APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[filed August 14, 2020]

MARY STEWART, as Administrator of the Estate of Luke O. Stewart, Sr., Deceased, *Plaintiff-Appellant*, v. CITY OF EUCLID, OHIO; MATTHEW RHODES, Euclid Police Officer, *Defendants-Appellees*.	No. 18-3767

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.

No. 1:17-cv-02122—James S. Gwin, District Judge.

Argued: May 8, 2019
Decided and Filed: August 14, 2020

Before: SILER, GIBBONS, and DONALD, Circuit Judges.

COUNSEL

ARGUED: Jacqueline Greene, FRIEDMAN & GILBERT, Cleveland, Ohio, for Appellant. Frank H. Scialdone, MAZANEC, RASKIN & RYDER, CO., L.P.A., Cleveland, Ohio, for Appellees. **ON BRIEF:** Jacqueline Greene, Sarah Gelsomino, Terry H. Gilbert, FRIEDMAN & GILBERT, Cleveland, Ohio, for Appellant. Frank H. Scialdone, James A. Climer, MAZANEC, RASKIN & RYDER, CO., L.P.A., Cleveland, Ohio, for Appellees.

SILER, J., delivered the opinion of the court in which GIBBONS, J., joined. DONALD, J. (pp. 15–24), delivered a separate opinion concurring in part and dissenting in part.

OPINION

SILER, Circuit Judge. Plaintiff Mary Stewart appeals the district court's grant of summary judgment to defendants, Officer Matthew Rhodes and the City of Euclid, on her claims brought pursuant to 42 U.S.C. § 1983 and state law. We **AFFIRM** dismissal of Stewart's federal claims but **REVERSE** dismissal of Stewart's state law claims and **REMAND** to the district court.

FACTUAL HISTORY

Around 7:00 a.m. on March 13, 2017, a Euclid, Ohio resident called the police department to report a suspicious vehicle outside her residence. The caller said a black car she did not recognize had been idling for about twenty minutes with its parking lights on. Officers Rhodes and Catalani were dispatched to check on the vehicle.

Hidden from view behind the Honda's dark windows was a sleeping Luke Stewart. He had hoped to spend the night at a friend's house, but when the friend did not answer his phone, Stewart parked nearby on South Lakeshore Boulevard. The area is residential with a school in close proximity.

Officer Catalani was the first to arrive at the scene. Initially, he positioned his car behind Stewart's vehicle, similar to a traffic stop. Catalani noticed the vehicle's running lights were on.

Catalani shined his flashlight through the car's windows and saw a digital scale in the center console area, an item he thought to be a burnt marijuana blunt in the passenger seat, and an aluminum screw top he believed to be from a wine bottle. Catalani also noticed Stewart who appeared asleep in the driver's seat. Catalani ran the license plate of the vehicle, which indicated the vehicle's owner had an outstanding warrant, but ultimately thought Stewart looked too young to be the owner.

While Rhodes drove to the scene, he heard Catalani radio that the car was occupied but that he did not believe it was by the vehicle's owner. Catalani stated, "once you get here, we're goina [*sic*], uh, end up pulling this guy out." When Rhodes arrived, Catalani explained what he had seen inside the car, and then Rhodes moved his car in front of the Honda to limit the potential for escape. Rhodes turned on his takedown lights and his spotlight but, like Catalani, did not turn on his vehicle's dashboard camera or his belt microphone. Neither officer turned on his vehicle's blue and red overhead lights.

Rhodes approached Stewart's vehicle from the passenger's side while Catalani approached from the driver's side. Catalani knocked on the window, and Stewart woke up. Catalani waived at Stewart and said, "hi." Stewart waived back, sat up in the seat, and started the car. Neither officer announced himself as a police officer. Catalani yelled for Stewart to "stop" and opened the driver's side door in an attempt to keep the vehicle from moving. He grabbed Stewart's left arm and tried to pull him away from the gearshift and out of the vehicle. Catalani reached

around Stewart's head with his right arm in an attempt to grab a pressure point under Stewart's jaw. Stewart began yelling.

While Catalani attempted to pull Stewart out of the Honda through the driver's side door, Rhodes opened the passenger's side door and began pushing Stewart. Rhodes leaned his upper body into the vehicle and braced his knees on the passenger's seat. Stewart did not prevent Rhodes from pushing him, but put the vehicle into gear and drove the Honda into Rhodes's patrol vehicle. While Catalani testified that the Honda struck the patrol car "pretty hard," neither officer remembers falling or losing balance from the impact. Stewart was able to drive around Rhodes's police car on the side closest to the center of the road.

Rhodes continued trying to gain control of the gear shift from the passenger's side of the car and, fearing his legs would be trapped if Stewart were to hit the open car door against Rhodes's patrol car as he went around it, Rhodes pulled his legs into the Honda. The door shut behind him. Catalani, who was still moving alongside Stewart's open driver's side door, decided to disengage with Stewart in fear of being injured by an oncoming vehicle. Catalani estimates that ten to fifteen seconds elapsed from the time he tapped on Stewart's window to Stewart's driving around Rhodes's patrol car.

To this point, Stewart had made no attempt to strike either officer. He began driving the vehicle down the road within the speed limit at around twenty-five miles per hour. While driving, Stewart looked over at Rhodes and asked, "Why are you in my car?" Rhodes yelled at Stewart in response, but does

not recall what he said. Catalani chased behind on foot.

Inside the car, Rhodes was intermittently attempting to gain control of the gearshift and the ignition keys while also striking Stewart in the side of the head with a closed fist. The strikes did not seem to have any effect on Stewart and he did not try to defend himself; Stewart simply responded to each blow by saying, "Naw, n****." Each time Rhodes pushed the gearshift into neutral, Stewart pushed it back into drive.

Rhodes eventually deployed his taser into Stewart's right side. Stewart shouted "Ah," and said, "you shot me." Rhodes pulled the taser trigger six times, but it had little effect on Stewart. He did not use the taser's close range drive stun feature; Rhodes did, however, use the taser to hit Stewart in the head causing a cut to open. Again, Stewart did not respond other than to say, "Naw, n****."

The Honda came to a stop in the intersection of South Lake Shore and East 222nd Street while making a left-hand turn. Rhodes believed he and Stewart hit another car because of how abruptly Stewart's vehicle stopped. Catalani testified that the Honda never struck a vehicle, however, and he thought the car simply stalled out. Rhodes believes he was thrown into the dashboard but does not "remember exactly." He testified that, during the stop, Stewart swatted at him and pushed him away but not with a closed fist. Rhodes got the car into neutral and shut off the engine, but could not get the keys out of the ignition. Rhodes heard dispatch instruct nearby officers to assist. The car was stopped for approximately ten to fifteen seconds in the intersection;

Rhodes did not try to get out of the car. Moments before Catalani reached the vehicle from behind, Stewart turned the car back on and continued driving.

After completing the turn onto 222nd Street, Stewart drove the car at approximately twenty to thirty miles per hour. Rhodes unsuccessfully tried again to put the car in park. The Honda went up over the curb and around a telephone pole before returning to the street. The car mounted the curb again near the intersection of 222nd Street and Milton Avenue. Rhodes claims he was thrown forward the second time the car struck the curb and Stewart used his right arm to push him forward, but Stewart made no attempt to strike Rhodes. At this point, Rhodes was able to get the car back into neutral, but Stewart continued to rev the engine. Rhodes believed that if he and Stewart "went forward again we were going to hit a telephone pole," implying the vehicle had stopped moving forward.

It was then that Rhodes pulled out his pistol and fired two shots into Stewart's torso. Stewart looked at Rhodes, said "Naw, N****," and, according to Rhodes, Stewart attempted to "punch" him for the first time. Rhodes shot Stewart three additional times, striking him in the neck, chest, and wrist. Stewart died from his wounds.

A later investigation by the Ohio Bureau of Criminal Investigation reported that continuous radio traffic showed fifty-nine seconds elapsed from the time Catalani advised dispatch that Stewart began to flee to the time he reported shots fired.

PROCEDURAL HISTORY

Mary Stewart, the mother of Luke Stewart, filed a lawsuit on his behalf against Officers Rhodes and Catalani and the City of Euclid. She brought federal claims pursuant to 42 U.S.C. § 1983 and *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978) for violating Stewart's Fourth Amendment right to be free from excessive force. And under Ohio law she claimed: (1) wrongful death; (2) intentional infliction of emotional distress; (3) assault and battery; (4) willful, wanton, and reckless conduct; and (5) survivorship claims against Rhodes and Catalani. This appeal deals only with the claims against Rhodes and the City of Euclid.

The district court found that qualified immunity barred the constitutional claims against Rhodes. It reasoned that Rhodes had probable cause to believe he was in danger of serious physical harm when unsecured in Stewart's car; he was at risk of being kidnapped; and Stewart's driving created a risk of serious physical harm to the public. The district court found the Constitution allowed Rhodes to shoot Stewart to prevent those immediate dangers. Further, even if Rhodes violated Stewart's constitutional rights, it held those rights were not clearly established as required to deny qualified immunity. Stewart's *Monell* claim was dismissed for lack of a constitutional violation, and the district court found Rhodes was entitled to immunity under Ohio law.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *Miller v. Maddox*, 866 F.3d 386, 389 (6th Cir. 2017). All facts and related inferences

are viewed in the light most favorable to the non-moving party. *Godawa v. Byrd*, 798 F.3d 457, 462 (6th Cir. 2015).

DISCUSSION

I. 42 U.S.C. § 1983 Claim Against Officer Rhodes

Qualified immunity shields an officer from liability "insofar as [his] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation marks omitted) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity thus entails two steps that can be undertaken in any order: (1) whether the public official's conduct violated a constitutional right, and (2) whether that right was clearly established at the time of the events. *Godawa*, 798 F.3d at 462-63 (citation omitted).

a. Constitutional Violation

The Fourth Amendment to the United States Constitution protects against unreasonable seizures, which includes excessive force by law enforcement officers. *Latits v. Phillips*, 878 F.3d 541, 547 (6th Cir. 2017). Shooting Stewart is a seizure under the Fourth Amendment. *Smith v. Cupp*, 430 F.3d 766, 774 (6th Cir. 2005) (citing *Tennessee v. Garner*, 471 U.S. 1, 9 (1985)). Thus, to be constitutional, it must be reasonable.

The reasonableness of a seizure depends on context: officers may use "some degree of physical coercion or threat" to effect an arrest, but the amount of force must be objectively reasonable under the

totality of the circumstances. *Graham v. Connor*, 490 U.S. 386, 396 (1989). Important considerations for determining reasonableness include "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." *Id.* In deadly force cases, the most critical factor is the immediate danger to officers and members of the public in the area. *Cass v. City of Dayton*, 770 F.3d 368, 375 (6th Cir. 2014). Where an officer has probable cause to believe the suspect poses such a threat of serious physical harm, "it is not constitutionally unreasonable to prevent escape by using deadly force." *Garner*, 471 U.S. at 11.

The circumstances, and their totality, are considered as they would have appeared to "a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. We take care not to "allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day." *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992).

As a threshold issue, it should be noted that Rhodes's choice to enter the vehicle, and his choice not to exit the vehicle when it was stopped for ten to fifteen seconds, is irrelevant in assessing the reasonableness of his use of force. *See Thomas v. City of Columbus, Oh.*, 854 F.3d 361, 365 (6th Cir. 2017) ("We do not scrutinize whether it was reasonable for the officer to create the circumstances" (quoting *Livermore v. Lubelan*, 476 F.3d 397, 406 (6th Cir. 2007))).

But having no duty to retreat does not mean Rhodes could use deadly force; his actions must still

be reasonable under the circumstances. Here, some of the circumstances support the reasonableness of Rhodes's actions. Stewart drove into a police car at the beginning of the interaction; his vehicle, for whatever reason, unexpectedly stopped in the middle of an intersection; and twice he drove onto a pedestrian sidewalk. All of this occurred at approximately 7:00 a.m. in a residential neighborhood with a school nearby. Stewart certainly presented some danger to the general public in the area.

So too do the circumstances show some danger to Rhodes. He was unsecured in a vehicle doing those things listed above. From the beginning to the end of the interaction, Stewart continued to put the car in drive and rev the engine, showing his commitment to driving the vehicle despite Rhodes's efforts to stop him.

But the question is "whether the *totality* of the circumstances" justifies deadly force. *Graham*, 490 U.S. at 396 (quoting *Garner*, 471 U.S. at 8-9). It does not. For one, Stewart was not aggressive toward Rhodes. The district court pointed out that, "[i]ndeed, Stewart was just driving[.]" Despite being hit by Rhodes's fist and later his taser, Stewart rarely attempted to defend himself. At no point did either officer see a weapon in Stewart's car, much less one that he attempted to use.

And Stewart's driving, while poor, was not so dangerous as to constitute "an immediate threat to the safety of the officers or others." *Id.* The officers estimated that Stewart's car only ever reached speeds of twenty to thirty miles per hour, with the car coming to a stop, or near- stop, twice during the approximately one-minute ride. While Rhodes claims to have

feared death or serious injury from being ejected through Stewart's windshield at the time he discharged his gun, the car had previously come to an abrupt halt in the intersection of South Lakeshore Boulevard and East 222nd Street; Rhodes does not remember if he went forward into the dashboard, and certainly did not sustain serious injury. Most importantly, Rhodes admits the car was in neutral at the time of the shooting and, in a light most favorable to the plaintiff, the car was not moving forward.

Even were Stewart to get the car back in gear, it seems doubtful that Stewart's driving alone was threatening enough to justify shooting him.[1] Finding deadly force reasonable to end a car chase often involves "dangerous prior conduct by the driver, imminent risk of harm to an identifiable party, or objective evidence of the driver's intent to harm officers." *Latits*, 878 F.3d at 551; *see Scott v. Harris*, 550 U.S. 372, 375-76 (2007) (driver exceeded 85 miles per hour on a two-lane road, running multiple red lights, swerving around more than a dozen cars, and forcing other vehicles off the roadway); *Freland*, 954 F.2d at 347 (driver led police on a "wild chase" exceeding speeds of 90 miles per hour).

Here, Stewart went up on the curb twice at low speeds as Rhodes hit and tasered him. While Catalani testified that he disengaged due to an oncoming vehicle, and that there were cars on 222nd Street,

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[1] It is true the Sixth Circuit recognizes that a dangerous situation may quickly evolve into a safe one before a police officer has a chance to realize the change. *Cupp*, 430 F.3d at 774-75. But here, it is unclear that Stewart's driving ever presented the type of immediate threat necessary for deadly force.

he admits there were initially no other cars on the street; neither side has pointed to evidence showing that there were bystanders or pedestrians along Stewart's route.

A jury could find that Stewart's use of the vehicle was not threatening lives around him and thus Rhodes's use of force was unreasonable. *See, e.g.*, *Cupp*, 430 F.3d at 775.

Finally, no reasonable officer in Rhodes's position would believe he was being kidnapped by Stewart. In fact, the circumstances here are the opposite of a kidnapping: Stewart was attempting to flee officers. While Rhodes had no duty to retreat from the vehicle, his entry into the vehicle and the availability of an exit speak to the totality of the circumstances informing his use of deadly force. A reasonable officer in Rhodes's position would have known that it was his own choice, and not any sort of pressure by Stewart, that caused him to enter the car. While these are acts Rhodes was legally entitled to do, a reasonable officer in his position would have understood he was not being kidnapped.

Some of the circumstances in this case suggest that Rhodes's use of deadly force was reasonable. Others—specifically, Stewart's lack of aggression toward Rhodes, the low speeds at which he was driving, and the fact that the car may have been already stopped at the time he was shot—allow a reasonable jury to find facts showing Stewart did not present an immediate danger of serious physical injury and thus the use of deadly force was unreasonable.

b. Clearly Established

Regardless of whether a constitutional violation occurred, however, the district court was correct to find the contours of the right were not clearly established in these circumstances.

To be "clearly established," existing precedent—either controlling authority or a "robust consensus of cases of persuasive authority"—must have placed the constitutional question "beyond debate." *Latits*, 878 F.3d at 552 (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 780 (2014)). The Supreme Court has recently elaborated:

> The "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him . . . . This requires a high degree of specificity. We have repeatedly stressed that courts must not define clearly established law at a high level of generality . . . the specificity of the rule is especially important in the Fourth Amendment context . . . . Thus, we have stressed the need to identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment. While there does not have to be a case directly on point, existing precedent must place the lawfulness of the particular arrest beyond debate.

District of Columbia v. Wesby, 138 S. Ct. 577, 589-90 (2018).

Graham and *Garner* establish the broad proposition that a seizure by law enforcement under the

Fourth Amendment must be reasonable, and it is unreasonable to seize a fleeing felon with deadly force when the suspect poses no immediate threat to officers or others. 490 U.S. at 394-96; 571 U.S. at 11. Other than in the "obvious" case, however, the Supreme Court has indicated these general propositions are "not enough" to delineate the contours of the right—to alert officers to the beginning and end of the right in the particular circumstances they face. *Brosseau v. Haugen*, 543 U.S. 194, 198-99 (2004) (quoting *Saucier v. Katz*, 533 U.S. 194, 201- 02 (2001)). Given the competing concerns noted earlier, this is not an obvious case.

Stewart has pointed to no cases in this circuit involving an officer being driven in a suspect's car, much less a case that shares similar characteristics such as the suspect's level of speed, aggression, or recklessness. While it is correct that the Sixth Circuit has established precedent for use of deadly force on those who flee in a vehicle, the two cases cited by Stewart involve officers standing outside a vehicle with wholly different concerns than an officer inside the vehicle. Those cases primarily focused on whether the officer was at risk of being hit or run over by the vehicle, a threat Rhodes did not face inside Stewart's car. *See Godawa*, 798 F.3d at 464–67 (finding officer outside a fleeing vehicle would have no fear of being struck given his positioning on the rear passenger's side); *Cupp*, 430 F.3d at 774 (determining that a jury could find an officer outside the fleeing vehicle was never in its path and fired his weapon after the vehicle had passed and thus was not in immediate danger). Put simply: cases about when officers may

use deadly force against the driver of a vehicle bearing down on them explain very little about whether that force is appropriate as a passenger of the vehicle. While plaintiff need not provide a case factually on all fours, existing precedent must be similar enough to place the question beyond debate. *Wesby*, 138 S. Ct. at 590. This circuit has not debated the types and level of threat faced by an officer inside a fleeing suspect's vehicle, much less placed it beyond debate.[2]

Further, Stewart's reference to two out of circuit cases does not provide the "robust consensus" required for the right to be clearly established. *Latits*, 878 F.3d at 552. Neither controlling nor persuasive precedent has clearly established Stewart's rights in the "particular circumstances" Rhodes faced. *Wesby*, 138 S. Ct. at 590. Indeed, few cases have ever considered the danger faced by an officer inside a fleeing suspect's vehicle and at what point it justifies the use of deadly force. Rhodes is entitled to qualified immunity.

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[2] While the dissent makes a compelling argument, we think it appropriate to narrowly evaluate the clearly established prong here. Recently, the Supreme Court sharply criticized a circuit for "defin[ing] the qualified immunity inquiry at a high level of generality" in a vehicular flight case. *Mullenix v. Luna*, 136 S. Ct. 305, 311 (2015) (per curiam). *See also District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018). Additionally, in a previous vehicular flight case, the Supreme Court explained that when an officer's "actions fell in the hazy border between excessive and acceptable force," we should hold that his conduct did not violate clearly established law. *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (citation omitted). Thus, Supreme Court precedent binds us to taking a narrow approach in analyzing this case.

II. Monell Claim Against City of Euclid

The Euclid Police Department's deadly force training program involved inappropriate and tasteless elements. The presentation materials included jokes trivializing the use of force, such as a graphic showing an officer beating a prone and unarmed suspect with the caption "[p]rotecting and serving the poop out of you." The presentation linked to a Chris Rock comedy routine in which Rock repeatedly jokes about police beating citizens on grounds of race and shows clips of officers beating suspects. Even the components of the program that can be stomached appear skimped, such as the single genre of factual scenarios used to test officers.

But Stewart cannot sue the City of Euclid for its distasteful, perhaps inadequate, training program. A municipality may be held liable for the constitutional violations of its employees when the municipality's custom or policy led to the violation. *Monell*, 436 U.S. at 694-95. But "[o]nly where a municipality's failure to train its employees in a relevant respect evidences a deliberate indifference to the rights of its inhabitants can such a shortcoming be properly thought of as a city policy or custom that is actionable under § 1983." *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) (internal quotation marks omitted). And "a municipal policymaker cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established." *Hagans v. Franklin Cty. Sheriff's Office*, 695 F.3d 505, 511 (6th Cir. 2012) (quoting *Szabla v. City of Brooklyn Park*, 486 F.3d 385, 393 (8th Cir. 2007) (en banc)). The Sixth Circuit more recently explained:

> When an injury arises directly from a municipal act—such as firing a city official without due process, or ordering police to enter a private business without a warrant, the violated right need not be clearly established because fault and causation obviously belong to the city. But when a municipality's alleged responsibility for a constitutional violation stems from an *employee's* unconstitutional act, the city's failure to prevent the harm must be shown to be deliberate under rigorous requirements of culpability and causation. The violated right in a deliberate-indifference case thus must be clearly established because a municipality cannot *deliberately* shirk a constitutional duty unless that duty is clear.

Arrington-Bey v. City of Bedford Heights, Ohio, 858 F.3d 988, 994-95 (6th Cir. 2017) (citations omitted) (quoting *Board of Cty. Comm'rs v. Brown*, 520 U.S. 397, 415 (1997)).

Here, Stewart's rights were not clearly established in the precedent of this circuit or otherwise. Thus, violation of his rights cannot be the "known or obvious consequence" disregarded by the City of Euclid through its training program and the *Monell* claim fails. *Connick v. Thompson*, 563 U.S. 51, 61 (2011).

III. Claims Against Officer Rhodes Under State Law

The district court found that Rhodes was entitled to immunity from Stewart's various state law claims

for the same reasons it concluded Rhodes did not violate Stewart's constitutional rights. We have rejected that analysis.

Statutory immunity under Ohio law, which applies to state law claims, is distinct from federal qualified immunity. *Roe v. Franklin Cty.*, 673 N.E.2d 172, 181 n.7 (Ohio. Ct. App 1996). Ohio provides statutory immunity from suit to its police officers unless, among other things, the officer's "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." Ohio Rev. Code § 2744.03(A)(6)(b). Reckless conduct is "characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Argabrite v. Neer*, 75 N.E.3d 161, 164 (Ohio 2016).

This court has previously endorsed the view that under Ohio law, "if the trier of fact were to find that [the decedent] posed no immediate threat of harm to anyone else . . . then the officer's actions in shooting the decedent were reckless at best." *Sabo v. City of Mentor*, 657 F.3d 332, 337 (6th Cir. 2011) (quoting *Carpenter v. City of Cincinnati*, No. C-1-99-227, 2003 WL 23415143, at *13 (S.D. Ohio Apr. 17, 2003)). And an Ohio appellate court has explained that the "relevant inquiry before the court [is] whether [the officer], from his own perspective, reasonably had probable cause to believe that he [was] at imminent risk of serious physical harm when he fired his weapon." *Hayes v. Columbus*, No. 13AP-695, 2014 WL 2048176, at *11 (Ohio Ct. App. May 15, 2014) (unreported).

As noted previously, a reasonable jury could find facts showing Stewart did not pose an immediate danger of serious physical harm and thus the use of deadly force was unreasonable. And the language of § 2744.03(A)(6)(b) does not appear to require analysis of whether the underlying right has been clearly established in precedent, as does qualified immunity. *See, e.g.*, *Bodager v. Campbell*, No. 12CA828, 2013 WL 5741005, at *5 (Ohio Ct. App. Oct. 7, 2013) (unreported) ("Immunity from state law claims turns not on the federal qualified immunity doctrine, but on R.C. 2744.03(A)(6)"). A jury could find that Rhodes knew firing his gun would cause harm to Stewart and the firing was unreasonable in the circumstances. Thus, Rhodes is not entitled to statutory immunity from the state law claims.

The district court did not consider whether—without immunity from suit—Stewart's various state law claims survive summary judgment. We remand these claims to the district court, which in its discretion may determine whether supplemental jurisdiction should be exercised, *see Musson Theatrical, Inc. v. Fed. Express Corp.*, 89 F.3d 1244, 1254-55 (6th Cir. 1996), and if so, whether the state law claims may proceed to trial.

CONCLUSION

We **AFFIRM** dismissal of Stewart's federal claims and **REVERSE** dismissal of Stewart's claims under state law. The state law claims are **REMANDED** to the district court for disposition consistent with this opinion.

CONCURRING IN PART AND DISSENTING IN PART

BERNICE BOUIE DONALD, concurring in part and dissenting in part. While I agree that the district court should be reversed on the state law claims and that Officer Rhodes violated Luke Stewart's Fourth Amendment right to be free from unreasonable seizures, I would also find that the constitutional right was clearly established and that, therefore, Rhodes is not entitled to qualified immunity. The majority evaluates the clearly-established prong too narrowly and provides immunity to an officer who created a dangerous situation and then used that situation to justify the fatal shooting of a man who did not present an immediate danger of serious physical injury to the officer. In fact, it is debatable whether Stewart presented any danger to the officer or the public, or if he even knew that Rhodes was a law enforcement officer, since neither Rhodes nor Catalani announced themselves as police officers.

I.

Despite § 1983's categorical decree that all persons under color of state law who cause the deprivation of a constitutional right "shall" be subject to liability, the Supreme Court overlaid qualified immunity onto the statute's directive in an effort to balance its underlying policies. *Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1135, 1209-17 (1977); *see also Wood v. Strickland*, 420 U.S. 308, 321-22 (1975). More specifically, the doctrine—as we know it today—was deemed necessary to protect public officials from unforeseeable developments in the law. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("If the law at that time was

not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful.").

Today, the seemingly endless struggle with applying the doctrine is in defining the extent of a clearly established right. *See, e.g.*, *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503- 04 (2019). The Supreme Court has explained that defining clearly established rights too broadly—such as "the right to due process of law"—"would destroy the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties, by making it impossible for officials reasonably [to] anticipate when their conduct may give rise to liability for damages." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (internal quotation marks and citation omitted) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984). Accordingly, the Supreme Court demanded that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. On the other hand, concerned that defining rights too narrowly would create *unqualified* immunity, the Supreme Court also explained that its emphasis on particularity "is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* (citations omitted).

Judge Willett from the Fifth Circuit recently highlighted some of the issues with the clearly-established standard in his dissent in *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., dissenting). Noting the courts' division over what level of "factual similarity must exist," he wrote that "the 'clearly established' standard is neither clear nor established among our Nation's lower courts." *Id.* He also emphasized that deciding immunity issues based on a too-narrow construction of clearly established law prevents the vindication of constitutional rights:

> Merely proving a constitutional deprivation doesn't cut it; plaintiffs must cite functionally identical precedent that places the legal question "beyond debate" to "every" reasonable officer. . . . This current "yes harm, no foul" imbalance leaves victims violated but not vindicated. Wrongs are not righted, and wrongdoers are not reproached.

Id. Of course, the problems do not end there, as courts have increasingly begun to skip the constitutional question and simply ask whether the right was clearly established. *Id.*; *see, e.g.*, *Hagans v. Franklin County Sheriff's Office*, 695 F.3d 505, 508 (6th Cir. 2012) ("The [constitutional] question raises some complications. The [clearly established prong] does not. We opt to answer the easier of the two questions, saving the harder one for another day."). This practice leads to perverse results:

> Plaintiffs must produce precedent even as fewer courts are producing precedent. Im-

> portant constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability.

Zadeh, 928 F.3d at 479-80 (Willett, J., dissenting).

Here, the majority answered the constitutional question first but construes the clearly- established prong too narrowly. The sole purpose of the clearly-established prong, as created and announced by the Supreme Court, is to protect officials from unforeseeable or unknowable developments in the law. *Harlow*, 457 U.S. at 818. It is not a blank check to engage in specific acts that have not previously been considered by a court of controlling authority. *Anderson*, 483 U.S. at 640. Nor is it "a license to lawless conduct." *Harlow*, 457 U.S. at 819. When defining clearly established rights, we must have in the forefront of our mind this question: would a reasonable officer have known that his actions were unconstitutional? *See Anderson*, 483 U.S. at 639; *see also District of Columbia. v. Wesby*, 138 S. Ct. 577, 590 (2018) (explaining that defining a right with specificity assists officers who "find it difficult to know how the general standard of probable cause applies in 'the precise situation encountered'" (citation omitted)). Defining the bounds of clearly-established rights too narrowly prevents the vindication of constitutional rights and allows courts to avoid the constitutional question all together because it is "easier." *Hagans*, 695 F.3d at 508.

II.

At the outset, I note that the Court is left with a one-sided account of the events from the officers' perspective since Rhodes ended Stewart's life. Further, officers did not activate dash cameras, body cameras, or any recording devices upon approaching Stewart because the evidence suggests that they had already determined that they were going to use force to remove him from the car rather than simply asking him to step out of the vehicle. Yet, even with those limitations, the majority and I both conclude that the actions as described were unconstitutional and thus unlawful. Because the qualified immunity inquiry turns on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, rather than the officer's subjective intent, we must review the totality of the circumstances. *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

On the morning of March 13, 2017, Stewart was asleep in his car, lawfully parked on the street. There was no suspicion of or complaint of a suspected crime. A woman simply called police to report that "a creepy" car had been parked on her street for twenty minutes with the engine running.

Catalani made the scene, and with the aid of his flashlight, observed Stewart asleep behind the wheel, a digital scale on the seat, and what appeared to be a wine cap on the floor. Upon running the license plate, Catalani determined there was an outstanding warrant for the owner of the vehicle, but he recognized that Stewart did not fit the owner's description. Catalani radioed another officer—Rhodes—and told him that "once you get here, we're goina [sic], uh, end up pulling this guy out."

Prior to arousing Stewart, the two officers positioned themselves on either side of the car and blocked Stewart's vehicle in with their squad cars. When the officers tapped on the vehicle's window and woke Stewart up, he engaged the engine and maneuvered the car from its position and onto the street, striking one of the police cars in the process. Rhodes hoisted himself into the car, and Catalani began running behind the car. The undisputed testimony of both officers is that Stewart's speed never exceeded 25-30 mph and that he never exceeded the speed limit. While Stewart drove, he asked Rhodes, "Why are you in my car?" As Stewart continued driving forward, Rhodes repeatedly tased Stewart. When this failed to stop Stewart from fleeing, Rhodes resorted to beating Stewart's head with the taser and punching Stewart repeatedly. Notably, Stewart did not respond in kind—he did not physically attack Rhodes, or even attempt to remove Rhodes from the vehicle.

During the encounter, the vehicle came to a full stop at least twice. At one point, the car was stopped long enough for Catalani to almost catch up to the vehicle, yet, during that stop, Rhodes did not display his badge, exit the vehicle, or tell Stewart he was under arrest. During the final stop of this 59-second ordeal, Rhodes, having never identified himself as a police officer, took out his service revolver and shot Luke Stewart. Stewart exhibited no aggression toward Rhodes until after Rhodes shot him. Stewart had not tried to strike, punch, or assault him. Yet, at a time when the vehicle was stopped, Rhodes fired not one, but five shots into the body of Luke Stewart, striking him in the chest, neck, torso, and wrist.

III.

Not every threat is sufficient to justify the use of deadly force. *See Gonzalez v. City of Anaheim*, 747 F.3d 789, 794-97 (9th Cir. 2014) (en banc). A court should consider 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 v. Connor*, 490 U.S. 386, 396 (1989). In *Elder v. Holloway*, the court reflected a permissive view of what authorities can render the law clearly established. 510 U.S. 510 (1994). Further, a court should use its "full knowledge" of its own and other relevant precedents in determining whether a right is clearly established. *Id.* at 516 (quoting *Davis*, 468 U.S. at 192 n.9).

In *Godawa v. Byrd*, we held that an officer who shot at a fleeing suspect was not entitled to qualified immunity. 798 F.3d 457, 460 (6th Cir. 2015). The facts in this case do not change that analysis where an officer, against department policy, places himself inside a misdemeanor suspect's car and begins tasing, beating, and punching the driver. Moreover, the officer elected to remain in the car even through the car stopped on several occasions. There is no evidence in the record that Stewart posed an imminent danger to citizens or officers, making Rhodes' assertion of an imminent fear blatantly unreasonable, and the use of deadly force unjustifiable. *See Tennessee v. Garner*, 471 U.S. 1, 21 (1985).

The majority notes that Rhodes had no duty to retreat. However, Rhodes likewise had a duty to only use such force as was necessary under the totality of the circumstances. The fact that Rhodes shot Stew-

art five times at near point-blank range defies reasonableness. This is the type of wantonness that does not require a case on point to put an officer on notice that his conduct is unreasonable. As Judge Gorsuch opined, "some things are so obviously unlawful that they don't require detailed explanations" or happen so rarely that there will be no case on point. *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015).

Had Rhodes been standing outside of the car when he used lethal force, this would be a very simple case—he would not be entitled to qualified immunity. *See, e.g.*, *Lewis v. Charter Twp. of Flint*, 660 F. App'x 339, 346 (6th Cir. 2016) ("There is longstanding precedent holding that it is unreasonable for an officer to use deadly force against a suspect merely because he is fleeing arrest; rather, such force is only reasonable if the fleeing suspect presents an imminent danger to the officer or others in the vicinity."). However, in this Circuit, the Court has not encountered the exact situation that occurred in this case—the officer being *inside* of the car at the time of the shooting. That lack of precisely-analogous controlling law can oftentimes sound the death knell to a § 1983 claim. *See City of Escondido, Cal. v. Emmons*, 139 S. Ct. at 503 (admonishing the Ninth Circuit for generally describing the clearly-established right as "the right to be free from excessive force"). Here, the majority sounds the death knell for Stewart's § 1983 claims and finds that the right was not clearly established, but I disagree.

In addition to this being a situation where precisely-analogous law should not be required, both in-circuit cases and out-of-circuit cases show that

Rhodes violated Stewart's clearly-established right to be free from excessive force when he shot Stewart five times and killed him, even though he posed no imminent threat of physical injury or death to the officer or the public.

A.

Although this case presents a slight variation on the factual situations that this Court has addressed—inside the car versus outside the car—it does so against a backdrop of voluminous law involving fleeing suspects of which any reasonable officer would be aware. In that way, this case aligns with *Guertin v. Michigan*, 912 F.3d 907, 933 (6th Cir. 2019), in which we recently held that a right can be clearly established—even in the face of unique factual circumstances— when "[a]ny reasonable official should have known that" his or her actions violated the constitution. Indeed, the dissent in *Guertin* was particularly concerned that there were *no* prior cases with similar facts, *id.* at 957-62 (McKeague, J., dissenting), but that lack of analogous cases was not enough to overcome the clarity of the constitutional violation. *Guertin* is not an outlier in this respect, either. *Smith v. Cupp*, 430 F.3d 766, 777 (6th Cir. 2005) ("[W]here a general constitutional rule applies with 'obvious clarity' to a particular case, factually similar decisional law is not required to defeat a claim of qualified immunity." (citation omitted)).

This case fits the same bill. The law is clearly established in this Circuit that an officer may not use deadly force against a fleeing suspect unless the suspect is presenting an imminent threat of physical injury or death to the officer or the public. *See, e.g.*, *Garner*, 471 U.S. at 11 ("Where the suspect poses no

immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."); *Sample v. Bailey*, 409 F.3d 689, 697 (6th Cir.2005) (stating that "only in rare instances may an officer seize a suspect by use of deadly force." (quotations omitted)). Here, at the time Rhodes fired shots at Stewart, Stewart was unarmed, was not suspected of committing a serious felony, and was operating a stationary vehicle. Therefore, he presented no imminent threat of death or serious physical injury to any individual, and "any reasonable official should have known" that lethal force was plainly inappropriate. *See Guertin*, 912 F.3d at 933.

This conclusion bears out in ample case law. *See, e.g.*, *Sigley v. City of Parma Heights*, 437 F.3d 527, 537 (6th Cir. 2006) ("Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend his [sic] does not justify the use of deadly force to do so." (citation and quotations omitted)). For instance, in *Smith v. Cupp*, the suspect stole the police officer's car and drove the car directly at the police officer. 430 F.3d at 770. The police officer began shooting at the car, allegedly firing his last shot while he was "jumping out of the direct path of the vehicle[.]" *Id.* Despite the danger the police officer faced as the car drove toward him, this Court denied the police officer's request for qualified immunity because, at the time of the last shot, the car did not pose a danger to the officer or the public, making it an "obvious case" despite the lack of "factually similar decisional law[.]" *Id.* at 776-77.

Again, the same can be said here. Although Rhodes asserts that he felt that he was in danger while the car was moving, and that he feared that he may be in danger if the car were to begin moving again, the fact remains that the car was not moving at the time Rhodes chose to shoot Stewart. This lack of imminent threat of serious physical injury renders lethal force objectively unreasonable in this circumstance (despite Rhodes' individualized concern to the contrary). *See Garner*, 471 U.S. at 11-12.

B.

Although this case presents unique factual circumstances within this Circuit, there are at least *four* factually similar cases from other jurisdictions. The first is *Gonzalez v. City of Anaheim*, 747 F.3d 789, 795-97 (9th Cir. 2014) (en banc). In *Gonzalez*, the police officer entered the suspect's vehicle when the suspect "stomped on the accelerator" in an effort to flee. *Id.* at 792-93. After the car had travelled fifty feet, the police officer fatally shot the suspect. *Id.* at 793. The Ninth Circuit found that, although the car was moving at the time the shots were fired, the suspect did not present an imminent danger to the officer or the public, so the police officer had violated the suspect's Fourth Amendment rights. *Id.* at 796-97.

The second, although a district court case post-dating the events of the case before us, is also instructive. *Adame v. City of Surprise*, No. cv-17-03200-phx-gms, 2019 WL 2247703 (D. Ariz. June 29, 2018). In *Adame*, a police officer instructed Adame to keep his hands up and visible, but Adame started his car and began pulling away. *Id.* at *1. The officer then entered the vehicle, told Adame to keep his hands up, and then fired two shots. *Id.* The district court found

that the officer "violated Adame's clearly established Fourth Amendment rights by unreasonably resorting to lethal force under these circumstances." *Id.* at * 4.

Another instructive case is *City of Dallas v. Half Price Books, Records, Magazines, Inc.*, 883 S.W.2d 374 (Tex. Ct. App. 1994). In *City of Dallas*, a police officer engaged two men who were found crawling behind cars in a parking lot. *Id.* at 375. Eventually, the police officer entered the suspects' car, struggling with the driver, while the passenger was hitting the police officer from behind. *Id.* at 375-76. At that point, the police officer fatally shot the driver while they were both inside of the moving car. *Id.* The Texas court found that the police officer had not submitted evidence demonstrating that "a reasonably prudent officer, under the same or similar circumstances, could have believed that his decision—to draw and fire his gun in an attempt to stop the fleeing suspects—was justified." *Id.* at 377 (footnote and internal quotation marks omitted).

Finally, another district court determined that factually similar circumstances rendered the officer's use of lethal force unjustifiable in *Ford v. City of Pittsburgh*, 2016 WL 4367994 (W.D. Pa. Aug. 15, 2016). In *Ford*, the police officer also entered the suspect's car and, within seconds after the car started moving, fatally shot the suspect. *Id.* at *2. The court found that, viewing the evidence in the light most favorable to the plaintiff, a jury could find that the police officer's actions were objectively unreasonable—i.e., unconstitutional under the Fourth Amendment—and thus denied summary judgment to the police officer on qualified immunity grounds. *Id.* at *8.

While it is arguable that these four cases establish the "robust consensus" that would put a reasonable officer on notice of Stewart's specific rights, *see Moldowan v. City of Warren*, 578 F.3d 351, 381-82 (6th Cir. 2009) (citing three out-of-circuit cases as evidence that a robust consensus exists); *Stanton v. Sims*, 571 U.S. 3, 6-7 (2013) (considering state appellate court and district court decisions in assessing whether a robust consensus existed), what is more persuasive is that these four cases illuminate the application of the specific—and clearly established—right that an individual has to be free from lethal force when fleeing arrest in a car that is not presenting an imminent threat of serious physical harm to anybody. *Lewis*, 660 F. App'x at 343 ("[W]here the car no longer presents an imminent danger, an officer is not entitled to use deadly force to stop a fleeing suspect." (quotation marks and citation omitted)). Moreover, these four cases applied that specific right when the suspect's car was actually moving, whereas in our case Stewart's car was *stopped* when he was killed. That distinction makes it even more apparent that a reasonable officer would have known that lethal force was inappropriate in this case. As such, I would find that Stewart's rights were clearly established at the time that Rhodes shot and killed him.

IV.

I find myself writing separately about the dangers of unchecked police powers with unsettling and increasing frequency. Six years ago, I dissented from a decision affirming summary judgment for several officers who killed Leroy Hughes, an African American man suffering from mental illness, by shocking him with tasers twelve times in five minutes. *See*

Sheffey v. City of Covington, 564 F. App'x 783, 796-97 (6th Cir. 2014) (Donald, J., dissenting). The first eight shocks occurred in a single minute. *Id.* at 796. The total delivery exceeded 14,000 volts. *Id.* at 797. In that dissent, I recalled the names of Amadou Diallo, Sean Bell, Oscar Grant, Jonathan Ferrell, and others. *Id.* at 798. And I exhorted this Court and its readers not to "ignore the seeds of systemic inequalities sown in our Nation's history and lain bare by diligent review." *Id.*

We have new names today: George Floyd, Elijah McClain, Rayshard Brooks, and too many others. The world knows why they died. The same seeds whose bitter fruit killed Leroy Hughes killed them too. And on March 13, 2017, in Euclid, Ohio, they killed Luke Stewart.

That the seeds of these senseless killings are systemic should not absolve the shooters. Our system of justice bestows upon police great powers and a sacred trust. We rightly protect police from penalties that otherwise would follow from poor conduct when officers act with reason. But when officers fail to act with reason, when they are motivated by impulses that spring from dark corners of the psyche or simply fail implicitly to acknowledge the humanity of the people before them, they violate our sacred trust. And then the same system that empowers and protects police must, if it is to function properly, if it is to be worthy of recognition as a system of justice, strip those powers and protections away.

Luke Stewart should be alive today. He was unarmed, unsuspected of committing a serious felony, and behind the wheel of a stationary vehicle when Rhodes opened fire into his torso, chest, neck, and

wrist. Qualified immunity should not shield Rhodes from the consequences of that unreasonable decision.

I dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

[filed July 13, 2018]

MARY STEWART, *as Administrator of the Estate of* LUKE O. STEWART, SR., *Deceased* Plaintiff, vs. CITY OF EUCLID, *et al.*, Defendants.	Case No. 1:17-cv-2122 OPINION & ORDER [Resolving Docs. 12, 38]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

On March 13, 2017, Euclid police officer Matthew Rhodes shot and killed Luke Stewart Sr. ("Stewart") during a traffic stop.[1] His mother, Mary Stewart, now sues Officer Rhodes and Officer Louis Catalani (who was also on the scene) on behalf of Stewart's estate.[2] She contends that the officers violated Stewart's constitutional and state-law rights and that those violations caused Stewart's death.[3] She also brings a *Monell*[4] claim against the City of Euclid.[5]

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[1] Doc. 12-1 at 50, 52–53, 60.

[2] Doc. 1 at ¶¶ 31–33, 50–65.

[3] *Id.*

[4] *Monell v. Dep't. of Soc. Servs. of the City of N.Y.*, 436 U.S. 658

Finally, Mary Stewart also brings a state-law survivorship action.[6] All three defendants have moved for summary judgment.[7]

For the reasons that follow, the Court GRANTS the Defendants' motion for summary judgment.

I. BACKGROUND

Because this case is at the summary judgment stage, the Court recites the facts in the light most favorable to the Plaintiff, resolving factual disputes and drawing reasonable inferences in Plaintiff's favor.[8] Moreover, in evaluating the parties' evidence, the Court is mindful of the fact that Decedent Luke Stewart cannot testify as to his version of what happened on March 13, 2017. This recitation of facts is for summary judgment purposes only and is not intended to express any opinion as to what the trial evidence might have shown.

A. Officer Catalani Responds to a Suspicious Vehicle Report

At around 6:50 a.m. on Monday, March 13, 2017, a Euclid resident called the Euclid Police Department.[9] She told the police that there was a "creepy looking car . . . parked outside" her house on South Lake Shore.[10] The resident described the car as a

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(1978).

[5] Doc. 1 at ¶¶ 34–49.

[6] *Id.* at ¶¶ 66–69.

[7] Doc. 12. Plaintiff Mary Stewart opposes. Doc. 22. Defendants reply. Doc. 30.

[8] *See Burgess v. Fischer*, 735 F.3d 462, 471 (6th Cir. 2013).

[9] Doc. 12-1 at 51.

[10] *Id.*

"black Honda" with windows that were so dark that she could not tell whether the car was occupied.[11] She told the police that the car had been sitting outside with its parking lights on for around twenty minutes.[12]

Defendant Officers Rhodes and Catalani were dispatched to the South Lake Shore location.[13] Catalani was the first to arrive to the scene.[14] He drove by the Honda that the resident had described, observing that the running lights were on.[15] Window tinting prevented Officer Catalani from seeing inside the vehicle.[16]

Defendant Officer Catalani parked his patrol vehicle about ten feet behind and slightly to the left of the Honda.[17] He trained his spotlight and takedown lights on the vehicle, then exited his vehicle and approached the vehicle on foot.[18] Despite a departmental policy requiring him to do so, Catalani did not activate his patrol vehicle's dashboard camera or his belt microphone.[19]

Upon reaching the vehicle, Catalani observed Luke Stewart in the driver's seat.[20] Officer Catalani

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 52–53.

[15] Doc. 14 at 39.

[16] *Id.* at 39–40.

[17] *Id* at 40.

[18] *Id.* at 41, 51.

[19] *See id.* at 34–37. This despite the fact that the dash camera could be activated from the belt microphone. Doc. 15 at 75.

[20] *See* Doc. 14 at 41, 43.

shined his flashlight into the Honda, but Stewart did not react.[21] Catalani observed a digital scale in the center console,[22] what he believed to be a half-burnt marijuana blunt in the passenger's seat,[23] and something that appeared to be the screw-on cap to a wine bottle near Stewart's feet.[24] Catalani observed that the keys were in the ignition but that the engine was not running.[25] Catalani did not see any weapons in the car.[26]

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[21] *Id.* at 42.

[22] *Id.* Officer Catalani also testified that there appeared to be drug residue on the scale. Doc. 14 at 42, 44–45. But he made no mention of any residue in his interview with agents from the Ohio Bureau of Criminal Investigation (BCI). Doc. 12-1 at 53. Viewing the evidence in the light most favorable to the plaintiff, the Court will proceed as if Catalani saw no residue on the scale. Plaintiff Mary Stewart also points out that Catalani's deposition testimony indicated that the scale was "black or silver," whereas he described the scale as "silver" to the BCI agent. *Compare* Doc. 14 at 44 *with* Doc. 12-1 at 53. This seems to have been an attempt to conform his testimony to the physical evidence, because the scale found in Stewart's car was apparently black (though it is tough to tell from the photographic evidence submitted). *See* Doc. 22 at 7; Doc. 14 at 189; Doc. 12-1 at 83. In any event, Plaintiff does not appear to contest that Catalani saw a scale and, even if he didn't, that would not change the Court's analysis.

[23] Doc. 14 at 42.

[24] *Id.* Plaintiff Mary Stewart argues that Luke Stewart's legs would have blocked Catalani's view of the wine cap. Doc. 22 at 7. But the mere fact that Stewart's legs were extended into the footwell area of the car, Doc. 14 at 43, does not necessarily mean that Officer Catalani could not see the wine cap. In any event, whether Catalani could see the cap does not affect the Court's analysis in this opinion.

[25] *Id.* at 46.

[26] *Id.* at 48.

Catalani ran the Honda's license plate and discovered the car was registered to an older man with an active arrest warrant issued against the registered car owner.[27] But Catalani thought Luke Stewart looked too young to be the owner.[28]

B. Officer Rhodes Arrives and Stewart Begins to Flee

Defendant Officer Rhodes heard the dispatch call at the same time as Officer Catalani.[29] At the time, he was having breakfast with two other officers.[30] As Rhodes made his way to the scene, Officer Catalani radioed to say: "[O]nce you get here, we're goina [sic], uh, end up pulling this guy out."[31]

After arriving on the scene, Rhodes briefly discussed the situation with Catalani before moving his car in front of Stewart's Honda to prevent it from escaping.[32] Neither officer activated his overhead lights.[33] But Officer Rhodes did direct both his spotlight and takedown lights at the Honda.[34] Rhodes admitted that these lights could blind a car's driver.[35] Rhodes also did not activate his dashboard cam-

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[27] *Id.* at 46.

[28] *Id.* at 59; Doc. 12-1 at 52.

[29] *See id.*

[30] *See* Doc. 15 at 48.

[31] *Id.* at 50; Doc. 12-1 at 52.

[32] Doc. 15 at 59–62; Doc. 14 at 70–72.

[33] *See* Doc. 14 at 61, 76.

[34] *Id.* at 76.

[35] Doc. 15 at 79. Defendant Officer Rhodes asserted, however, that the tinting on the Honda would have prevented the lights from blinding Stewart. *Id.* at 80. But the Honda's windows do not appear unusually dark in the BCI report photos. Doc. 12-1

era and forgot his belt microphone in his patrol vehicle.[36]

Both officers approached the Honda—Officer Catalani approached on the driver's side, Officer Rhodes approached on the passenger side. [37] Officer Catalani knocked on the driver's window, waved, and said "hi."[38] Catalani did not announce himself as a police officer.[39]

According to Officer Catalani, Stewart looked out the window and waved back.[40] Stewart then started sitting up in the seat and went immediately to start the car.[41] He started the engine.[42]

At that point and according to Defendant Officer Catalani, Catalani yelled: "No. No. No. Stop. Stop. Stop."[43] Catalani grabbed the door handle and opened the driver's side door.[44] He grabbed Stewart's left arm and tried to pull him away from the gearshift and out of the vehicle.[45] Stewart began yell-

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at 65.

[36] Doc. 15 at 73–74. Officer Rhodes' deposition seems to suggest that he thought about turning on the camera before leaving his vehicle, but did not do so. *Id.*

[37] Doc. 14 at 73.

[38] *Id.* at 74.

[39] *Id.* Officer Rhodes testified at his deposition that he heard Stewart say "police" around this time, Doc. 15 at 84, but Catalani makes no mention of that.

[40] Doc. 14 at 75.

[41] *Id.* at 80.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 81.

ing.[46] Officer Catalani then reached around Stewart's head with his right arm in an attempt to grab a pressure point under Stewart's jaw.[47] Catalani continued trying to pull Stewart out of the car with his left hand.[48] Throughout all this, Catalani's body (except for his arm) remained outside the vehicle.[49]

While Catalani struggled with Stewart on the Honda's driver's side, Defendant Officer Rhodes opened the passenger side door and began attempting to push Stewart out of the car.[50] Bracing his knees on the passenger seat, Rhodes leaned into the Honda and pushed on Stewart's side and shoulder.[51] Rhodes initially pushed with his feet on the ground, but in the course of pushing Stewart he moved further into the car, resting his knees on the passenger seat and allowing his feet and lower legs to hang outside the car.[52] Meanwhile, Stewart was reaching for the gearshift.[53]

C. Officer Rhodes Becomes Trapped in the Fleeing Car

According to Officer Rhodes, his and Catalani's push-pull routine was working—until Stewart got the car in gear.[54] Then the car began moving forward

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[46] *Id.* at 82.

[47] *Id.*

[48] *Id.* at 83–84.

[49] *Id.* at 84.

[50] Doc. 15 at 85–86.

[51] *Id.* at 107.

[52] *Id.* at 109–10.

[53] *Id.* at 108.

[54] *Id.* at 108.

and Stewart drove his vehicle into Rhodes' patrol vehicle.[55] While Officer Catalani testified that the Honda struck Rhodes' vehicle "pretty hard,"[56] Officer Rhodes testified that he does not remember either falling forward or hitting the dashboard as a result of the impact.[57]

Officer Rhodes struggled with Stewart for control of the gearshift.[58] Rhodes tried to put the gearshift into park; Stewart tried to keep the gearshift in reverse to back away from Rhode's damaged patrol vehicle.[59] But Stewart was able to get the car into reverse and back up enough to allow him to get around Rhodes' patrol vehicle.[60]

After pulling away from the collision with Rhodes patrol vehicle, Stewart began to drive the Honda east on South Lake Shore.[61] As the Honda passed Rhodes'

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[55] Doc. 14 at 94.

[56] *Id.* at 105.

[57] Doc. 15 at 112.

[58] *Id.* at 112.

[59] *See id.* at 113–15.

[60] *Id.* at 112–21. There is some discrepancy in the Defendant Officers' accounts of events at this point. Officer Rhodes, as related above, testified that Stewart was able to get the car in reverse, then shift gears again and go around the patrol vehicle. *See id.* Officer Catalani testified that the impact with the Honda caused Rhodes' patrol vehicle to roll backwards, allowing Stewart to drive away. Doc. 14 at 105–07. It may have been some combination of both, because it is undisputed that Catalani's patrol vehicle was parked further from the Honda than Rhodes'. Doc. 15 at 62–63; Doc. 14 at 40. This dispute, however, has no bearing on the resolution of the case.

[61] *Id.* at 109. We will never know exactly why Stewart chose to flee in this case. It could be that he was blinded by the lights on his vehicle and did not realize at first that the people trying to

patrol vehicle, Defendant Officer Rhodes pulled himself fully into the car to avoid his legs from becoming pinned.[62] The passenger-side door closed behind him.[63]

Meanwhile, Officer Catalani was moving alongside the driver's side of the vehicle Stewart was driving.[64] Although Stewart angled the car in Catalani's direction to drive around Rhodes' vehicle, Catalani was alongside but not in front of the car.[65]

As the Honda made its way east, a white SUV was travelling west on South Lake Shore.[66] Defendant Officer Catalani was forced to step back from the Honda to avoid being hit by the SUV.[67] However, Catalani followed the vehicle on foot, radioing dispatch that "the vehicle ha[d] taken off and tried to

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remove him from the car were police officers. He was also well over the legal limit for alcohol consumption while operating a motor vehicle and under the influence of cocaine, Doc. 12-1 at 88, so he may not have been thinking rationally or have feared prosecution. Or he might have fled as a result of his previous encounters with other police officers. *Id.* at 76–80. In any event, Stewart's reasons for fleeing do not impact the outcome of this case, particularly because there is no real evidence that Officers Rhodes and Catalani were aware of his level of intoxication or criminal history. (That said, Catalani apparently suspected that Stewart might be passed out because of the blunt, cap, and alleged residue on the scale—though, as discussed above, the Court discounts this latter observation—he thought he saw in the Honda. Doc. 14 at 47–50.)

[62] Doc. 15 at 121–22.

[63] *Id.* at 120–21.

[64] Doc. 14 at 94, 109.

[65] *Id.* at 103–05.

[66] *Id.* at 109.

[67] *Id.*

run us over."[68] Catalani testified that the Honda was travelling at about twenty-five miles per hour down South Lake Shore.[69]

Up to this point, Stewart had made no attempt to strike either of the Defendant Officers.[70] Indeed, Stewart was just driving and looked at Rhodes to ask: "Why are you in my car?"[71] Rhodes yelled in response, but doesn't remember what he specifically said.[72]

D. The Car Briefly Stops

Inside the Honda, Officer Rhodes was attempting to get control of the gearshift and keys.[73] He began punching Stewart in the head.[74] Defendant Officer Rhodes testified that Stewart did not react to being punched, other than to say "Na n****" every time he was hit.[75] Rhodes testified that he was saying things to or yelling at Stewart as he struck Stewart, but does not remember what he was yelling.[76] Stewart did not attempt to defend himself.[77] Rhodes believes he struck Stewart three times.[78]

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[68] *Id.* at 113.

[69] *Id.*

[70] *Id.* at 104; Doc. 15 at 125.

[71] *Id.* at 123.

[72] *Id.*

[73] *Id.* at 129–30.

[74] *Id.* at 130.

[75] *Id.*

[76] *Id.* at 135.

[77] *Id.*

[78] *Id.* at 138.

Officer Rhodes did not attempt to remove Stewart's arm from the gearshift.[79] Nor did he attempt to use the emergency brake,[80] even though it was next to the gearshift that Rhodes was fighting with Stewart to control.[81]

At one point, Officer Rhodes grabbed the keys, but they would not come out of the ignition because the vehicle was not in park.[82]

As the car proceeded down South Lake Shore, Officer Rhodes was apparently able to get the car into neutral several times.[83] When he did, he would reach up to try to turn the car off.[84] But as he reached up from the gear shift to turn the car off, Stewart would shift the car back in drive and they would continue down the street.[85]

Eventually Rhodes pulled out his Taser and shot Stewart with it.[86] Stewart called out "Ah!" and said: "you shot me."[87] The Taser apparently had no other effect.[88] Then the Taser stopped making noise.[89] Officer Rhodes discovered the safety on the Taser had

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[79] *Id.* at 132.

[80] *See id.* at 136.

[81] Doc. 14 at 189–90.

[82] Doc. 15 at 133–34.

[83] *Id.* at 139–40.

[84] *Id.* at 140.

[85] *Id.*

[86] *Id.* at 144.

[87] *Id.* at 144.

[88] *See id.*

[89] *Id.* at 145.

re-engaged.[90] He turned the safety off and pulled the trigger five additional times.[91] It had no additional effect.[92]

Defendant Officer Rhodes' Taser was equipped with a "drive-stun" feature that would have allowed the officer to use the body of the Taser (rather than the prongs deployed when the Taser is fired like a gun) to administer an electrical shock to Stewart.[93] But Rhodes did not use this feature.[94] Nor did he deploy pepper spray.[95]

Instead, when the Taser prongs proved ineffective, Officer Rhodes began hitting Stewart in the head with the Taser.[96] Stewart merely jerked and said "naw, n****."[97] Stewart swatted at Officer Rhodes or pushed him away in a defensive fashion, but not with a closed fist.[98]

Notwithstanding the ineffectiveness of the Taser (both as a method of applying electric shocks and as a club), the Honda came to a stop in the intersection

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[90] *Id.*

[91] *See id.* at 145, 150.

[92] *Id.* at 145.

[93] *Id.* at 149, 202; Axon, *TASER X26EEE ECD User Manual* 17–18 (2011) (hereinafter "User Manual"). While the Taser user manual cited in this opinion was not submitted into the record by the parties, the Court uses it primarily to explain the functions of a Taser (particularly those mentioned by the parties but not explained in their filings).

[94] Doc. 15 at 149.

[95] *Id.* at 150.

[96] *Id.* at 157–58.

[97] *Id.*

[98] *See id.* at 161.

between South Lake Shore and East 222nd Street while making a left-hand turn.[99] Rhodes believes that he was thrown into the dashboard, but doesn't "remember exactly."[100] At this point, Rhodes got the car into neutral and shut off the engine.[101] But he still could not get the keys out of the ignition.[102]

Officer Rhodes testified that he did not know why the car stopped, but thought they had hit another vehicle.[103] Officer Catalani was still pursuing the vehicle on foot, however, and testified that the car never hit anything.[104]

While the car was stopped at the intersection, Defendant Officer Catalani caught up to the vehicle.[105] According to Catalani, there were cars operating on 222nd Street at the time.[106] Catalani caught up to the Honda's in the ten to fifteen seconds the car was stopped.[107]

Defendant Officer Rhodes saw Officer Catalani approach the vehicle. [108] He also heard dispatch order the next shift of officers, who were located nearby

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[99] *Id.* at 153; Doc. 14 at 126, 135.

[100] Doc. 15 at 159–60. Officer Rhodes testified that he lost his Taser at this point, *id.*, but that contradicts his statement to the BCI, Doc. 12-1 at 59–60.

[101] Doc. 15 at 153.

[102] *Id.*

[103] *Id.* at 155.

[104] *See* Doc. 14 at 155.

[105] *Id.* at 138.

[106] *Id.* at 139.

[107] *Id* at 137–40; *See* Doc. 15 at 156.

[108] *Id.* at 162.

at the station, to exit roll call to assist Rhodes and Catalani.[109] But then Stewart got the car started again and began driving down 222nd Street just as Officer Catalani was about to put his hand on the door handle.[110]

E. Officer Rhodes Decides to Use Deadly Force

The Honda then proceeded down 222nd Street at twenty-five to thirty miles per hour.[111] Officer Rhodes continued to unsuccessfully struggle with Stewart for control of the gearshift and the keys.[112]

As they vied for vehicle control, the Honda went up over the curb and around a telephone pole before returning to the roadway.[113] It mounted the curb again near the intersection of 222nd Street and Milton Avenue.[114] Officer Rhodes was thrown forward and lost his Taser as they mounted the curb a second time and Stewart tried to push him forward, but Stewart made no attempt to strike Rhodes.[115] At around the same time, Rhodes was able to get the vehicle into neutral again and the vehicle had come

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[109] *Id.*

[110] *Id.* at 163, 165; *See* Doc. 14 at 137–38, 151. Officer Rhodes testified that it appeared to him as if Catalani attempted to open the Honda's driver side door, but that it would not open. Doc. 15 at 162.

[111] *Id.* at 151.

[112] Doc. 12-1 at 60.

[113] Doc. 15 at 166; Doc. 14 at 151.

[114] Doc. 15 at 168.

[115] *Id.* at 168–69; Doc. 12-1 at 60.

to a stop.[116] Nonetheless, Stewart continued to rev the engine.[117]

It was at this point that Defendant Officer Rhodes chose to use deadly force.[118] Rhodes shot Stewart twice in the torso with his service weapon.[119] Stewart looked at Rhodes, said "Naw, n****," and attempted to strike him.[120] Rhodes fired his weapon three additional times, striking Stewart in the neck, chest, and wrist.[121]

Rhodes then attempted to exit the Honda, but the passenger door would not open.[122] After he kicked the door several times, he was able to open the door and exit.[123]

A later BCI investigation revealed that, by the end of Rhodes and Stewart's struggle, the Honda could no longer be shifted into drive.[124]

F. Procedural History

In October 2017, Plaintiff Mary Stewart, on behalf of Luke Stewart's estate, filed this lawsuit against Defendant Officers Rhodes and Catalani and the City of Euclid.[125] She brings federal claims under

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[116] *See id.*

[117] *Id.*

[118] *See id.*

[119] Doc. 15 at 172.

[120] *Id.*

[121] *Id.* at 173, 175; *see* Doc. 12-1 at 81–82.

[122] Doc. 15 at 176–77.

[123] *Id.* at 177.

[124] Doc. 12-1 at 88.

[125] Doc. 1.

42 U.S.C. § 1983 against all three defendants, alleging that their conduct violated Stewart's constitutional rights.[126] She also brings Ohio state law (1) wrongful death; (2) intentional infliction of emotional distress; (3) assault and battery;(4) willful, wanton, and reckless conduct; and (5) survivorship claims against Officers Rhodes and Catalani.[127]

All three Defendants move for summary judgment.[128]

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, "[s]ummary judgment is proper when 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'"[129] The moving party must demonstrate this lack of any genuine dispute of fact.[130]

Once the moving party has done so, the non-moving party must set forth specific record facts—not mere allegations or denials in pleadings—showing a triable issue of fact.[131] The non- moving party must show more than some doubt as to the material facts in order to defeat a motion for summary judgment.[132] But the Court views the facts and all

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[126] *Id.* at ¶¶ 31–49.

[127] *Id.* at ¶¶ 50–69.

[128] Doc. 12. Plaintiff opposes. Doc. 22; Doc. 23; Doc. 25; Doc. 28; Doc. 29; Doc. 32. Defendants reply. Doc. 30; Doc. 31; Doc. 34.

[129] *Killion v. KeHE Distribs., LLC*, 761 F.3d 574, 580 (6th Cir. 2014) (quoting Fed. R. Civ. P. 56(a)).

[130] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

[131] *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

[132] *Id.* at 586.

reasonable inferences from those facts in favor of the non-moving party.[133]

When parties present competing versions of the facts on summary judgment, a district court adopts the non-movant's version of the facts unless incontrovertible record evidence directly contradicts that version.[134] Otherwise, a district court does not weigh competing evidence or make credibility determinations.[135]

III. ANALYSIS

A. Constitutional Claims Against the Individual Officers

Defendant Officers Rhodes and Catalani argue that they are entitled to qualified immunity from Stewart's § 1983 claims.[136] The Court agrees.

1. Qualified Immunity Standard

"Qualified immunity is intended to protect public officials from unnecessary interference with their duties, while also holding them accountable 'when they exercise power irresponsibly.'"[137] It "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions."[138] "When properly applied, it protects 'all but

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[133] *Killion*, 761 F.3d at 580 (internal citations omitted).

[134] *See Scott v. Harris*, 550 U.S. 372, 380 (2007).

[135] *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1037 (N.D. Ohio 2012) (citing *V & M Star Steel v. Centimark Corp.*, 678 F.3d 459, 470 (6th Cir. 2012)).

[136] Doc. 12 at 7–12.

[137] *Godawa v. Byrd*, 798 F.3d 457, 462 (6th Cir. 2015) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

[138] *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

the plainly incompetent or those who knowingly violate the law.'"[139]

"Public officials are entitled to qualified immunity from suits for civil damages if either [1] the official's conduct did not violate a constitutional right or [2] if that right was not clearly established at the time of the [official's] conduct."[140]

2. Constitutional Violation

a. Officer Catalani

Because Defendant Officer Catalani was not in the Honda and did not fire his weapon at Stewart, Plaintiff's claim against him is premised on the initial decision to pull Stewart out of the Honda on South Lake Shore.[141] She argues that this violated Stewart's Fourth Amendment right to be free from unreasonable seizure.[142] Viewing the evidence in the light most favorable to Plaintiff, she is mistaken.

Stewart was seized within the meaning of the Fourth Amendment when Defendant Officers Rhodes and Catalani attempted to remove him from his car. The question is whether that seizure was constitutionally permitted.

"Generally, the Fourth Amendment requires at least a 'reasonable suspicion' that an individual has committed a crime before the individual may be seized."[143] "Reasonable suspicion is more than an ill-

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[139] *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

[140] *Latits v. Phillips*, 878 F.3d 541, 547 (6th Cir. 2017).

[141] Doc. 22 at 20–21.

[142] *Id.*

[143] *Bletz v. Gribble*, 641 F.3d 743, 755 (6th Cir. 2011); *see also*

defined hunch; it must be based upon a particularized and objective basis for suspecting the particular person of criminal activity."[144] An officer performing an investigatory stop of a suspect must be able to point to "'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant'" the stop and subsequent investigation.[145]

That said, "reasonable suspicion" is a quantum of evidence "considerably less than proof of wrongdoing by a preponderance of the evidence" and "obviously less demanding than that for probable cause."[146] "[R]easonable suspicion" may also be based on evidence that is "less reliable than that required to show probable cause."[147]

In this case, it is uncontested that Officer Catalani observed what he believed to be a marijuana blunt inside Stewart's vehicle.[148] As marijuana use is a criminal offense, that is sufficient to establish reasonable suspicion to stop Stewart and investigate further. It is true, as Plaintiff argues, that Catalani had not yet confirmed that what he saw was, in fact, a marijuana blunt.[149] But absolute certainty is not

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Terry v. Ohio, 392 U.S. 1 (1968).

[144] *United States v. Collazo*, 818 F.3d 247, 257 (6th Cir. 2016) (quoting *United States v. Shank*, 543 F.3d 309, 313 (6th Cir. 2008)).

[145] *See Eisnnicher v. Bob Evans Farms Rest.*, 310 F. Supp. 2d 936, 946 (S.D. Ohio 2004) (quoting *Terry*, 392 U.S. at 21).

[146] *See United States v. Sokolow*, 490 U.S. 1, 7 (1989).

[147] *Alabama v. White*, 496 U.S. 325, 330 (1990).

[148] Doc. 14 at 42.

[149] Doc. 22 at 20.

required even to establish probable cause, let alone reasonable suspicion. It is enough that Defendant Officer Catalani saw what appeared to be a blunt inside the vehicle.

Because he had reasonable suspicion to justify stopping Stewart, Officer Catalani could order Stewart out of his vehicle without any additional suspicion.[150]

The complicating factor in this case is that Officer Catalani does not seem to have ever actually *ordered* Stewart to exit the vehicle, because Stewart started the car and attempted to put it in gear before he did so. Stewart was, therefore, not defying any order to step out of the Honda.

But focusing on that fact ignores the fact that Stewart was attempting to flee the scene—or, at least, a reasonable officer could believe he was. He had, after all, started the engine.[151] Then, despite Officer Catalani's instruction to "stop," Stewart reached for the gearshift.[152] The Sixth Circuit has held that a police officer may use reasonable force to remove a suspect from his vehicle where that person "refuse[s] to stop his vehicle despite a police officer's obvious indication that he should."[153] The force used by Catalani in his interactions with Stewart on South Lake Shore were reasonable, albeit unsuccessful, efforts to remove a fleeing suspect from his vehicle. The Court

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[150] *See Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *see also Maryland v. Wilson*, 519 U.S. 408 (1997).

[151] Doc. 14 at 80.

[152] Doc. 15 at 107–08.

[153] *Hayden v. Green*, 640 F.3d 150, 153–54 (6th Cir. 2011).

therefore finds that Catalani did not violate Stewart's rights.

It is true that Officer Catalani did not verbally identify himself as a police officer before attempting to remove Stewart from the Honda.[154] It is also true that Catalani's command to "stop" may have been given as he opened the car door.[155] And it may also be true that the lights from Catalani's and Rhodes' patrol vehicles temporarily blinded Stewart, preventing him from seeing that it was a police officer outside his window.[156] But these facts do not affect the reasonableness of Catalani's conduct.

Fourth Amendment reasonableness is determined from the officer's perspective, not the suspect's.[157] Defendant Officer Catalani had no way of knowing whether Stewart was blinded by the patrol vehicle lights, even if he was aware that it was possible. For all Catalani knew, Stewart woke to find himself boxed in by two police vehicles[158] and with two fully uniformed police officers[159] outside his windows—circumstances that would suggest to any reasonable person that they were not free to leave—and decided to flee the scene. And Catalani was not required to stand in place, allowing Stewart uninhibited access

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[154] Doc. 14 at 74.

[155] *Id.* at 80–81.

[156] *Id.* at 61–62, 76; Doc. 15 at 79.

[157] *Hayden*, 640 F.3d at 153 ("We decide [whether an officer used excessive force] based on 'the perspective of a reasonable officer on the scene . . . .'" (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989))).

[158] Doc. 14 at 40; Doc. 15 at 62.

[159] Doc. 12-1 at 4, 14.

to the keys and gearshift, while he identified himself and ordered Stewart to stop. He could—and did—take reasonable steps to prevent Stewart from driving away as soon as it appeared that Stewart would attempt to flee.

Plaintiff argues that, all of that notwithstanding, Officer Catalani's conduct was unconstitutional because he intended to use physical force to remove Stewart from the vehicle long before Stewart gave him any cause to do so.[160] She bases her argument on Catalani's radio dispatch informing Rhodes that "we're goina [sic], uh, end up pulling this guy out."[161]

But an officer's subjective intent is not relevant to the Court's Fourth Amendment analysis, so long as the officer's conduct was otherwise justified.[162] In other words, because Stewart gave Officer Catalani a valid, Fourth-Amendment-compliant reason to remove him from the Honda, the fact that Catalani might have otherwise intended to do does not matter in a legal sense. This is not to say that such an intention, if Officer Catalani possessed it, is not problematic in a moral sense; only that it does not affect the outcome of this case.

b. Officer Rhodes

Plaintiff contends that Defendant Officer Rhodes violated Stewart's constitutional rights in two ways.

i. Initial Stop

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[160] Doc. 22 at 20.

[161] Doc. 12-1 at 52.

[162] *Cf. Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable- cause Fourth Amendment analysis.").

First Plaintiff contends that, like Defendant Officer Catalani, Rhodes violated Stewart's rights during the initial stop on South Lake Shore.[163] The Court rejects this claim for largely the same reasons it rejected the same claim as to Officer Catalani: Rhodes acted reasonably in attempting to remove an apparently fleeing suspect from the Honda. While there may have been wiser means of doing so than entering the vehicle from the passenger side, the Court cannot say Rhodes' effort to prevent Stewart's flight during the initial stop was unreasonable.

ii. Use of Deadly Force

Second, Plaintiff contends that Officer Rhodes used unconstitutionally excessive force when he fatally shot Stewart on 222nd Street.[164] Although it is a close and difficult question, the Court ultimately concludes that Rhodes did not use unconstitutionally excessive force.

General Legal Standard

The Fourth Amendment limits the amount of force a police officer may employ to detain a suspect.[165]The test for excessive force is "whether the officer['s] actions [were] 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[166] Objective reasonableness is assessed from the point of view of the officer at the time of the use

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[163] Doc. 22 at 20–21.

[164] *Id.* at 17–20.

[165] *Papp v. Snyder*, 81 F. Supp. 2d 852, 856 (N.D. Ohio 2000).

[166] *Cass v. City of Dayton*, 770 F.3d 368, 374 (6th Cir. 2014) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)).

of force, not with the benefit of hindsight or evidence that later investigations reveal about the circumstances the officer faced.[167]

"In determining reasonableness, a court allows for the fact that police officers are often forced to make split-second judgments about the amount of force that is necessary in a particular situation, in 'tense, uncertain, and rapidly evolving circumstances.'"[168] A court should "never allow the theoretical, sanitized world of [its] imagination to replace the dangerous and complex world policemen face every day."[169] "What constitutes 'reasonable action' may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure."[170]

An officer is justified in using deadly force on a fleeing suspect only where he has probable cause to believe that the suspect presents an immediate threat of physical harm to the officer or others.[171]

The Segmented Approach

Additionally, the Sixth Circuit has held that courts must use a "segmented analysis" to determine whether an officer properly used deadly force.[172] In

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[167] *Id.* at 375.

[168] *Jones v. Beatty*, 4 F. Supp. 2d 737, 743 (N.D. Ohio 1998) (quoting *Graham*, 490 U.S. at 396)).

[169] *Id.* at 743–44 (quoting *Smith v. Freland*, 954 F.2d 343, 345 (6th Cir. 1992)).

[170] *Id.* at 744. (quoting *Smith*, 954 F.2d at 345).

[171] *Chappell v. City of Cleveland*¸ 585 F.3d 901, 908 (6th Cir. 2009) (quoting the district court below and *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)).

[172] *Id.* at 909 (quoting *Livermore ex rel. Rohm v. Lubelan*¸ 476

other words, the Court must focus on "the totality of the circumstances facing" Defendant Officer Rhodes "at the time [he] made [his] split second judgments immediately prior to using deadly force."[173] "Because it is the reasonableness" of that use of force "that is the issue, not the reasonableness of [Rhodes'] conduct in time segments leading up to" the use of force, the Court cannot consider whether Rhodes acted reasonably in those earlier time periods in determining whether he properly used deadly force in this case.[174]

The Sixth Circuit justified its "segmented approach" in *Dickerson v. McClellan*,[175] explaining that:

> The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would

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F.3d 397, 406 (6th Cir. 2007)). Plaintiff sought to file a sur-reply addressing the Defendants' citation to the segmented approach in their reply brief. Doc. 33. She argued that the Defendants had not raised this approach in their earlier briefing. *Id.* at 1–2. The Court denied that motion. Doc. 35. The Court notes here, however, that the "segmented approach" is not a new argument; it is how the Sixth Circuit has directed district courts to consider excessive force cases involving the use of deadly force. The Court would, therefore, have been obligated to use it regardless of whether the Defendants had raised it. Moreover, the Court has (out of an abundance of caution) reviewed Plaintiff's proposed sur-reply brief. Doc. 33-1. Nothing in that brief changes its conclusion in this case.

[173] *Chappell*, 585 F.3d at 909.

[174] *Id.*

[175] 101 F.3d 1151, 1161 (6th Cir. 1996) (quoting *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994)).

> have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing.

The Sixth Circuit has applied the segmented approach even where a plaintiff has contended that officers' earlier conduct transgressed constitutional limits.[176] And the Supreme Court has rejected an alternative rule.[177]

There is reason to question a rule that immunizes officers for the use of deadly force that, although it was reasonable in the moment, was prompted by the officers' own earlier reckless conduct.[178] But the Court must apply the segmented approach, regardless of whether the Court agrees with it.

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[176] *Chappell*, 585 F.3d at 909.

[177] *County of L.A. v. Mendez*, 137 S. Ct. 1539 (2017).

[178] *See generally Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002) *abrogated by Mendez*, 137 S. Ct. 1539 (holding that an officer could be liable where (1) he "intentionally or recklessly provoke[d] a violent confrontation" and (2) "the provocation [was] an independent Fourth Amendment violation."). This sentence in the main opinion text is not meant to imply that Defendant Officer Rhodes' earlier conduct in this case was reckless in the *Billington* sense. As a result of the segmented approach, the Court need not and *does not* make any determination on that front and considers recklessness only in relation to the Plaintiff's Ohio state law claims in Section III.B. The Court only means to say here that in at least some cases the segmented approach shields officers from the legal consequences of their own dangerous recklessness and that the Court believes that approach may be unwise.

As a result, the Court does not consider (for instance) whether Rhodes could have exited the Honda while it was stopped at the intersection of South Lake Shore and 222nd Street or whether Rhodes and Catalani should have left less space between their patrol vehicles on South Lake Shore so as to more effectively box Stewart's Honda in. It limits its analysis to the circumstances confronting Rhodes in the moment he used deadly force.

The Use of Deadly Force

The question is whether, at the moment that Defendant Officer Rhodes used deadly force, Defendant Officer Rhodes had probable cause to believe that Stewart posed an imminent risk of serious physical harm to the officer or others. Probable cause amounts to a "fair probability" or "substantial chance" that a fact is true.[179]

In this case, Defendant Officer Rhodes had witnessed the Honda leave the roadway on two occasions.[180] And on one of those occasions the car came close to colliding with a telephone pole.[181] Officer Rhodes was not securely buckled into the passenger seat.[182] The car was not travelling at an unreasonable rate of speed,[183] but that is likely because Rhodes'

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[179] *Cf. Illinois v. Gates*, 462 U.S. 213, 238, 243 n.13 (1983); *see also United States v. Poulsen*, 655 F.3d 492, 504 (6th Cir. 2011) ("The magistrate judge properly found probable cause. Certainty is not required, but rather a fair probability and something more than mere suspicion.").

[180] Doc. 15 at 166, 168; Doc. 14 at 151.

[181] Doc. 14 at 151, 155.

[182] *See* Doc. 15 at 131, 167–68.

[183] Doc. 14 at 151.

struggle with Stewart over the gearshift prevented the car from remaining in drive for an extended period of time.[184] It is uncontested that Stewart was attempting to accelerate down the street, even though the car had stopped and was in neutral at the moment Rhodes shot Stewart.[185] The Honda had been travelling down a residential street at around the time many people begin heading to work.[186] And Rhodes' prior attempts to stop the car—by gaining control of the gearshift and ignition, by tasing Stewart, and by striking him with the Taser and his fists—had proved ineffective.

Under these circumstances, Defendant Officer Rhodes had probable cause to believe that he was in danger of serious physical harm and that there was some similar risk to the public. He was, therefore, justified in using deadly force. It also seems to the Court that Officer Rhodes was justified in using deadly force to prevent himself from being kidnapped by Stewart.[187]

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[184] *See* Doc. 12-1 at 60.

[185] *Id.* at 60.

[186] Doc. 15 at 44, 203. Defendant Officer Rhodes does not mention a concern for public safety in his deposition, focusing primarily on the danger to himself and a desire to stop the vehicle. *Id.* at 167–71. Plaintiff uses this to suggest that public safety concerns cannot justify the shooting. *See* Doc. 22 at 11–13. But it is not clear that is true. Rhodes seems to have indicated to the BCI that he feared for public safety. Doc. 12-1 at 62. In any event, the test here is objective and not dependent upon Rhodes' actual subjective intent. *Chappell*, 585 F.3d at 908.

[187] This may not have been Stewart's intention. It may well be that he simply meant to flee. But whether intentionally or not, Stewart was transporting Officer Rhodes against Rhodes' will to an unknown location.

Admittedly, Officer Rhodes did not use all possible means of bringing the Honda to a stop. He did not, for instance, pull the emergency brake, use pepper spray, or use the drive-stun feature on his Taser. But the ultimate question is not whether the officer exhausted every possible alternative before resorting to deadly force.[188] It is whether there was probable cause to believe that deadly force was necessary to avoid a serious risk to the officer or others. And in this case, the Court is not persuaded that there were viable alternatives to the use of deadly force.

Pulling the emergency brake might have brought the Honda to a swift stop. But it also posed the risk of sending Officer Rhodes, who was not wearing a seatbelt, through the windshield.[189] Moreover, there is no reason that Stewart could not have disengaged the brake as easily as he was able to consistently put the car back into drive. The brake and the gearshift were, after all, right next to each other.[190]

Using pepper spray in the enclosed passenger cabin of the Honda risked blinding Rhodes as well as Stewart.[191]

Deploying the Taser's drive stun feature also seems unlikely to have made much difference. A

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[188] *Scott v. Edinburg*, 346 F.3d 752, 760 (7th Cir. 2003); 3 Wayne R. LaFave, *Search & Seizure* § 5.1(d) (2017) ("[T]he Fourth Amendment does not require police to exhaust every alternative before using deadly force; the alternative must be reasonably likely to lead to apprehension before the suspect can cause further harm." (footnotes omitted)).

[189] *See* Doc. 15 at 131, 167–68.

[190] Doc. 14 at 189–90.

[191] Doc. 15 at 150.

Taser works by causing neuro muscular incapacitation, which immobilizes a person by causing involuntary stimulation of the sensory and motor nerves.[192] It does so by sending an electrical flow between the two probes launched from the Taser when it is fired.[193] The greater the distance between the probes, the more muscles that are effected and the greater the incapacitation.[194]

If the probes are not spread far enough, perhaps because the officer was not far enough from the subject when the Taser was fired, the Taser will not cause as much incapacitation and will mainly become a tool for causing pain compliance.[195] Put another way, if the probes are not spread out enough, they will cause pain but will not immobilize a suspect. Defendant Officer Rhodes testified that he suspects this is why the Taser did not work on Stewart: there was not enough space inside the Honda's passenger cabin for the probes to spread before contacting Stewart.[196]

All of this is relevant here because the drive stun feature is primarily a tool of pain compliance, much like the probes if there is not enough distance between them.[197] So if the probes did not work when operating as a pain compliance measure, one would suspect the drive stun feature would not work either. Or at least a reasonable officer in the midst of a wild

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[192] User Manual at 5–6.

[193] *See id.* at 6.

[194] *See id.* at 6, 16.

[195] *Id.* at 16.

[196] Doc. 15 at 145–47.

[197] User Manual at 17.

ride with a suspect who refused to respond to blows to his head might conclude that.[198]

Plaintiff suggests that Officer Rhodes and/or Officer Catalani could have called for backup or asked that stop sticks be placed in front of the car.[199] Those options, however, would require other officers to overtake Stewart's vehicle, which would present a challenge even though the police station was nearby. Perhaps Officer Rhodes could have slowed Stewart down enough to allow for these options by continuing to struggle for the gearshift. But that would be asking Rhodes to gamble that nothing would happen between the time he called for backup or stop-sticks and the time they were deployed. Moreover, this analysis is the sort of speculative, hindsight-driven theorizing that the Sixth Circuit has directed district courts to avoid.[200]

The Court rejects the argument that Rhodes could simply have gotten out of the car while it was stopped after mounting the curb a second time. Police officers have no duty to retreat before using deadly force once a suspect puts them in a position where deadly force is justified.[201] Moreover, having witnessed Stewart quickly get the vehicle into drive multiple times, Officer Rhodes had little reason to

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[198] Defendant Officer Rhodes testified that he did not think to use the drive stun feature. Doc. 15 at 149. So all of this is somewhat speculative. The point is, though, that even if he had thought of it, it appears that it would not have been effective in stopping the Honda.

[199] *See* Doc. 22 at 10–11.

[200] *See Jones*, 4 F. Supp. 2d at 743–44.

[201] *See Nicholson v. Kent Cty. Sheriff's Dep't*, 839 F. Supp. 508, 516 (W.D. Mich. 1993).

believe that Stewart would not be able to get the car moving again between the time he stopped fighting for the gearshift and started attempting to exit the vehicle. Jumping on Stewart or grabbing for the steering wheel might have been even more dangerous if Stewart was able to get the car in gear again.

We now know, of course, that the Honda could no longer be shifted into drive and, thus, could no longer be moved forward.[202] But there is no evidence that Defendant Officer Rhodes knew that the vehicle was incapacitated. The Court must evaluate the use of deadly force from his perspective.[203]

Finally, it is true that (1) Stewart was not attempting to harm Rhodes in the Honda and (2) that some of Stewart's erratic driving may have been caused by Rhodes' attempts to gain control of the vehicle. The Court is not persuaded that these facts change the analysis. First, even if Stewart's actions *inside* the Honda did not necessarily put Officer Rhodes or others at risk of physical harm, his refusal to stop *operating* the Honda did. And second, Officer Rhodes was not required to allow Stewart to transport him to another location without a struggle and the fact that the struggle put his life in danger justified the use of deadly force.

The Court is aware that the Ninth Circuit Court of Appeals has concluded that a constitutional violation did occur under similar circumstances.[204] But that decision is not binding on this Court and the

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[202] Doc. 12-1 at 88.

[203] *Jones*, 4 F. Supp. 2d at 743.

[204] *Gonzalez v. City of Anaheim*, 747 F.3d 789 (9th Cir. 2014) (en banc).

Court is not persuaded by its reasoning. Faced with these circumstances, the Court is simply not sure what alternative course Officer Rhodes could safely have taken.

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All fatal encounters between citizens and the police are tragedies on both a personal and societal level. And it is right that citizens should ask whether an officer-involved shooting was avoidable, including through the use of the legal system. Ultimately, though, in a § 1983 case, the question is not whether every action an officer took was wise or whether that officer made mistakes. Nor is the question whether the Court, in hindsight, can imagine a way in which the shooting could have been avoided.

The question is whether, under all of the circumstances facing the officer at the moment he pulled the trigger, there was probable cause to believe that the suspect posed a serious risk of physical harm to the officer or others. The Court finds that, even viewing the facts in the light most favorable to the Plaintiff, there was probable cause for such a belief in this case. It follows that Defendant Officer Rhodes's use of deadly force did not violate Stewart's Fourth Amendment rights.[205]

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[205] Plaintiff's complaint mentions that her § 1983 claims are based upon violations of both the Fourth and Fourteenth Amendments. Doc. 1 at ¶ 32. To the extent this is meant to reflect the fact that the Fourth Amendment's guarantees are incorporated against the States by way of the Fourteenth Amendment's Due Process Clause, she is correct. *See generally Mapp v. Ohio*, 367 U.S. 643 (1961). To the extent that she is attempting to state a Due Process claim separate and distinct from the Fourth Amendment's guarantees, such a claim fails.

3. Clearly Established

Having concluded that Defendant Officers Rhodes and Catalani did not violate Stewart's constitutional rights, the Court need not necessarily consider whether those rights were clearly established.[206] The Court declines to do so for Plaintiff's claims regarding the initial stop on South Lake Shore.

But whether Defendant Officer Rhodes' use of deadly force violated Stewart's constitutional rights was a much closer question. So (out of an abundance of caution) the Court considers whether, even assuming the use of deadly force was a constitutional violation, that violation was clearly established. The Court concludes that it was not.

The Sixth Circuit has held that "it is axiomatic that individuals have a clearly established right not to be shot absent 'probable cause to believe that [they] pose[ ] a threat of serious physical harm, either to the officer or to others.'"[207] But the Circuit has since recognized that Supreme Court precedent

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See Graham, 490 U.S. at 395 ("*[A]ll* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." (emphasis in original)).

[206] *See Hayden*, 640 F.3d at 153.

[207] *Mullins v. Cyranek*, 805 F.3d 760, 765 (6th Cir. 2015) (quoting *Sample v. Bailey*, 409 F.3d 689, 698 (6th Cir. 2005) (second and third alterations in original).

stops this Court from defining a right at such a high level of generality for qualified immunity purposes.[208]

"A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'"[209] The Supreme Court has repeatedly told courts "not to define clearly established law at a high level of generality."[210] Instead, "[t]he dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'"[211]

While some cases may be obvious violations of constitutional rights and the law does not require a case that is "directly on point" to recognize a right as clearly established, "existing precedent must" nonetheless "have placed the statutory or constitutional

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[208] *See Latits*, 878 F.3d at 552–53. Ordinarily, the earlier decided case (*Mullins*) would control over the later case (*Latits*). *Sowards v. Loudon Cty*, 203 F.3d 426, 431 n.1 (6th Cir. 2000) ("When a later decision from this court conflicts with its prior decisions, the earlier cases control."). But the Supreme Court has further clarified its position between the time the Sixth Circuit decided *Mullins* and the time it decided *Latits*. *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) ("Today, it is again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" (quoting *al-Kidd*, 563 U.S. 731, 742 (2011))). The Court will abide by the Supreme Court's instructions.

[209] *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (per curiam) (quoting with alterations *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

[210] *al-Kidd*, 563 U.S. at 742.

[211] *Mullenix*, 136 S. Ct. at 308 (quoting *al-Kidd*, 563 U.S. at 742) (emphasis in original).

question beyond debate."[212] "The precedent clearly establishing a right can be in the form of a case of 'controlling authority or a robust consensus of cases of persuasive authority.'"[213]

There is no such controlling authority or persuasive authority here.

Plaintiff points to cases like *Smith v. Cupp*[214]to attempt to show that Defendant Officer Rhodes' conduct here violated a clearly established right.[215] That case, however, is very different from the facts here.

In *Smith*, an officer detained a suspect in a restaurant parking lot, handcuffed him, and placed him in the backseat of a police cruiser.[216] The suspect somehow escaped his restraints and gained control of the cruiser while the officer was outside the vehicle.[217] He then drove the cruiser in the officer's direction, either in an attempt to hit the officer or in order to get out of the parking lot.[218] The officer shot the suspect multiple times as he passed.[219] The Sixth Circuit denied qualified immunity because a reasonable jury could find a constitutional violation.[220] It explained that a jury could find that the suspect was

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[212] *White*, 137 S. Ct. at 551 (quoting *Mullenix*, 136 S. Ct. at 308).

[213] *Latits*, 878 F.3d at 552 (quoting *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014)).

[214] 430 F.3d 766 (6th Cir. 2005).

[215] Doc. 22 at 19–20 n.14, 21.

[216] 430 F.3d at 769.

[217] *Id.*

[218] *Id.* at 769–70.

[219] *Id.*

[220] *Id.* at 773–75.

simply trying to escape and that the officer was outside the zone of danger when he fired.[221] The other controlling case Plaintiff cites is factually similar to *Smith*.[222]

This case, however, is very different. Defendant Officer Rhodes was not outside the Honda in a place of safety when he shot Stewart. He was inside the vehicle, struggling for control, as it travelled down a public roadway.

Indeed, the facts in *Latits v. Phillips*[223]were more similar to *Smith* than the facts in this case. In *Latits*, officers engaged in a high-speed chase with a suspect, eventually forcing his car off the road in violation of department policy.[224] When the suspect's car stopped, officers pulled along either side.[225] Another officer pulled in front of the suspect's car when he started to slowly move forward again.[226] The officer who rammed the suspect off the road ran behind the suspect's car and shot the suspect when he began to reverse away from the cruisers that had boxed him in.[227] Notwithstanding the factual similarities with *Smith*, the Sixth Circuit nonetheless held that the constitutional violation in *Latits* was not clearly established.[228] This suggests that any constitutional

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[221] *See id.*

[222] *See Godawa v. Byrd*, 798 F.3d 457 (6th Cir. 2015).

[223] 878 F.3d 541.

[224] *Id.* at 544–46.

[225] *Id.* at 546.

[226] *Id.*

[227] *Id.*

[228] *Id.* at 552–53.

violation in this case also was not clearly established, because the facts in this case are further afield of *Smith* than the facts in *Latits*.

Moreover, there are several decisions that, although persuasive rather than binding, could be read to suggest that Officer Rhodes' conduct was constitutionally permissible. In those cases, an officer was being dragged along outside a vehicle by a suspect attempting to flee after a traffic stop.[229]

Again, this case is different: Defendant Officer Rhodes was inside the vehicle and, thus, not in danger of being run over or dragged down the street at the time he shot Stewart. But the fact remains that the facts of this case lie somewhere between the facts of *Smith* and the facts of the vehicle dragging cases. That ambiguity precludes the alleged deadly force constitutional violation in this case from being clearly established.

Plaintiff points to two out-of-circuit cases, including the Ninth Circuit case discussed above, to support her position.[230] But two persuasive cases do not establish the "robust consensus" of persuasive authority necessary to show that the alleged violation here was clearly established.[231]

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[229] [229]*Jones*¸4 F. Supp. 2d 737; *Estate of Alexander v. Merrow*, No. 14-cv-11612, 2016 WL 1465011 (E.D. Mich. April 14, 2016) (*aff'd sub nom*, *Alexander v. County of Wayne*, 689 F. App'x. 441 (6th Cir. 2017)).

[230] Doc. 22 at 19–20 n.14 (citing *Gonzalez*¸747 F.3d 789 and *Ford v. City of Pittsburgh*, No. 13-cv-1364, 2016 WL 4367994 (W.D. Pa. Aug. 15, 2016)).

[231] *Latits*, 878 F.3d at 552 (quoting *Plumhoff*, 134 S. Ct. at 2023).

For those reasons, the Court concludes that Defendant Officer Rhodes would be entitled to qualified immunity on Plaintiff's excessive force claim even if his use of deadly force violated Stewart's constitutional rights.

B. State Law Claims Against the Individual Officers

Plaintiff also brings a variety of Ohio state-law claims against Defendant Officers Rhodes and Catalani.[232] The Defendant Officers argue that they are immune from those claims under Ohio law.[233] The Court agrees.

Ohio law immunizes public employees from liability unless (1) "[t]he employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;" (2) those "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;" or (3) "[c]ivil liability is expressly imposed upon the employee by" statute.[234] Plaintiff contends that the second of these exemptions applies in this case.[235]

For the reasons (discussed in Section III.A) that the Court concluded that Officers Rhodes and Catalani did not violate Stewart's constitutional rights, the Court also concludes that the officers did not act with malicious purpose, in bad faith, or wantonly or recklessly within the meaning of Ohio law. Officers Rhodes and Catalani acted reasonably in attempting

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[232] Doc. 1 at ¶¶ 50–69.

[233] Doc. 12 at 22-23.

[234] O.R.C. § 2744.03(A)(6).

[235] Doc. 22 at 24–25.

to remove Stewart from his vehicle when he began to flee the scene. And Officer Rhodes had probable cause to believe that he or others were in serious risk of physical injury when he shot and killed Stewart on 222nd Street.

The Court therefore concludes that the Officer Defendants are entitled to immunity from Plaintiff's Ohio state-law claims.[236]

C. *Monell* Claim Against the City of Euclid

Finally, Plaintiff brings a *Monell* claim against Defendant City of Euclid, alleging that its practices or procedures led to the violation of Stewart's constitutional rights and his death.[237] Because the Court finds that Defendant Officers Rhodes and Catalani did not violate Stewart's constitutional rights, Plaintiff's *Monell* claim fails.[238]

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[236] The City of Euclid also asserts that it is entitled to immunity from Plaintiff's Ohio state-law claims. Doc. 12 at 20–22. But Plaintiff does not assert any state-law claims against the City of Euclid. *See generally* Doc. 1. Instead, she brings only a *Monell* claim against the City. The only claim that could possibly be interpreted otherwise is her survivorship claim, Doc. 1 at 66–69, but even that appears to be solely directed at the Officer Defendants. Out of an abundance of caution, however, the Court concludes that—to the extent Plaintiff's Ohio state-law claims are directed against the City of Euclid—the City is immune from those claims. *See* O.R.C. § 2744.02.

[237] Doc. 1 at ¶¶ 34–49.

[238] *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point."); *see also Peet v. City of Detroit*, 502 F.3d 557, 566 (6th Cir. 2007).

The Court will note, though, that the City might have some difficulty surmounting Plaintiff's *Monell* claim if that were not the case. Of particular concern is the City's blasé attitude toward excessive force training. Other than whatever basics are taught to officers when they attend a police academy, the City's training seems to consist initially of simply reading the excessive force policy after advising officers to "pay attention."[239] The City then apparently follows that up with a barebones yearly test (which is the same every year) and yearly scenarios that each focus on a single genre of facts that might require the use of force.[240] But the City does not seem to make any serious effort to track which scenarios individual officers were exposed to or ensure that the scenarios (over the course of several years) cover a comprehensive range of instances that might require the use of force.[241]

Moreover, although the police department's training policy calls for a training committee to review training needs and set training objectives, the department apparently does not have such a committee.[242]

Lastly, the presentation materials used during at least one of the Euclid Police Department's in-service trainings display a disturbing tendency to trivialize the use of excessive force.[243] For instance, one slide

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[239] Doc. 20 at 35–36; *see* Doc. 21 at 27, 42, 45–46; Doc. 37 at 14, 119–20.

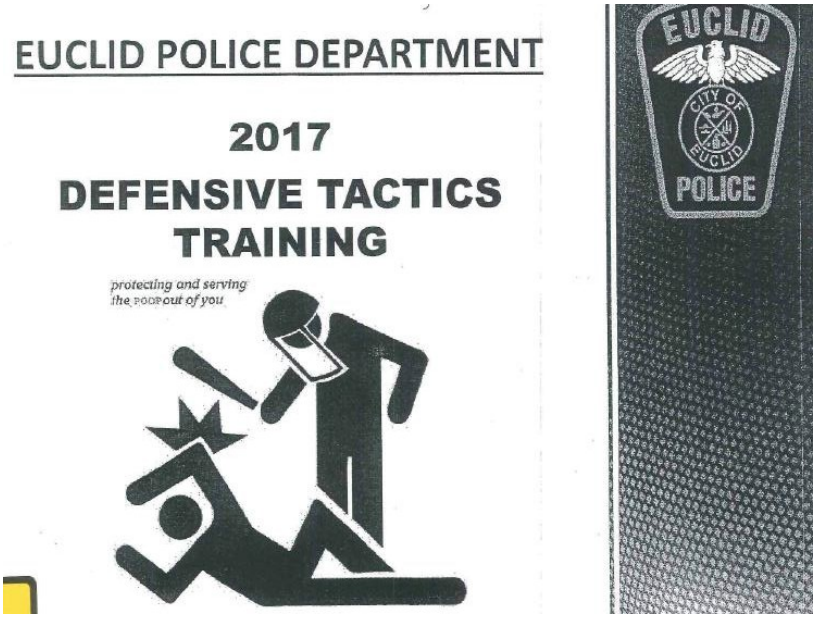
[240] *Id.* at 28–32.

[241] *Id.* at 36–47; Doc. 21 at 33–37.

[242] *Id.* at 29; Doc. 12-1 at 35–36.

[243] The Court GRANTS Plaintiff's motion to supplement her

contains the following graphic showing an officer beating a prone and unarmed suspect with the caption "[p]rotecting and serving the poop out of you."[244]



Another slide, which expressly discusses the department's use of force policy, contains an image of two officers—one holding a shotgun, the other holding a pistol—with furious expressions on their faces.[245] The caption on this slide reads: "Bed bug! Bed bug on my shoe!"[246]

Yet another slide contains a link to a Chris Rock comedy routine on YouTube entitled "How not to get

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summary judgment briefing in light of Police Chief Scott Meyer's deposition, which could not be taken prior to the deadline for filing her opposition. Doc. 38 at 1.

[244] Doc. 37-1 at 25; *see* Doc. 37 at 128–38.

[245] Doc. 37-1 at 49; *see* Doc. 37 at 128–38.

[246] Doc. 37-1 at 49; *see* Doc. 37 at 128–38.

your ass kicked by the police!"[247] During the skit, Rock says:

- "People in the black community . . . often worry that we might be a victim of police brutality, so as a public service the Chris Rock Show proudly presents: this educational video."[248]
- "Have you ever been face-to-face with a police officer and wondered: is he about to kick my ass? Well wonder no more. If you follow these easy tips, you'll be fine."[249]
- "We all know what happened to Rodney King, but Rodney wouldn't've got his ass kicked if he had just followed this simple tip. When you see flashing police lights in your mirror, stop immediately. Everybody knows, if the police have to come and get you, they're bringing an ass kicking with 'em."[250]
- "If you have to give a friend a ride, get a white friend. A white friend can be the difference between a ticket and a bullet in ya'."[251]

The video also shows numerous clips of multiple officers beating suspects.[252] Whatever the merits of

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[247] Doc. 37-1 at 41 (linking to https://www.youtube.com/watch?v=uj0mtxXEGE8).

[248] InsaneNutter, *Chris Rock-How not to get your ass kicked by the police!* (Feb. 2, 2007), https://www.youtube.com/watch?v=uj0mtxXEGE8.

[249] *Id.*

[250] *Id.*

[251] *Id.*

[252] *Id.*

this routine as comedy, it is grossly inappropriate in the context of a police department's use of force training.

To be clear, the Court does not find that the Department's dubiously supervised and organized excessive force training regimen or its tasteless, irresponsible frivolity with regard to the use of force would certainly support a *Monell* claim if Officers Rhodes and Catalani had violated Stewart's constitutional rights. It mentions these facts to express its caution that the Euclid Police Department seems to view the use of force (including deadly force) with cavalier indifference and to suggest that the viability of a *Monell* claim would be a close question.

In this case, however, the lack of a constitutional violation precludes *Monell* liability.

IV. CONCLUSION

For all of those reasons, the Court GRANTS the Defendants' motion for summary judgment and orders that Plaintiff's complaint be DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: July 13, 2018

s/James S. Gwin
JAMES S. GWIN
UNITED STATES
DISTRICT JUDGE