Kong had any mental health issues at the time of the shooting, and that the Policy accordingly did not apply. (*See* Defs.' Br. at 41.) Defendants also argue that, even if the Policy did apply, they properly exercised their discretion in an emergency situation, and did not knowingly violate the Policy. (*Id*. at 41-42; Defs.' Reply Br. at 5-6.)

Plaintiff, in turn, contends that, (1) the record shows that Defendants "believed that Mr. Kong was experiencing a crisis caused by such drug intoxication," (2) "[d]espite such knowledge, Defendant[s] disregarded the provisions of the Policy, which clearly applied to Mr. Kong," and (3) "[t]he contrast between the guidance set forth in the Policy and what actually happened could not be starker, and supports a finding that Defendants proceeded in the unreasonable manner they did because they willfully disregarded department policy." (Pl.'s Br. at 42-43.)

Viewing the evidence in the light most favorable to Plaintiff, the Court finds that material questions of fact exist as to whether Defendants knowingly, or "maliciously," acted in contravention of the Policy. First, even though the officers uniformly contended at their depositions that they did not believe Mr. Kong

was experiencing a mental health crisis, a reasonable juror could infer from the video evidence and the Policy's plain text (as well as other circumstantial evidence, like Officer Jacobs's decision to call for a medic and the dispatcher's response to that call), that the Policy applied in this situation. *See supra* note 15.

Second, a reasonable juror could find that Defendants' actions contravened the Policy. For example, the Policy lists ten things officers should do when confronted with someone in a mental health crisis besides using force, such as "requesting available backup officers and specialized resources," and "secur[ing] the scene and clear[ing] the immediate area." (*See* CIT Policy at 2.) A reasonable juror might find that Defendants acted contrary to the Policy by breaking Mr. Kong's windows and using a taser on him six minutes into the encounter, even though Mr. Kong was "contained," in Officer Jacobs's words (Jacobs Body Camera at 5:45-5:55), and additional officers were available from neighboring police departments to help clear the scene of bystanders. *See supra* at 17 and note 12. A reasonable juror might also conclude that Defendants' guiding assumption that "the situation was not safe so long as Mr. Kong was in his car," *supra* note 7 (quoting Mott Dep. at 48-49), ran afoul the Policy's directive that "passively monitoring the situation may be the most reasonable response to a mental health crisis." (CIT Policy at 3.) This factual dispute is further sharpened by the parties' expert witnesses. (*Compare* Wickelgren Ex. Rep. (opining that Defendants acted in accordance with the Policy and reasonable law enforcement techniques) *with* Blaricom Ex. Rep. (opining that Defendants acted in contravention of the Policy and reasonable law enforcement techniques).)

Third, a reasonable juror could find that Defendants had "reason to believe" that their actions contravened the Policy because they were all familiar with the Policy at the time of the incident. *City of Mounds View*, 518 N.W.2d at 571. Indeed, Officer Mott had received extensive training on the Policy, and was a member of the Department's "CIT Team." *See supra* at 6; *cf. Maras*, 502 N.W.2d at 78 (denying official immunity at summary judgment and noting that an officer's "intentional" decision to shoot a person who he deemed a threat, along with the officer's "aware[ness] of state and city policy regarding the use of deadly force," were "sufficient to let the jury decide whether his actions constituted a willful or malicious wrong").

The Eighth Circuit decision, *Hayek v. City of St. Paul*, offers a useful comparison to this case. There, police officers received a call that a mentally disturbed young man was having a mental breakdown in his mother's apartment. *See* 488 F.3d at 1052. Police officers entered the apartment and found the man, alone, holding a "Samurai sword in his lap." *Id.* at 1053. The officers began talking to the man, telling him "they were there to help him" and "were his friends." *Id.* After further conversation, the officers convinced the man to put his weapon down and come out into the hallway. *Id.* However, when the officers attempted to arrest the man, the man resisted and ran back into the apartment. *Id.* After the officers unsuccessfully attempted to use a canine to bring the man down, the man grabbed his sword and began stabbing an officer. *Id.* The other officers then shot and killed the young man. *Id.*

Plaintiff there brought a negligence claim, and argued that the officers failed to follow their duties un-

der a "Policy on Emotionally Disturbed Persons" similar to the Policy at issue here. *Id*. at 1056. The Eighth Circuit rejected this argument at summary judgment, and found that the officers were entitled to official immunity. "The record clearly shows the officers adequately complied with this policy," the Eighth Court held, especially because the officers "attempted to establish a friendly rapport with [the man] and [first] restrain [him]," before resorting to "deadly force after [the man] stabbed [an officer] and continued to pursue [the officer]." *Id*.

By contrast, the record here does not "clearly show" that Defendants "adequately complied" with the Policy, up to and including their use of deadly force on the fleeing Mr. Kong. *Id*. For instance, in comparison to the officers' initially "friendly" approach in *Hayek*, there is a fact question here as to whether Defendants knowingly contravened the Policy's "de-escalation" guidance during the few minutes between arriving on the scene and breaking Mr. Kong's car windows. *Cf. Hall v. Ramsey Cty.*, 2016 WL 3659261, at *5 (Minn. Ct. App. July 11, 2016) (concluding that a detox facility nurse's "actions were not willful or malicious because they were justified under the detox center's procedures").

For these reasons, the Court denies Defendants' summary judgment motion with respect to Plaintiff's negligence claim.[20]

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[20] Because the Court concludes that the individual officer Defendants are not entitled to official immunity on Plaintiff's negligence claim, the City of Burnsville is not entitled to vicarious official immunity either. *See Brown*, 706 N.W.2d at 524.

III. CONCLUSION

Based on the submissions and the entire file and proceedings herein, **IT IS HEREBY ORDERED** that Defendants' Motion for Summary Judgment [Doc. No. 43] is **GRANTED IN PART AND DENIED IN PART**.

A jury trial is set for Monday April 15, 2019 at 10:00 AM in Courtroom 7B (STP). The Court will issue a final pretrial order forthwith.

Dated: December 14, 2018

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Judge