# APPENDIX

# APPENDIX

## TABLE OF CONTENTS

## APPENDIX A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)
File Name: 22a0204p.06

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**No. 21-5044**

**[Filed August 29, 2022]**

| | |
|---|---|
| MARK CAMPBELL; SHERRIE CAMPBELL, *Plaintiffs-Appellees*, | ) |
| *v.* | ) |
| CHEATHAM COUNTY SHERIFF'S DEPARTMENT, et al., *Defendants*, | ) |
| JAMES DOUGLAS FOX, *Defendant-Appellant*. | ) |

Appeal from the United States District Court for the Middle District of Tennessee at Nashville.
No. 3:19-cv-00151—Waverly D. Crenshaw, Jr., District Judge.

Argued: May 4, 2022

Decided and Filed: August 29, 2022

Before: BOGGS, GIBBONS, and NALBANDIAN, Circuit Judges.

---

## COUNSEL

**ARGUED:** Robyn Beale Williams, FARRAR & BATES LLP, Nashville, Tennessee, for Appellant. John H. Morris, NASHVILLE VANGUARD LAW PLLC, Nashville, Tennessee, for Appellees. **ON BRIEF:** Robyn Beale Williams, FARRAR & BATES LLP, Nashville, Tennessee, for Appellant. John H. Morris, NASHVILLE VANGUARD LAW PLLC, Nashville, Tennessee, Andrew S. Lockert, LOCKERT LAW, PLLC, Ashland City, Tennessee, for Appellees.

GIBBONS, J., delivered the opinion of the court in which BOGGS, J., joined. NALBANDIAN, J. (pp. 16–27), delivered a separate dissenting opinion

---

## OPINION

---

JULIA SMITH GIBBONS, Circuit Judge. Mark and Sherrie Campbell filed a complaint under 42 U.S.C. § 1983 against the Cheatham County Sheriff's Department, the Municipal Government of Cheatham County, Cheatham County Sheriff Mike Breedlove, and Officers James Fox and Christopher Austin. The district court granted summary judgment for all defendants except Fox, concluding that Fox was not entitled to qualified immunity on the Campbells' excessive force claim against him. Fox appeals, and we affirm.

## I

On August 21, 2018, around 9:15 p.m., Fox and Austin were dispatched to the Campbells' residence to conduct a welfare check after a 9-1-1 dispatcher received two hang-up calls from a phone located on the property. They arrived at the Campbells' home around 9:39 p.m. They did not activate the emergency lights on their cars but kept their headlights pointed toward the house.

Fox walked up onto the small porch and knocked on the front door. He did not announce himself as law enforcement. The district court compiled a useful table of what occurred next, which we adopt here after confirming its accuracy with video footage[1] and the other record evidence.

| Seconds Elapsed | Description of Event |
|---|---|
| 0 | Fox knocks three times |
| 1–5 | Fox walks down the steps and stands next to Austin |
| 10 | Mark says, "You got a gun?" through the closed door |
| 12–17 | Fox unholsters his gun and walks to the other side of Austin while saying, "Mark . . . come on out Mark, what's up man?" |
| 18 | Mark again says, "You got a gun?" |

[1] The video footage includes both officers' body cameras and the dashboard camera in Fox's vehicle.

| | |
|---|---|
| 21 | Fox says, "What' going on Mark?" |
| 23 | Mark says, "I got one too." |
| 24–25 | Fox draws his gun and turns his back to the door as he walks behind Austin |
| 26 | Mark begins to open the door |
| 27 | Fox turns quickly back toward the door |
| 28 | Fox says, "Do what Mark?" and then fires two shots toward the door in rapid succession |
| 29 | Austin trips or jumps to the ground |
| 30 | Fox says, "You good?" |
| 31 | Fox fires six shots toward the door in rapid succession |

*Campbell v. Cheatham Cnty. Sheriff's Dep't*, 511 F. Supp. 3d 809, 814 (M.D. Tenn. 2021) (footnotes omitted).

The parties dispute what the officers saw when Mark began to open the door, and the video footage does not resolve the dispute. Mark says he may have had a cell phone in his hand, but not a gun. Both officers contend they thought Mark had a gun. However, there is evidence that on the evening of the incident, the officers did not know what, if anything, Mark was holding.

Following Fox's first shots, Mark fell to the floor and kicked the door shut. He yelled to his wife, Sherrie, to call 9-1-1 because somebody was shooting at them. Sherrie was asleep in the bedroom, woke to gunshots, and heard her husband yelling. She called 9-1-1.

Although Fox fired eight shots at the home, no one was hit.

After the shots, Fox and Austin made their way behind Fox's car as Fox reported over the radio that shots were fired. Mark yelled profanities through the closed door. A few minutes later, Mark walked onto his porch holding a flat reflective rectangular item. Fox and Austin yelled at Mark to get on the ground and show his hands. Mark yelled that his phone was in his hand and lifted his empty left hand. He yelled that he was not getting on the ground, to shoot him, and profanities, before returning inside his home. Mark opened the door again a minute later and stood in the doorway as he appeared to talk on the phone and pointed at the officers. Again, Fox and Austin yelled at Mark to show his hands. Mark yelled back and then returned inside and shut the door.

Several other officers soon arrived at the Campbells' home, and one of them apprehended Mark in the yard of the home. After Mark's arrest, Fox, Austin, and a detective went inside the home. They told Sherrie, who was still in the bedroom, to come out with her hands visible. Sherrie complied, and the officers detained her while they cleared the house. No firearms were found in the home. Mark was charged with two counts of aggravated assault, both of which were ultimately dismissed.

The Campbells sued Fox in his individual capacity for excessive use of force under 42 U.S.C. § 1983. Fox argued that the statute of limitations barred the Campbells' § 1983 claim and that he was entitled to qualified immunity because (1) he did not seize the

Campbells within the meaning of the Fourth Amendment, and (2) his use of force was objectively reasonable. The district court disagreed with each of these arguments. Fox appealed. We decline to exercise jurisdiction over Fox's statute of limitations argument, and we affirm the district court's denial of summary judgment.

## II

"We review de novo a district court's denial of a defendant's motion for summary judgment on qualified immunity grounds." *Stoudemire v. Mich. Dep't of Corr.*, 705 F.3d 560, 565 (6th Cir. 2013). Summary judgment is appropriate only when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *see* Fed. R. Civ. P. 56(a). We view the facts and reasonable factual inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Where there is video footage of an incident, we view the facts in the light depicted by any unambiguous footage. *See Scott v. Harris*, 550 U.S. 372, 378–81 (2007).

## III

Fox contends that the district court erred in denying him summary judgment because the Campbells' § 1983 claim is barred by the statute of limitations and because he is entitled to qualified immunity.

**A**

Fox argues Tennessee's one-year statute of limitations applies to the Campbells' § 1983 claim. We lack jurisdiction to address this argument.

We have jurisdiction to review "final decisions" from the district courts. 28 U.S.C § 1291. Under the collateral order doctrine, however, some interlocutory orders are immediately appealable, because they amount to final decisions. *United States v. Mandycz*, 351 F.3d 222, 224 (6th Cir. 2003). Such orders include only "decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Id.* (quoting *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995)). An order must satisfy all three of these requirements to be appealable under the collateral order doctrine. *Id.*

The district court determined the Campbells' §1983 claim was timely under the applicable statute of limitations. "A statute of limitations is not an immunity from suit; it is a defense to liability." *DeCrane v. Eckart*, 12 F.4th 586, 601 (6th Cir. 2021). Therefore, Fox's argument on the statute of limitations can be effectively reviewed after a final judgment. As this issue does not satisfy the requirements under the collateral order doctrine, we lack jurisdiction to review it.[2] *See id.* at 601–02.

---

[2] We have exercised pendent appellate jurisdiction over issues that are inextricably intertwined with qualified immunity. *DeCrane*, 12 F.4th at 602. We decline to do so here, as Fox has not invoked our discretionary pendent appellate jurisdiction and his statute of

**B**

We turn to qualified immunity. Unlike the statute of limitations defense, qualified immunity enables a defendant to avoid litigating a dispute. *DeCrane*, 12 F.4th at 601. We may "review the district court's interlocutory denial of qualified immunity only to the extent that it turns on an issue of law." *Stoudemire*, 705 F.3d at 564.

The Campbells alleged that Fox violated their constitutional rights by using excessive force against them. Fox, as a government official, is entitled to qualified immunity from this claim unless the Campbells can show that Fox violated a constitutional right that was clearly established at the time of his alleged misconduct. *Id.* at 567.

**1**

We start with the constitutional right. A § 1983 claim of excessive force implicates "either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct." *Graham v. Connor*, 490 U.S. 386, 394 (1989). Where, as here, "the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen," it invokes "the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their

---

limitations defense is not inextricably intertwined with qualified immunity. *Id.*

persons . . . against unreasonable . . . seizures' of the person." *Id.* (quoting U.S. Const. amend. IV). Fox contends the Campbells cannot establish a violation of the Fourth Amendment because they were not seized.

A seizure can occur in one of two ways: (1) use of force with the intent to restrain; or (2) show of authority with acquisition of control. *Torres v. Madrid*, 141 S. Ct. 989, 998, 1001 (2021). The first type covers uses of physical force, such as when an officer shoots an individual. *Id.* at 999. Had Fox's shots hit the Campbells, then they would have been seized under this category. Since Fox missed and there was no physical contact, we look to the second type—acquisition of control. As the Supreme Court has explained, "[u]nlike a seizure by force, a seizure by acquisition of control involves either voluntary submission to a show of authority or the termination of freedom of movement." *Id.* at 1001. The parties do not dispute that Fox showed authority by firing eight shots into the Campbells' home, but Fox contends that the Campbells did not submit to this show of authority, and thus were not seized.

What constitutes a submission to a show of authority or a termination of freedom of movement? If an officer rams a suspect's car off the road or locks a suspect in a room, the officer has terminated the suspect's freedom of movement and seized the suspect under the Fourth Amendment. *See id.* Alternatively, if an officer orders an individual to stop but the individual continues running away, then there has been no seizure, because there has been no submission to authority or termination of movement. *See*

*California v. Hodari D.*, 499 U.S. 621, 626 (1991). As the Supreme Court has recognized, "when an individual's submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not." *Brendlin v. California*, 551 U.S. 249, 255 (2007). The Court explained that "a seizure occurs if 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Id.* (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). "Examples of circumstances that might indicate a seizure" include "the threatening presence of several officers [or] the display of a weapon by an officer." *Mendenhall*, 446 U.S. at 554.

In view of all the circumstances here, a reasonable person would not believe that he or she was free to leave a house while an officer repeatedly fired at the front door.[3] We considered a similar situation in *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002). In *Ewolski*, John Lekan had a standoff with the police at his home. *Id.* at 498–500. "The district court concluded that Mr. Lekan was not seized, because by barricading himself in his home he never submitted to official authority." *Id.* at 506. We held that this

[3] The dissent states, "Mark evidently felt differently." Dis. Op., at 18. But the test established in *Mendenhall* is objective: "Not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *Hodari D.*, 499 U.S. at 628.

conclusion was erroneous, because under the circumstances, Lekan was not free to leave. *Id.* As we explained, "although Mr. Lekan was never in police custody, the police surrounded the house and paraded an armored vehicle in front of the Lekans' house." *Id.* "These actions qualify as an intentional application of physical force and show of authority made with the intent of acquiring physical control" and "this assertion of force and authority succeeded in restraining Mr. Lekan's liberty to leave his home." *Id.* In this case, when Fox fired immediately and repeatedly upon Mark opening the door, Fox terminated the Campbells' movement and "a reasonable person would have believed that he was not free to leave." *Brendlin*, 551 U.S. at 255 (citation omitted). Therefore, the Campbells were seized within the meaning of the Fourth Amendment.

Fox attempts to analogize this case to cases in which officers' missed shots failed to stop a fleeing suspect. We rejected this same argument in *Ewolski*, explaining that "[u]nlike the fleeing suspects [in other cases,] Mr. Lekan was not 'on the loose.'" 287 F.3d at 506. Like Lekan, the Campbells were not "on the loose," but rather confined to their home because of Fox's show of authority. *See id.* The dissent distinguishes *Ewolski*, emphasizing that Mark was on the loose because he walked onto his front porch and yard. Dis. Op., at 20. We find Mark's limited range of movement onto the curtilage of his home more in line with the facts of *Ewolski* than the fleeing cases in which suspects ran away from chasing officers.

In analyzing whether conduct constitutes submission to a show of authority, we also look to "what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away." *Brendlin*, 551 U.S. at 262. When Fox shot at their front door, the Campbells effectively submitted to his show of authority by remaining in their home. Fox emphasizes that Mark later came out to his front porch, yelled profanities, and went out to his yard. This limited range of movement is factually distinguishable from the cases in which a suspect is fleeing by running or driving away from officers. *See Floyd v. City of Detroit*, 518 F.3d 398, 405–06 (6th Cir. 2008); *cf. Hodari D.*, 499 U.S. at 622–23; *Adams v. City of Auburn Hills*, 336 F.3d 515, 517, 518–20 (6th Cir. 2003). Moreover, Mark's subsequent actions on his porch and in his yard are of little use in determining whether the Campbells were seized at the time that Fox fired his weapon, because a seizure is "a single act, and not a continuous fact," and an individual may be seized for a brief time despite later demonstrating freedom of movement. *Torres*, 141 S. Ct. at 1002 (quoting *Hodari D.*, 49 U.S. at 625). The dissent contends we fail to look at what occurred after the gunshots, erasing the distinction between seizures by control and seizures by force. Dis. Op., at 17. We, of course, look to what the Campbells did in response to Fox's show of authority. They took cover in their home. The dissent focuses on Mark's actions minutes later when he came onto his porch. But the events immediately following the gunshots is of greater value in determining whether the Campbells were seized because a seizure is a discrete moment,

and not a continuous chain of events. We do not ignore what happened next. Rather, we emphasize that what occurred immediately is more informative than what occurred later in time. By remaining on their property rather than leaving after shots were fired at their door, the Campbells submitted to Fox's show of authority and were restricted in their movement.

It also makes no difference whether Fox knew Sherrie was also inside the home. We have explained that when an officer seizes one person by shooting at a car, for example, the officer seizes everyone in the car, even if the officer is unaware of the presence of passengers. *Rodriguez v. Passinault*, 637 F.3d 675, 686–87 (6th Cir. 2011); *Fisher v. City of Memphis*, 234 F.3d 312, 318–19 (6th Cir. 2000); *see also Brendlin*, 551 U.S. at 254–59. The same logic extends to the home: just as shooting at a car and causing it to stop terminates the freedom of movement of everyone in the car, so does shooting into a house in a manner that prevents occupants from leaving constitutes a seizure of the occupants. By shooting at the house, Fox seized everyone inside, including Sherrie.[4]

---

[4] In *Ewolski*, this court held Lekan's wife and child, who were also trapped in the home, were not seized because "[t]heir movement was restrained by Mr. Lekan . . . not by the police." 287 F.3d at 507. In fact, the police were attempting to "remove them from the house and remove them from the control of Mr. Lekan." *Id.* But in this case, Fox's gunshots, rather than Mark's actions, confined Sherrie to her home. The dissent disagrees and contends Mark kept Sherrie in the house, because he told her to stay put. Dis. Op., at 22. But, of course, Mark told Sherrie not to move because Fox was shooting at the home.

The dissent analogizes this case to *Bletz v. Gribble*, 641 F.3d 743 (6th Cir. 2011). Dis. Op., at 22–23. In *Bletz*, officers went to the Bletz family home to execute a warrant for Zachary Bletz's arrest. 641 F.3d at 747. While waiting for Zachary to secure his dog, officers waited in the breezeway of the home and saw a man pointing a gun at them. *Id.* This was Zachary's father, Fred Bletz, who had poor vision and hearing. *Id.* at 748. Officers shot him. *Id.* Officers then moved into the home where they handcuffed Zachary and his mother, Kitti Bletz, before placing them in police cars. *Id.* Kitti alleged her Fourth Amendment rights were violated. *Id.* We held that "it is indisputable that Kitti was seized within the meaning of the Fourth Amendment when defendants handcuffed her and placed her inside a locked police vehicle." *Id.* at 754. The dissent contends this shows that Kitti was not seized before this moment. Dis. Op., at 22–23. *Bletz* did not engage in any analysis of whether everyone in the house was seized when the officers started shooting, so the same issue was not before the court. But, regardless, unlike our case, officers did not shoot multiple rounds at the Bletz family home's front door. Rather, officers were already inside the breezeway of the home and shot directly at one person in response to that person pointing a weapon at them. *Bletz* does not address the same seizure issues presented here.

"When an officer fires a gun at a person," but "the bullet does not hit the person, the 'show of authority . . . ha[s] the intended effect of contributing to [the person]'s immediate restraint'" and under our caselaw is a seizure." *Jacobs v. Alam*, 915 F.3d 1028, 1042 (6th Cir. 2019) (alterations in original) (quoting *Thompson*

*v. City of Lebanon*, 831 F.3d 366, 371 (6th Cir. 2016)). By firing at the Campbells' home, Fox made a show of authority. This show of authority restricted the Campbells' movement such that a reasonable person, under these circumstances, would not feel free to leave.[5] Therefore, Fox seized the Campbells under the Fourth Amendment.

**2**

Having established that Fox seized the Campbells, we turn to whether a reasonable jury could conclude that Fox's use of force was excessive, in violation of the Fourth Amendment. As this is an interlocutory appeal, Fox "must be willing to concede the most favorable view of the facts to the [Campbells] for purposes of the appeal." *Jacobs*, 915 F.3d at 1039 (citation omitted). If Fox fails to do so, we may exercise jurisdiction only over "the purely legal question of whether the facts alleged support a claim of violation of clearly established law." *Id.* at 1039–40 (citation omitted).

"We have authorized the use of deadly force 'only in rare instances'" in which "the 'officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.'" *Id.* at 1040 (citations omitted). We look at the circumstances of each case to determine the reasonableness of the use of force, "including the

[5] For this inquiry, it is irrelevant whether Mark or Sherrie knew the individual shooting at the door was a law enforcement official, because the inquiry is objective and does not "depend on the subjective perceptions of the seized person." *Torres*, 141 S. Ct. at 999.

severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. The Campbells had committed no crime and were not evading arrest when Fox used deadly force—leaving only the threat factor for our consideration. The threat actor "is 'a *minimum* requirement for the use of deadly force,' meaning deadly force 'may be used only if the officer has probable cause to believe that the suspect poses a threat of severe physical harm.'" *Mullins v. Cyranek*, 805 F.3d 760, 766 (6th Cir. 2015) (citation omitted); *see also Tennessee v. Garner*, 471 U.S. 1, 12–13 (1985). We make an objective assessment based on the perspective of a reasonable officer in Fox's position. *See Jacobs*, 915 F.3d at 1040–41.

Viewing the facts in the light most favorable to the Campbells, Fox and Austin arrived at the Campbells' home in the evening to conduct a welfare check. Fox, without announcing himself as an officer, knocked on the front door. Mark asked, "You got a gun?" Fox asked Mark, "What's going on?" Mark said, with the door still closed, "I got one too." Mark slightly opened the door and Fox immediately began firing his weapon. Under these facts, a reasonable officer would not have believed deadly force was justified, as there was no probable cause to believe that Mark posed a threat to anyone's safety simply by virtue of informing the officers that he had a gun and then opening the door as they asked him to do. *See Floyd*, 518 F.3d at 405–07; *Dickerson v. McClellan*, 101 F.3d 1151, 1163 (6th Cir. 1996).

Fox emphasizes that Mark said he had a gun. But under our precedent, mere possession of a weapon is not sufficient to justify the use of deadly force. *Jacobs*, 915 F.3d at 1040. Rather, there must be additional indicia that the safety of the officer or others is at risk. *See, e.g.*, *Hicks v. Scott*, 958 F.3d 421, 435 (6th Cir. 2020) (individual pointed a rifle at the officer's face); *Thomas v. City of Columbus*, 854 F.3d 361, 365–66 (6th Cir. 2017) (individual suspected of committing a burglary ran with a gun in hand toward a lone officer in a high-crime area). Fox nonetheless contends that two of our cases support his use of deadly force as reasonable: *Pollard v. City of Columbus*, 780 F.3d 395 (6th Cir. 2015) and *Simmonds v. Genesee County*, 682 F.3d 438 (6th Cir. 2012). In *Pollard*, we concluded that an officer's use of deadly force was objectively reasonable where the suspect clasped his hands in a shooting posture and pointed it at the officers after engaging in a dangerous car chase and ignoring multiple commands. 780 F.3d at 400, 403–04. In *Simmonds*, we concluded that an officer's use of deadly force was reasonable where the suspect brandished a silver object while yelling "I have a gun" after the suspect threatened to kill others, ignored repeated orders, and fled from officers. 682 F.3d at 445. *Pollard* and *Simmonds* thus provide examples of circumstances extending beyond mere possession of a weapon that would lead a reasonable officer to believe there was a threat to the safety of others. Without these additional circumstances, the fact that an individual states that he has a weapon, or even in fact possesses a weapon, is not enough to justify the use of deadly force. *See Lee v. Russ*, 33 F.4th 860, 863–66 (6th Cir. 2022); *Jacobs*, 915 F.3d at 1040; *King v. Taylor*, 694 F.3d 650, 663–64 (6th

Cir. 2012); *Bradenburg v. Cureton*, 882 F.2d 211, 215 (6th Cir. 1989); *see also Knowlton v. Richland Cnty.*, 726 F. App'x 324, 326–27, 331 (6th Cir. 2018); *Woodcock v. City of Bowling Green*, 679 F. App'x 419, 424–25 (6th Cir. 2017). Viewing the evidence in the light most favorable to the Campbells, no additional circumstances existed during the incident that would lead a reasonable officer to believe that the Campbells posed a safety risk to others.

Fox additionally contends that he believed Mark was holding a gun when Mark began opening the door. However, this is a genuine dispute of fact, as Mark contends that he was not holding a gun[6] and there is evidence in the record that the officers did not know what, if anything, Mark was holding. We lack jurisdiction to resolve the factual dispute over what Fox perceived that evening when Mark slightly opened the door. *See Jacobs*, 915 F.3d at 1041; *Floyd*, 518 F.3d at 404; *Graves v. Malone*, 810 F. App'x 414, 422–23 (6th Cir. 2020). Accepting the Campbells' version of the facts, a reasonable jury could find that Fox's use of deadly force was objectively unreasonable. Therefore, we turn to whether the right was clearly established.

**3**

An officer is not entitled to qualified immunity if he violates a constitutional right "so clearly established when the acts were committed that any officer in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative

[6] No gun was found in the search of the Campbells' home.

duty to have refrained from such conduct." *Bouggess v. Mattingly*, 482 F.3d 886, 894 (6th Cir. 2007) (quoting *Dominque v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987)).

The use of excessive force in a seizure is a violation of the Fourth Amendment. *See Graham*, 490 U.S. at 394. And "[i]t has been clearly established in this circuit for some time that individuals have a right not to be shot unless they are perceived as posing a threat to officers or others." *Jacobs*, 915 F.3d at 1040 (citation omitted). In some "obvious" cases, these general standards are sufficient to clearly establish that an officer's conduct is unconstitutional, even "without a body of relevant case law." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam). More often, however, decisions at this level of generality are insufficient to indicate whether the law clearly establishes that an officers' use of force is unreasonble. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam). Instead, we look to the law at the time of the officer's conduct and identify the "existing precedent [that] 'squarely governs' the specific facts at issue." *Id.* at 1153 (citation omitted). There need not be "a case directly on point for a right to be clearly established," but "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* at 1152 (citation omitted). "Precedent involving similar facts can help move a case beyond the otherwise 'hazy border between excessive and acceptable force' and thereby provide an officer notice that a specific use of force is unlawful." *Id.* at 1153 (citation omitted). "A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that

what he is doing violates that right.'" *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam) (citation omitted).

In the light most favorable to the Campbells, this may be an obvious case in which the general rule on use of deadly force, enunciated in *Garner*, provided sufficient notice to Fox that his conduct was unlawful. *See Garner*, 471 U.S. at 12–13. But we need not resolve that issue because, viewing the record in the light most favorable to the Campbells, *Floyd*, 518 F.3d at 398, decided a decade before the incident here, clearly establishes that Fox's conduct was unconstitutional. In *Floyd*, a dispute among neighbors resulted in a complaint to the Detroit police. *Id.* at 401–02. Two officers arrived at Floyd's residence while Floyd was at a barbeque. *Id.* at 402. The complaining neighbor told the officers that Floyd had threatened him with a shotgun earlier and had brandished a weapon. *Id.* Floyd arrived home around 8:00 p.m. and parked in his backyard. *Id.* He got out of his car and began walking with his empty hands out in front of him when officers suddenly ran toward him. *Id.* A split second later, the officers began shooting at him without warning. *Id.* We held that the officers' use of deadly force under these circumstances was objectively unreasonable and therefore unconstitutional, because under Floyd's version of the facts, he did not pose a threat of serious physical harm. *Id.* at 407.

Under the Campbells' version of events, *Floyd* is controlling. Mark was in his own home, unarmed, when Fox knocked on his door late in the evening. Though Mark did not make any threatening gestures indicating a danger of physical harm to others, Fox began

repeatedly shooting at him without warning. In both cases, the officers had some reason to believe that the suspect had a weapon. Despite this, we determined in *Floyd* that the officers' use of force was excessive. This finding comports with our caselaw at the time of Fox's use of force, which made clear that merely possessing a weapon, without more, is insufficient to justify the use of deadly force against a suspect. *See Bouggess*, 482 F.3d at 896 ("[E]ven when a suspect has a weapon, but the officer has no reasonable belief that the suspect poses a danger of serious physical harm to him or others, deadly force is *not* justified."); *King*, 694 F.3d at 663–64 (concluding that, though an individual was found with a gun after he was killed by an officer, "if [the officer] shot King while he was lying on his couch and not pointing a gun at the officers, [the officer] violated King's clearly-established right to be free from deadly force"); *Thomas*, 854 F.3d at 366 ("To be clear, we do not hold that an officer may shoot a suspect merely because he has a gun in his hand. Whether a suspect has a weapon constitutes just one consideration in assessing the totality of the circumstances."); *see also Knowlton*, 726 F. App'x at 330–32; *Woodcock*, 679 F. App'x at 424–25. Given this clear precedent and the analogous facts of *Floyd*, any reasonable officer in Fox's position would know that using deadly force, under the circumstances that the Campbells have asserted, was unconstitutional.

The dissent takes a different approach to the "clearly established" question, focusing on whether Fox was on notice that he seized the Campbells. Dis. Op., at 23–24. When Fox fired his weapon, he knew one of two things would occur: either he would hit someone, or he

would not. If he did shoot someone, then there is clearly established law that this is a seizure. *See Bouggess*, 482 F.3d at 889. If he missed, then it was clearly established that a seizure occurs if a reasonable person would have believed he was not free to leave in response to Fox's gunshots. *See Brendlin*, 551 U.S. at 255. As discussed, *Ewolski*, decided sixteen years before this incident, established that a reasonable person would not feel free to leave in response to police surrounding his home. *See* 287 F.3d at 506. Therefore, Fox was on fair notice that by shooting at the Campbell's home, he effectuated a seizure. Therefore, Fox is not entitled to qualified immunity at the summary judgment stage.

## IV

Accepting the Campbells' version of events, as we must in this interlocutory appeal, Fox used deadly force while conducting a welfare check, shooting eight times into the home of two unarmed nonthreatening individuals without warning. The "fortuity that [Fox's] shot[s] failed to strike [the Campbells]" does not take this case out of the Fourth Amendment's protection against unreasonable seizures. *Floyd*, 518 F.3d at 407. The Campbells were seized when Fox shot at their house, thereby restricting their freedom to leave. There remains a genuine dispute of material fact regarding how Mark appeared to officers that night, but in the light most favorable to the Campbells, Fox's use of deadly force was clearly excessive and unconstitutional. The district court properly determined Fox was not entitled to qualified immunity at the summary judgment stage. We affirm.

## DISSENT

NALBANDIAN, Circuit Judge, dissenting. This excessive-force case involving qualified immunity presents a threshold question: Did Officer Fox seize Mark and Sherrie Campbell under the Fourth Amendment when he fired his gun at Mark eight times, thankfully striking no one? Under current law, including the Supreme Court's recent decision in *Torres v. Madrid*, 141 S. Ct. 989 (2021), I believe the answer is no. And regardless, neither the Campbells nor the majority points to an on-point case that gave Officer Fox notice that his conduct constituted a seizure.

Next, even if Officer Fox seized the Campbells, he acted reasonably given that Mark announced he had a gun and then quickly opened the door at point-blank range with something in his hand. And, in any event, no case exists that would have put Officer Fox on notice that his conduct violated a clearly established constitutional right.

I would grant Officer Fox qualified immunity, so I respectfully dissent.[1]

### I.

The § 1983 claim of excessive force here implicates the Fourth Amendment's prohibition of unreasonable

[1] I do, however, agree with the majority that we cannot review Officer Fox's statute-of-limitations argument.

seizures of a person. *See Graham v. Connor*, 490 U.S. 386, 394 (1989). But before we evaluate whether Officer Fox violated the Campbells' Fourth Amendment rights, we must make sure that Officer Fox's conduct implicated the Fourth Amendment in the first place. After all, the "Fourth Amendment protects against 'unreasonable seizures,' not unreasonable or even outrageous conduct in general." *Galas v. McKee*, 801 F.2d 200, 202 (6th Cir. 1986).

An officer can seize someone by force or by control. *See Torres*, 141 S. Ct. at 1001. I agree with the majority that seizure by force is not at issue. *See* Maj. Op. at 6. To seize someone by control "involves either voluntary submission to a show of authority or the termination of freedom of movement." *Torres*, 141 S. Ct. at 1001. Arguing that he should receive qualified immunity, Officer Fox contends that Mark never submitted to authority and that Officer Fox did not terminate Mark's freedom of movement. I agree.

A.

*Voluntary Submission*. Mark did not voluntarily submit to Officer Fox's authority. Just watch the tape. As the majority notes, Mark felt free enough to reemerge onto his front porch and yell profanities at the officers, asking them to shoot him. What's more, Mark declined to follow the officers' orders to get on the ground and show his hands. So even though Officer Fox tried to seize Mark, his show of authority failed. Mark submitted to authority (and was thus seized) only when a different officer arrested him in his backyard. *See California v. Hodari D.*, 499 U.S. 621, 629 (1991).

The majority suggests that *Torres* supports disregarding Mark's subsequent actions in the yard because a seizure, as it was in *Torres*, is "a single act, and not a continuous fact." *See* Maj. Op. at 8. I disagree. In *Torres*, the seizure was "a single act" because the officers shot Torres. 141 S. Ct. at 1002 (quoting *Hodari D.*, 499 U.S. at 625). For seizures by force, which is what *Torres* was, there is likely a single act of force plus an intent to restrain at that moment. *Id.* at 998. But in *Hodari D.*, the Court explained that for seizures by show of authority, a seizure does *not* occur when the subject does not yield at an officer's call to halt. 499 U.S. at 626.

Instead, for shows of authority, the seizure occurs only when the suspect submits to that authority, or when his movement is terminated, which did not happen in *Hodari D.* or here. *Torres* did not disturb *Hodari D.*'s analysis as it relates to seizures by control. So by posing the question as "whether the Campbells were seized at the time that Fox fired his weapon," Maj. Op. at 8, the majority "erases the distinction between seizures by *control* and seizures by *force*." *Torres* 141 S. Ct. at 1001. How can you tell whether firing a gun that doesn't strike a suspect led that suspect to submit to authority or terminated his freedom of movement without looking at what comes next? Simply put, you cannot. So looking at Mark's actions after the shooting is necessary to determine whether Officer Fox seized the Campbells. And the majority's emphasis on "what occurred immediately" rather "than what occurred later in time," Maj. Op. at 8, is misplaced. A suspect can show signs of submitting to authority but then decline to do so. *See United States*

*v. Jeter*, 721 F.3d 746, 752–53 (6th Cir. 2013) (rejecting an argument that a "momentary pause can . . . be considered a submission to authority" when the suspect later fled).

*Termination of Movement*. Did Officer Fox terminate Mark's ability to freely move around? The Supreme Court's guidance on the question is that the termination of movement is absolute. *See Scott v. Harris*, 550 U.S. 372, 385 (2007) (ramming a car off the road); *Brower v. County of Inyo*, 489 U.S. 593, 598–99 (1989) (stopping a person successfully with a police roadblock); *Williams v. Jones*, 95 Eng. Rep. 193, 194 (KB 1736) (locking a person in a room). So the question becomes, did Officer Fox absolutely terminate Mark's ability to move? Again, I think not.

For starters, the majority seems to think that Mark's behavior falls into a kind of "passive acquiescence" between fleeing and submission. *See Brendlin v. California*, 551 U.S. 249, 255 (2007). In those cases, the Supreme Court has suggested that "a seizure occurs" when "a reasonable person would have believed that he was not free to leave." *Id.* (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). So here the majority concludes that a reasonable person would not feel free to leave after a police officer fired eight shots at him. And I agree. But that's not the end of our inquiry. For one thing, Mark evidently felt differently by going in and out of his house multiple times, screaming at the officers, and disobeying orders. And for another, the Supreme Court has explained before that the "so-called *Mendenhall* test" "states a *necessary*, but not a *sufficient*, condition for seizure . . .

effected through a 'show of authority.'" *Hodari D.*, 499 U.S. at 627–28; *see also Torres*, 141 S. Ct. at 1001 (using *Brendlin* as an example of when the Court had "not always been attentive to [the] distinction [between seizures by control and seizures by force] when a case did not implicate the issue"). *Brendlin* was a case about whether a passenger of a car pulled over for a traffic stop was seized. 551 U.S. at 253—54. But the car stayed put, therefore indicating that those inside were submitting to authority. *Id.* at 262. It would be a different case had the car sped off.

Take the facts of *Hodari D.*, for instance. A fleeing youth was not seized when the officers gave chase, nor when he saw an officer almost upon him. 499 U.S. at 623, 629. Instead, the officer seized the youth only when he tackled him. *Id.* at 629. Was the youth "free to leave" during the chase? Of course not. Yet the seizure occurred only when his movement in fact stopped. So the reliance on *Brendlin* doesn't get the majority all the way there. Although the majority is correct that the standard under *Mendenhall* and *Brendlin* is objective, *see* Maj. Op. at 7 n.3, when a suspect fails to submit to a show of authority, like in *Hodari D.* and here, that objective standard cannot by itself turn an attempted seizure into a seizure. *See Hodari D.*, 499 U.S. at 629; *see also Torres*, 141 S. Ct. at 1001 ("[A]ctual control is a necessary element for [a seizure by acquisition of control.]").

How do the Campbells fill in the gap? They don't. But the majority says that *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002), is the best case to show that Officer Fox seized Mark by

terminating his movement. In *Ewolski*, John Lekan barricaded himself, his wife, and his son in their home during a two-day armed standoff with police. *See id.* at 498–99. During the standoff, Mr. Lekan exchanged gunfire with officers multiple times, and the police tried various breaches that included crashing an armored vehicle through the living room. *Id.* at 499. The district court decided that none of the Lekans were seized during the standoff, *see id.* at 505, but we reversed as to Mr. Lekan, *see id.* at 506.

The district court held that Mr. Lekan wasn't seized because, by barricading himself in his home, he never submitted to authority. *Id.* The district court analogized Mr. Lekan to a fleeing suspect who had not submitted to authority, but we disagreed. Instead, we found the situation more like *Brower*, a different fleeing case. *Id.* In *Brower*, police set up a roadblock that a fleeing suspect fatally crashed into. 489 U.S. at 594. The Supreme Court held that such action was a seizure because it was a governmental termination of freedom of movement through means intentionally applied. *Id.* at 599. Seizing on this, we concluded that "Mr. Lekan was not free to leave." *Ewolski*, 287 F.3d at 506. Just like the driver in *Brower*, Mr. Lekan was never in police custody. But the police actions in both cases still intentionally applied force and authority to restrain movement. So we said that Mr. Lekan wasn't "on the loose" like the fleeing suspect in *Hodari D. Id.* Instead, we reasoned that the police's actions were as if they had nailed all of Lekan's doors and windows shut, trapping him inside. *Id.*

The majority thinks the same reasoning applies here, but I see it differently. When it comes to whether Officer Fox seized Mark, *Ewolski* is distinguishable on both the facts and the law. Above all, in *Ewolski*, Mr. Lekan was both not free to move *and* unable to leave. After multiple gunfire exchanges and breach attempts, Mr. Lekan was not free to leave his home given police action, and in fact he did not leave his home. On the other hand, Mark was free to leave his home, and we know this because he in fact did. First, when he yelled at the officers from his front porch and disobeyed orders to get on the ground, and then again when he exited the rear of his house "to see who was shooting at [him] and maybe get a jump on them." (R. 71-6, Mark Campbell Dep., PageID 408–09.) During Mark's backyard jaunt, he "walked right on past these two officers in these vehicles." (*Id.* at 409.) It's clear to me that Mark was "on the loose" like the suspect in *Hodari D. See Ewolski*, 287 F.3d at 506. So unlike Mr. Lekan, Officer Fox's "intentional application of physical force and show of authority" did not "succeed[] in restraining" Mark's "liberty to leave his home." *Id.* "The distinguishing feature of a seizure is the restraint of . . . his . . . freedom to walk away." *Id.* at 507. Mark did just that. In sum, Officer Fox did not seize Mark.

Finally, the Supreme Court's decision in *Torres* does not change my conclusion. In *Torres*, officers shot a suspect that sped off after they tried to stop her car and speak with her. 141 S. Ct. at 994. The bullets didn't stop Torres though. She drove off, stole a car, and made it to a new town before being airlifted to a hospital to treat her gunshot wounds. *Id.* Authorities arrested Torres at the hospital the next day. *Id.* Torres later

brought an excessive-force claim against the officers under § 1983. The district court granted summary judgment to the officers, and the Tenth Circuit affirmed, reasoning that Torres's continued flight meant no seizure occurred. *Id.*

The Supreme Court vacated and remanded. First, the Court identified that the case was about the application of physical force, not a show of authority. *Id.* at 995. Then, after surveying the common law, the Court held that the officers seized Torres during the shooting because they "applied physical force to her body and objectively manifested an intent to restrain her from driving away." *Id.* at 999. Addressing opposing arguments, the Court talked about seizures by control and explained that, unlike seizures by force, seizures by control require that "an officer succeeds in gaining control" over a suspect by "either voluntary submission to a show of authority or the termination of freedom of movement."[2] *Id.* at 1001.

Because the seizure was "just the first step in the analysis," the Court remanded the case without deciding the reasonableness of the seizure and whether the officers were entitled to qualified immunity. *Id.* at 1003. On remand, the magistrate judge granted the officers qualified immunity because it wasn't clear to an officer at the time of the shooting that their conduct constituted a seizure. *Torres v. Madrid*,

---

[2] Because the three dissenting Justices agreed that to seize someone through a "show of authority" "occurs only if the suspect submits to an officer's possession," *Torres*, 141 S. Ct. at 1014 (Gorsuch, J., dissenting), all eight Justices on the case agreed on this point.

No. 1:16-cv-01163, 2021 WL 6196994, at *4 (D. N.M. Dec. 30, 2021).

*Torres* clarified that the rule is this: "A failed attempt to restrain a suspect is not a 'seizure' within the meaning of the Fourth Amendment unless there is some application of physical force." *Steed ex rel. Steed v. Mo. State Highway Patrol*, 2 F.4th 767, 770 (8th Cir. 2021) (citing *Torres*, 141 S. Ct. at 995). Of course, many understood that rule before *Torres*. Dissenting in *Hodari D.*, Justice Stevens understood the majority's decision to mean that a police officer firing his weapon at a suspect would "not implicate the Fourth Amendment—as long as he misses his target." *Hodari D.*, 499 U.S. at 630 (Stevens, J., dissenting). So applied here, when Officer Fox shot at Mark, he attempted to seize him. But "[a]ttempted seizures of a person are beyond the scope of the Fourth Amendment." *County of Sacramento v. Lewis*, 523 U.S. 833, 845 n.7 (1998). Had Officer Fox in fact shot Mark, he would have been seized even if he remained in his house or roaming around his backyard. *See Torres*, 141 S. Ct. at 999. But without the force, a seizure by acquisition of control "requires that 'a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.'" *Id.* at 1001 (quoting *Brower*, 489 U.S. at 599).

That didn't happen here. Both under the law at the time of Officer Fox's conduct, and especially after *Torres*, it's clear that Officer Fox did not seize Mark.

B.

Nor did Officer Fox seize Sherrie. *Ewolski* helps explain why. There, we held that the wife and child trapped in the home were not seized by police because Mr. Lekan, not the police, restrained their movement. 287 F.3d at 507. The officers here and in *Ewolski* both shot into the house, but in *Ewolski* that wasn't enough to seize the people not targeted by the gunfire. *Id.* Like *Ewolski*, here there "are no facts alleged that would suggest" Officer Fox in any way restrained Sherrie's movement. *Id.* In fact, the record shows that Sherrie stayed put because after the shooting had ended, Mark told her "not to move, to stay where [she was] at." (R. 71-7, Sherrie Campbell Dep., PageID 413.) So if anything, Mark kept Sherrie in the house, not Officer Fox.

The district court's reliance on *Rodriguez v. Passinault*, 637 F.3d 675 (6th Cir. 2011), and *Fisher v. City of Memphis*, 234 F.3d 312 (6th Cir. 2000), is misplaced. Both cases involved police shooting at cars, not homes, and both involved an officer's intentional exertion of force against the passenger.

In *Fisher*, an officer shot at the driver of a car but hit the passenger instead. 234 F.3d at 315. We held that the officer seized the passenger because he shot her while intending to shoot at the car. *Id.* at 318–19. And in *Rodriguez*, an officer shot and killed the driver of a fleeing vehicle and injured a passenger. 637 F.3d at 677–78. We denied qualified immunity because a dispute of fact existed about which version of the events to believe and how the passenger received her injury. *Id.* at 687–89.

Neither case is enough like this one to justify the majority's reliance. Instead, I think the closest analogue is *Ewolski* or *Bletz v. Gribble*, 641 F.3d 743 (6th Cir. 2011). In *Bletz*, two police officers executed an arrest warrant for a man who lived with his parents. 641 F.3d at 747. The officers went inside the home with Bletz so he could change clothes under their supervision. *Id.* at 748. But once inside, the officers came upon Bletz's father with a gun drawn. *Id.* The parties disputed some of what happened next, but it's undisputed that one of the officers shot and killed Bletz's father. *Id.* After the shooting, the officers moved to secure the home, handcuffing and detaining Bletz and his mother for several hours. *Id.* Bletz's mother claimed the officers violated her Fourth Amendment rights, but we held that the officers seized Bletz's mother "within the meaning of the Fourth Amendment when defendants handcuffed her and placed her inside a locked police vehicle," not when the shooting occurred. *Id.* at 754.

The two cases most like this one, *Ewolski* and *Bletz*, involved officers shooting or shooting at an individual at home, and we held that the third party was not seized at the time of the shooting. The two cases the majority relies on, *Fisher* and *Rodriguez*, both involved injuries to the passengers from the officers' intentional application of force with the intent to restrain. So it's clear to me that following the more analogous caselaw, Officer Fox did not seize Sherrie.

C.

As for the "clearly established" question, I think the discussion above shows, at a minimum, that no case

exists that could have put Officer Fox on notice that he seized the Campbells. "The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam) (cleaned up). "[Q]ualified immunity is appropriate unless the officer in question had 'fair notice' that h[is] conduct was unlawful." *Trozzi v. Lake County*, 29 F.4th 745, 761 (6th Cir. 2022) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)). To provide fair notice, the "scope of the constitutional right must be 'sufficiently clear that every reasonable official would have understood'" that their conduct violated that right. *Id.* (quoting *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (per curiam)). That the "scope of the constitutional right" must be clear enough to shape future conduct means, to me, the whole right. So even though we usually focus most of the "clearly established" inquiry on the violation of the right, the same reasoning applies to the implication of the right itself.

So we have examined whether it was clearly established that conduct constituted a seizure in the first place. *See Haywood v. Hough*, 811 F. App'x 952, 961 (6th Cir. 2020) ("At the time of [the Plaintiff's] initial detention, it was clearly established that confining a person to a room constituted a seizure . . . ."); *see also Gutierrez v. Cobos*, 841 F.3d 895, 907 (10th Cir. 2016) ("Because Plaintiffs did not proffer clearly established authority that [the Plaintiff] was seized, they did not carry their burden to rebut qualified immunity on this illegal seizure claim.");

*Flores v. City of Palacios*, 381 F.3d 391, 400 (5th Cir. 2004) (using the clearly established standard for whether a seizure occurred).

Here, neither the Campbells nor the majority "identified any Supreme Court case that addresses facts like the ones at issue here." *Rivas-Villegas*, 142 S. Ct. at 8. And "[e]ven assuming that Circuit precedent can clearly establish law for the purposes of § 1983," the cases the majority relies on—primarily *Ewolski*—are "materially distinguishable and thus do[] not govern the facts of this case." *Id.* And the Campbells admit as much. During oral argument, the Campbells' counsel conceded that "there is no case that addresses this particular scenario" when asked which case clearly established that a seizure occurred. (Oral Arg. at 16:04-16:30; *see also id.* at 23:58-24:04 ("I extensively researched this and came up at a loss to find anything truly on-point.").)

II.

Because I don't believe that Officer Fox seized either of the Campbells, I would stop here and grant qualified immunity. But even if Officer Fox did seize them, his conduct was reasonable. To decide whether Officer Fox's use of force was reasonable, we must balance Officer Fox's use of force with the threat that Mark posed to Officer Fox and his partner. *See Graham*, 490 U.S. at 396. Our assessment is objective, so it "must be made from the perspective of a reasonable officer." *Jacobs v. Alam*, 915 F.3d 1028, 1041 (6th Cir. 2019). Like all excessive-force evaluations, we consider a totality of the circumstances

without relying on "the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.

"If you were a police officer, what risk of getting shot would you be willing to face before" firing your weapon at a suspect who announced he had a gun, then, without warning, opened a door mere feet away from you? *Browning v. Edmonson County*, 18 F.4th 516, 536 (6th Cir. 2021) (Murphy, J., concurring in part and dissenting in part). That's the choice Officer Fox faced here. And I believe that he made a reasonable one.

Our caselaw shows that a reasonable officer would have thought that Mark had a gun. In *Simmonds v. Genesee County*, police officers shot a suspect who yelled that he had a gun and then leaned out of his car with an object in his hand that the officers thought was a gun. 682 F.3d 438, 441–42 (6th Cir. 2012). We affirmed a grant of qualified immunity, finding that "the officers were permitted to use deadly force in light of the uncontested statement by [the suspect] that 'I have a gun.'" *Id.* at 446. Next, in *Pollard v. City of Columbus*, officers shot a suspect after his car crashed following an unsuccessful flee attempt. 780 F.3d 395, 399–400 (6th Cir. 2015). As officers approached the car, the suspect reached down to the floor of his car and then pointed his hands at the officers in a clasped shooting posture. *Id.* at 400. We affirmed the grant of qualified immunity, holding that the officers reasonably thought the suspect had a gun and could reasonably consider him a threat. *Id.* at 404.

Here, Mark announced that he had a gun. And this statement must be viewed in context. The porch was lit

and had a security camera. Although Mark later testified that the camera was a fake, installed to deter neighbors, the officers believed that Mark knew they were police when he announced that he had a gun and as he opened the door. Someone willing to tell an officer at his door that he has a gun is threatening. As soon as Mark said, "I got one too," Officer Fox immediately unholstered his gun. So like the officers in *Simmonds* and *Pollard*, Officer Fox had reason to believe that Mark had a gun.

True, whether Mark had a gun, a cellphone, or nothing in his hand is not dispositive. As the majority points out, "merely possessing a weapon is not enough—the officer must reasonably believe he individual poses a danger of serious physical harm." *Jacobs*, 915 F.3d at 1040 (cleaned up). But the officers' perception that the individual has a weapon, combined with other circumstances that give the reasonable officer reason to believe that there is a danger of serious harm, can be dispositive.

Here, the officers testified that they thought that Mark had something in his hand after he had said that he had a gun and after he opened the door. (R. 71-1, Austin Decl., PageID 377 ("I believed, and still believe, that Mr. Campbell had a gun[.]"); R. 71-2, Fox Decl., PageID 388 ("I . . . had only a second or two to observe a silver or gun-metal gray object, which I believe to have been a gun[.]").) Mark did not contradict that testimony. In fact, Mark testified that he thought he "had [his] cellphone in [his] hand." (R. 71-6, Mark Campbell Dep., PageID 401.) But he never denied that he had something in his hand, and in fact told the

officers that he had a gun. So nothing in the record refutes the officers' perception that, at a minimum, Mark had something in his hand. *See Hicks v. Scott*, 958 F.3d 421, 437 n.2 (6th Cir. 2020).

Beyond his perceived possession of a weapon, Mark's close proximity to the officers is enough of an additional circumstance to warrant the use of deadly force. *See Hicks*, 958 F.3d at 436 (reasoning that an officer's "close proximity" to an armed suspect "compounded" the perceived threat); *see also Chappell v. City of Cleveland*, 585 F.3d 901, 911 (6th Cir. 2009) ("[I]t is apparent that if the detectives had hesitated one instant, i.e., long enough to allow [the suspect] to take even one more step, they would have been within his arm's reach and vulnerable to serious or even fatal injury."). In *Thomas v. City of Columbus*, for instance, we found that 40 feet was a close enough distance to warrant deadly force. 854 F.3d 361, 366 (6th Cir. 2017). We reasoned that, at that range, "a suspect could raise and fire a gun with little or no time for an officer to react." *Id.* So we held the officer's decision to fire his gun, even though the suspect never raised his, to be objectively reasonable. *Id.*

As seen from the body-camera footage, Mark was much closer to the officers than the 40 feet in *Thomas*. At that distance, it would take only a second or two for someone to point, aim, and fire. These kinds of split-second decisions are ripe for second-guessing, but we must resist that temptation. *See Graham*, 490 U.S. at 396–97; *see also Williams v. City of Grosse Pointe Park*, 496 F.3d 482, 487 (6th Cir. 2007) (emphasizing "the need to assess the reasonableness of an officer's

conduct in view of uncertain and rapidly developing circumstances").

From these cases, it's clear that when officers are close to a suspect and have reason to believe he's armed, either because of his statement or other gestures, the use of deadly force is reasonable. The facts, even in the light most favorable to the Campbells, show that reasonable officers would've felt that Mark posed an imminent threat to their safety. "Sometimes, the time or space available to an officer may mean that the reasonable thing to do is to monitor the suspect, issue a warning, or take cover." *Thomas*, 854 F.3d at 366–67. But this wasn't one of those times. Given the totality of the circumstances, Officer Fox acted reasonably.

III.

Moreover, even if Officer Fox seized the Campbells, the law didn't provide him sufficient notice that his conduct was unlawful. "A right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Rivas-Villegas*, 142 S. Ct. at 7 (quoting *Mullenix*, 577 U.S. at 11). In non-obvious cases like this one, the Campbells must identify a case that put Officer Fox on notice that his specific conduct was unlawful. *See id.* at 8.

The Campbells land on *Floyd v. City of Detroit* as that case. There, we affirmed a denial of qualified immunity to two officers who shot an unarmed man. *Floyd*, 518 F.3d 398, 402, 409 (6th Cir. 2008). But *Floyd*

is "materially distinguishable and thus does not govern the facts of this case." *Rivas-Villegas*, 142 S. Ct. at 8.

Above all, the officers in *Floyd* had much less reason to feel threatened by Floyd than Officer Fox did by Mark. Those officers were responding to a call about a dispute from more than an hour before regarding a suspect with a weapon. *See Floyd*, 518 F.3d at 402. And although the first officer who fired did so without hearing from Floyd first, Floyd testified that he yelled that he didn't have a gun before the second officer fired, striking him. *Id.* Mark himself announced that he had a gun just seconds before opening the door. What' more, Floyd's hands were empty and extended out in front of his body. *Id.* at 407. It's clear that shooting an unarmed man with his hands out based on a stale tip is markedly different from shooting at someone feet away who announced they had a gun and opened a door without warning. *Floyd* is thus materially distinct and an improper case for providing Officer Fox notice that his conduct was unlawful.

IV.

For these reasons, I would grant qualified immunity and I respectfully dissent.

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**No. 21-5044**

**[Filed August 29, 2022]**

MARK CAMPBELL; SHERRIE CAMPBELL
Plaintiffs - Appellees,

v.

CHEATHAM COUNTY SHERIFF'S DEPARTMENT, et al.,
Defendants,

JAMES DOUGLAS FOX,
Defendant - Appellant.

Before: BOGGS, GIBBONS, and NALBANDIAN, Circuit Judges.

### JUDGMENT

On Appeal from the United States District Court for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

**ENTERED BY ORDER OF THE COURT**
/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

**NO. 3:19-cv-00151**

**[Filed January 5, 2021]**

| | |
|---|---|
| MARK CAMPBELL and SHERRIE CAMPBELL, Plaintiffs, | ) |
| v. | ) |
| CHEATHAM COUNTY SHERIFF'S DEPARTMENT, et al., Defendants. | ) |

**MEMORANDUM OPINION**

Mark and Sherrie Campbell[1] filed this action under 42 U.S.C. § 1983 against the Cheatham County Sheriff's Department ("Sheriff's Department"), the Cheatham County Municipal Government, Cheatham County Sheriff Mike Breedlove in his official capacity, and James Fox and Christopher Austin in their individual capacities as officers for the Sheriff's

[1] For clarity and brevity, the Court may refer to Plaintiffs by their first names below.

Department. Before the Court are two Motions for Summary Judgment: one filed by the Sheriff's Department, the Cheatham County Municipal Government, and Sheriff Breedlove (collectively, the "County") (Doc. No. 65); and one filed by Officers Fox and Austin (the "Officers") (Doc. No. 69). Plaintiffs filed a Response to each Motion, (Doc. No. 75 (Response to the County); Doc. No. 78 (Response to the Officers)), and the Officers filed a Reply (Doc. No. 80). For the following reasons, the County's Motion will be granted, and the Officers' Motion will be granted in part and denied in part.

## I. Background

### A. Shooting at the Campbell Residence

Around 9:15 p.m. on August 21, 2018, Officers Fox and Austin were dispatched to the Campbell residence after the Cheatham County Emergency Communications Center received three 9-1-1 hang-up calls that it associated with Plaintiffs' address. (Doc. No. 71-1 at 5–6; Doc. No. 78-1 ¶ 2.) Plaintiffs deny any connection to the phone or phone number associated with these calls. (Doc. No. 75-1 ¶¶ 1, 3.) Nonetheless, the parties agree that the Officers drove to Plaintiffs' residence to perform a "welfare check." (Doc. No. 78-1 ¶ 4.)

Around 9:39 p.m., the Officers arrived at Plaintiffs' residence in marked patrol cars equipped with dashboard cameras, wearing uniforms equipped with body cameras. (Doc. No. 75-1 ¶¶ 2, 4–5.) Plaintiffs (Doc. Nos. 8, 27) and the Officers (Doc. No. 73) submitted

footage of the ensuing events from Fox's dash-cam and each Officers' body-cam.[2]

The Officers did not activate the emergency lights on their cars, but their headlights remained on and pointed toward Plaintiffs' residence as they approached the residence on foot. (Doc. No. 75-1 ¶ 6.) A porch light controlled by a heat sensor turned on as the Officers approached. (Doc. No. 78-1 ¶ 7; M. Campbell Dep.[3] at 40.) Austin remained on the ground in front of the porch as Fox walked up four steps to a small landing to knock on the door. (Fox dash-cam; Fox body-cam; Austin body-cam.) Fox claims that he observed a security camera on the porch (Doc. No. 71-2 ¶ 3), and Mark testified that he has a fake security camera on the porch to deter neighbors (M. Campbell Dep. at 54).

Based on the three videos supplied by the parties, the Court has established the following timeline of events, beginning with Fox's knock and concluding with Fox firing his gun. The "seconds elapsed" reflects the approximate time of an event after the first knock:

---

[2] The Officers also submitted an audio recording of a 9-1-1 call from Sherrie beginning shortly after the shooting and lasting approximately 24 and a half minutes. (See Doc. Nos. 73, 114.) The Court will refer to this recording as "Sherrie 9-1-1 Call."

[3] The Court will refer to the following deposition transcripts, using each deposition's internal pagination, as: Doc. Nos. 67-4, 71-6, 75-2 at 24–39 ("M. Campbell Dep."); Doc. No. 75-2 at 40–44 ("S. Campbell Dep."); Doc. Nos. 67-1, 75-2 at 18–23 ("Fox Dep."); Doc. No. 67-2 ("Austin Dep."); Doc. Nos. 67-3, 75-2 at 4–17 ("Breedlove Dep.").

| Seconds Elapsed | Description of Event |
|---|---|
| 0 | Fox knocks three times |
| 1–5 | Fox walks down the steps and stands next to Austin |
| 10 | Mark says, "You got a gun?" through the closed door |
| 12–17 | Fox unholsters his gun[4] and walks to the other side of Austin while saying, "Mark . . . come on out Mark, what's up man?" |
| 18 | Mark again says, "You got a gun?"[5] |
| 21 | Fox says, "What' going on Mark?" |
| 23 | Mark says, "I got one too."[6] |

[4] This act is not visible from the footage, but Fox claims as much in his declaration. (Doc. No. 71-2 ¶ 4.)

[5] Fox claims that, at this point, he believed that Mark "knew that law enforcement was outside the residence" because of Fox's prior interactions with Mark, Mark's "security lights and camera being on the porch, and [Mark's] questioning." (Doc. No. 71-2 ¶ 4.) The Officers also point to Sherrie's 9-1-1 call, which includes her isolated statement that Mark "woke [her] up screaming, saying something about the police shot into the house." (Doc. No. 75-1 ¶ 29; Sherrie 9-1-1 Call.) Mark, on the other hand, testified that he did not know that law enforcement was outside until later when he went out his back door to "find out who was shooting at [him]" and saw police vehicles in the yard and driveway. (M. Campbell Dep. at 79–80.)

[6] Both Officers claim they feared for their safety at this point. (Doc. No. 71-1 ¶ 3; Doc. No. 71-2 ¶ 4.)

| | |
|---|---|
| 24–25 | Fox draws his gun and turns his back to the door as he walks behind Austin |
| 26 | Mark begins to open the door |
| 27 | Fox turns quickly back toward the door |
| 28 | Fox says, "Do what Mark?" and then **fires two shots** toward the door in rapid succession[7] |
| 29 | Austin trips or jumps to the ground |
| 30 | Fox says, "You good?" |
| 31 | Fox **fires six shots** toward the door in rapid succession |

(Fox dash-cam; Fox body-cam; Austin body-cam.) After the first two shots, Mark fell to the floor inside the house, kicked the door shut, and yelled for Sherrie to call 9-1-1 because "somebody" was shooting at them. (M. Campbell Dep. at 50; S. Campbell Dep. at 33–34). Sherrie was in the bedroom at the time. (S. Campbell Dep. at 33.) The shots did not hit anyone, and law enforcement did not locate a weapon in a subsequent search of the residence. (Doc. No. 75-1 ¶¶ 35–36.)

The Officers then made their way behind a patrol car as Fox reported "shots fired" over the radio. Almost a minute later, Mark yelled profanities at Fox and Austin through the closed door. A few minutes later,

---

[7] Both Officers claim they believe Mark had a gun when he opened the door. (Doc. No. 71-1 ¶ 5; Doc. No. 71-2 ¶ 4.) Fox testified that he fired his weapon because he "perceived what [he] observed . . . to [be] a firearm." (Fox Dep. at 25–26.) Mark, however, testified that he did not have a gun and that he thinks he had his cell phone in his hand. (M. Campbell Dep. at 45, 48, 72).

Mark opened the door and stood on the porch, holding up a flat, reflective, rectangular item in his right hand. Fox and Austin yelled at him to get on the ground and show his hands. Mark yelled that his phone was in his hand. Mark lifted his empty left hand, yelled he was not getting on the ground, yelled for Fox and Austin to shoot him, yelled profanities, and then went inside and shut the door. About a minute later, Mark again opened the door and stood in the doorway, appearing to talk on the phone and point at Fox and Austin. Fox and Austin yelled at him to show his hands. Mark yelled back and then went inside and shut the door. (Fox dash-cam; Fox body-cam; Austin body-cam.)

Meanwhile, after the Officers returned to the patrol car, they made several statements reflecting that they did not know what, if anything, Mark has holding when he opened the door. For instance, Fox asked, "What did he point at us?" and Austin replied, "I don't know, he just came out the door and pointed something, so I ducked." Fox also reported over the radio that Mark "came out the door with something in his hands." Austin later asked what Mark came "out the door with," and Fox replied, "I don't know, he had something in his hand and he raised it up." Austin responded, "He came out the door with his hand raised, that's where I heard you shooting, I just backed up." (Fox body-cam; Austin body-cam.)

Several other officers responded to the area, one of whom apprehended and arrested Mark in the backyard about 9 minutes after Mark's last interaction with Fox and Austin. (Fox dash-cam; Fox body-cam; Austin body-cam.) On three separate occasions, Fox explained

the shooting to other officers on the scene. Each time, Fox stated that he fired after Mark asked if Fox and Austin had a gun, said that he had a gun, opened the door, and "lift[ed] something up." During one of these explanations, Austin stated that Mark "came to the door, had a gun," before trailing off. (Fox body-cam; Austin body-cam.)

After Mark's arrest, Fox and Austin accompanied a Detective to "clear the house." Sherrie was still in the bedroom with the door closed and still on the phone with 9-1-1. Austin and another officer directed Sherrie to come out with her hands visible, and she complied. Austin cuffed and detained Sherrie for about 3.5 minutes while other officers finished clearing the house. The Detective questioned Sherrie, directed Austin to uncuff her, continued questioning her, and then directed her to complete a written statement. Sherrie was crying off and on for much of this interaction until she was taken to complete a statement. (Fox body-cam; Austin body-cam.)

### B. Cheatham County's Practices and Customs[8]

New hires for the Cheatham County Sheriff's Department receive 12 to 14 weeks of training through the Tennessee Law Enforcement Training Academy, during which they "learn all the basic skills," including constitutional law, use of force, physical fitness, and shooting. (Doc. No. 78-1 ¶ 27; Breedlove Dep. at 21.) After this training, new hires are placed on a one-year probation, but they may "start riding within six weeks or two months" based on the evaluation of a supervisor. (Breedlove Dep. at 21.)

All Sheriff's Department officers are required to complete 40 annual hours of "in-service" training, which includes training on the use of deadly force

---

[8] Plaintiffs object to the format of the County's Statement of Undisputed Material Facts. (Doc. No. 78-1 at 1–2.) The Court agrees that the County presented several categories of non-factual statements as statements of fact, including allegations (id. ¶¶ 1–2, 9, 17–18), summarized or quoted deposition testimony (id. ¶¶ 8, 13–15, 19–39, 42–43), and legal conclusions (id. ¶¶ 40–41, 44). This format is improper because a party moving for summary judgment should set forth each *fact* "in a separate, numbered paragraph" that is "supported by specific citation to the record." Local Rule 56.01(b). Regardless, "Rule 56(c)(1)(A) permits a party seeking summary judgment to rely on," among other things, "'depositions' . . . in the record." Mount Vernon Fire Ins. Co. v. Liem Constr., Inc., No. 3:16-cv-00689, 2017 WL 1489082, at *2 (M.D. Tenn. Apr. 26, 2017). Thus, for the purpose of ruling on the pending summary judgment motions, the Court will consider any assertions of fact within the deposition testimony cited in the County's Statement of Undisputed Material Facts. However, the Court will not consider any extraneous, non-material statements within this testimony.

under state law, firearms, emergency vehicles, domestic violence cases, and other areas. (Id. at 23, 25–28.) Officers Fox and Austin each testified that they received training on the use of force. (Fox. Dep. at 16; Austin Dep. at 11.)

It is Sheriff's Department policy to respond to all 9-1-1 hang-up calls, and the response is typically considered a "welfare check." (Breedlove Dep. at 33.) It is not departmental policy for officers to immediately identify themselves as law enforcement when they knock on the door of a residence. (Id. at 37.) Sheriff Breedlove testified that "[i]t depends on the situation itself and the nature of the call," and that for welfare checks, the process typically goes as follows: "[W]e come, we knock on the door, and mostly in all cases somebody on the other end is going to go, 'who is it?' 'Sheriff's office.' Or they're going to look out the window and see that the sheriff's office is here." (Id. at 37–38.) Fox testified that he was trained to announce himself as law enforcement when executing a search warrant. (Fox. Dep. at 10.)

Sheriff Breedlove also personally maintains a Facebook page for the Cheatham County Sheriff's Department. (Breedlove Dep. at 72.) He claims that the purpose of the page is to inform the public about crimes and the Department's efforts to deter them, develop a relationship with the community, and enlist the public's help in locating individuals with outstanding arrest warrants. (Id. at 72–73.) Breedlove testified that he writes "snippets and stories" about criminal activity using "humor [and] seriousness." (Id. at 73–74.) He also testified that he has used the page to "shame[]

criminals" to deter criminals and drug dealers. (Id. at 75–76.)

### C. This Lawsuit

On February 16, 2019, Plaintiffs filed this lawsuit asserting four claims. In Count I, Plaintiffs assert that Officer Fox used excessive force against them. (Doc. No. 1 ¶¶ 47–58.) In Count II, Plaintiffs assert that Officer Austin failed to protect them from Fox's use of force. (Id. ¶¶ 59–69.) In Count III, Plaintiffs assert a claim of municipal liability against the County. (Id. ¶¶ 70–81.) And in Count IV, Plaintiffs assert that all Defendants are liable for the Tennessee tort of intentional (or negligent) infliction of emotional distress. (Id. ¶¶ 82–98.) The Officers and the County move for summary judgment on all claims.

## II. Legal Standard

The Court will grant summary judgment to a moving party that shows "there is no genuine dispute as to any material fact" and that it is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine dispute of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Peffer v. Stephens, 880 F.3d 256, 262 (6th Cir. 2018) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). The Court "must ultimately decide 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Burgess v. Fischer, 735 F.3d 462, 471 (6th Cir. 2013) (quoting Anderson, 477 U.S. at 251–52). In doing so, the Court "draw[s] all

reasonable inferences in the light most favorable to the non-moving party." Davis v. Gallagher, 951 F.3d 743, 747 (6th Cir. 2020) (citing Anderson, 477 U.S. at 251–52). "But where, as here, there is 'a videotape capturing the events in question,' the court must 'view[] the facts in the light depicted by the videotape.'" Green v. Throckmorton, 681 F.3d 853, 859 (6th Cir. 2012) (quoting Scott v. Harris, 550 U.S. 372, 378–81 (2007)).

## III. Analysis

### A. Fourth Amendment Claims against the Officers

Counts I and II are asserted on behalf of both Plaintiffs. That is, both Mark and Sherrie assert that Officer Fox used excessive force against them, and that Officer Austin failed to protect them from that use of force. These claims arise under the Fourth Amendment. See Graham v. Connor, 490 U.S. 386, 395 (1989) ("[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."); Pineda v. Hamilton Cnty., Ohio, 977 F.3d 483, 493 (6th Cir. 2020) (collecting cases) ("[A] nearby officer who does not actively participate in the use of excessive force may still violate the Fourth Amendment if the officer fails to intervene to stop a fellow officer's use of such force.") The Court will address two preliminary arguments raised by the Officers before turning to their qualified immunity defense.

### 1. Statute of Limitations

The Officers contend that Plaintiffs' Section 1983 claim against Officer Fox is barred by the statute of limitations because they did not serve Fox in a timely manner. (Doc. No. 70 at 21–23.) Plaintiffs disagree. (Doc. No. 75 at 15–18.) The Court concurs with Plaintiffs.

For Section 1983 claims, state law determines "the length of the limitations period," as well as the "closely related" issue of how to apply the statute of limitations. Markowitz v. Harper, 197 F. App'x 387, 389 (6th Cir. 2006) (quoting Harris v. United States, 422 F.3d 322, 331 (6th Cir. 2005)). In Tennessee, the limitations period is one year. Jordan v. Blount Cnty., 885 F.3d 413, 415 (6th Cir. 2018) (citing Tenn. Code Ann. § 28-3-104(a)). Meanwhile, under federal law, the limitations period starts running "when the plaintiff knows or has reason to know of the injury which is the basis of his action." Johnson v. Memphis Light Gas & Water Div., 777 F.3d 838, 843 (6th Cir. 2015) (quoting Roberson v. Tennessee, 399 F.3d 792, 794 (6th Cir. 2005)).

Here, the shooting incident at Plaintiffs' residence occurred on August 21, 2018, so Plaintiffs had one year from that date to file any Section 1983 claim related to the shooting. Plaintiffs initiated this action well within this deadline by filing the complaint on February 16, 2019. (Doc. No. 1.) The Officers nonetheless argue that Plaintiffs' Section 1983 claim against Officer Fox is untimely because Plaintiffs did not comply with Tennessee Rule of Civil Procedure 3, which establishes that "timely service of process is essential to the

commencement of an action such that the statute of limitations is satisfied." Dolan v. United States, 514 F.3d 587, 595 (6th Cir. 2008) (applying Tennessee Rule of Civil Procedure 3 to Bivens claims).

Tennessee Rule of Civil Procedure 3 provides:

> All civil actions are commenced by filing a complaint with the clerk of the court. An action is commenced within the meaning of any statute of limitations upon such filing of a complaint, whether process be issued or not issued and whether process be returned served or unserved. If process remains unissued for 90 days *or is not served within 90 days from issuance, regardless of the reason, the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations unless the plaintiff continues the action by obtaining issuance of new process within one year from issuance of the previous process* or, if no process is issued, within one year of the filing of the complaint.

Tenn. R. Civ. P. 3 (emphasis added).

Here, process issued for Fox (and the other Defendants) on February 19, 2019. (Doc. No. 5 at 4.) But Plaintiffs did not serve Fox within 90 days of that date. Thus, to satisfy the statute of limitations under Tennessee law, Plaintiffs were required to "obtain[] issuance of new process within one year from" February 19, 2019. See Tenn. R. Civ. P. 3. And Plaintiffs did just that, by obtaining issuance of an alias summons for Fox on January 2, 2020. (Doc. No. 39.) The record reflects that Fox was personally

served the next day. (Doc. No. 40 at 2.) Accordingly, by the express terms of Tennessee Rule of Civil Procedure 3, Plaintiffs may "rely upon the original commencement" of the action on February 16, 2019, for purposes of the statute of limitations.

The Officers argue that Plaintiffs served Fox "an invalid summons" because they had yet to be granted an extension of time to serve Fox under Federal Rule of Civil Procedure 4(m). (Doc. No. 70 at 23.) But the question of timely service under Rule 4(m) is distinct from the question of timeliness under the Tennessee statute of limitations. See Farivar v. Lawson, No. 3:14-CV-76-TAV-HBG, 2017 WL 149970, at *6 (E.D. Tenn. Jan. 13, 2017) (quoting Sydney v. Columbia Sussex Corp., No. 3:13-CV-312-TAV-CCS, 2014 WL 7156953, at *5 (E.D. Tenn. Dec. 15, 2014)) ("It's not the failure to serve within the 120 days . . . that has undone the plaintiff here. It is state law, which must be satisfied in addition to the Rule 4(m) requirement."). Non-compliance with Rule 4(m) only affects a state statute of limitations where "the failure to serve process causes the district court to dismiss the action." Sydney, 2014 WL 7156953, at *6 (quoting Mann v. Am. Airlines, 324 F.3d 1088, 1091 (9th Cir. 2003)). That is not the case here, as the Magistrate Judge ultimately granted Plaintiffs' motion for an extension of time to serve Fox under Rule 4(m). (Doc. No. 45.) Thus, Plaintiffs' Section 1983 claims against Fox are not subject to dismissal as untimely under the applicable statute of limitations.

### 2. Seizure of Mark and Sherrie

Next, the Officers argue that Plaintiffs' Fourth Amendment claims fail as a matter of law because neither Mark nor Sherrie were "seized" when Fox fired at Mark and missed. Although Plaintiffs do not directly respond to these arguments, the Court finds summary judgment to be inappropriate on this basis.

A citizen has standing to bring a Fourth Amendment claim when he or she is "seized" by a law enforcement officer. See Smoak v. Hall, 460 F.3d 768, 778 (6th Cir. 2005) (quoting United States v. Richardson, 949 F.2d 851, 855 (6th Cir. 1991)) ("The[] safeguards of the Fourth Amendment, 'with respect to police/citizen contact, vest only after [a] citizen has been seized.'"). "A seizure occurs where, 'in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" Id. (quoting United States v. Mendenhall, 446 U.S. 544, 544 (1980)).

#### a. Mark

The Officers contend that they did not seize Mark within the meaning of the Fourth Amendment because Fox's shots did not strike Mark or cause him to submit to the Officers' authority. (Doc. No. 70 at 9–10.) Even though Mark was not hit by the gunfire, however, a reasonable person in Mark's circumstances would not have believed that he was free to leave the premises. See Floyd v. City of Detroit, 518 F.3d 398, 405–06 (6th Cir. 2008) (rejecting officer's argument he could not have violated a citizen's Fourth Amendment rights by shooting at and missing the citizen); see also Rodriguez

v. Passinault, 637 F.3d 675, 687 (6th Cir. 2011) (citations omitted) (stating that it "goes against established law" to believe that a citizen cannot "maintain an excessive force/unreasonable seizure Fourth Amendment claim without having been shot").

The dash- and body-cam footage reflects that Fox knocked on Plaintiffs' front door, responded to Mark's question through the closed door with a command to "come on out," and soon thereafter fired two shots toward Mark as Mark opened the door. Fox fired another six shots at Mark about 3 seconds later. Fox and Austin retreated behind the police cars in the front yard but remained on the scene. And Mark was aware of their continued presence, as reflected by his intermittent exchanges with Fox and Austin through the closed door and from the front porch. Based on this evidence, Fox's shots "ha[d] the intended effect of contributing to [Mark's] immediate restraint" within the residence. See Jacobs v. Alam, 915 F.3d 1028, 1042 (6th Cir. 2019) (quoting Thompson v. City of Lebanon, 831 F.3d 366, 371 (6th Cir. 2016)) (finding seizure where officer shot at and missed a plaintiff within a house who, according to plaintiff, retreated to another part of the residence and only later learned it was law enforcement who shot at him). Accordingly, Mark was seized for Fourth Amendment purposes.[9]

---

[9] That is not to say that a seizure necessarily occurs every time an officer fires his weapon. As the Officers point out, the Sixth Circuit has twice concluded that an officer did not seize a citizen by shooting and missing. (Doc. No. 70 at 9 (citing Cameron v. City of Pontiac, 813 F.2d 782, 785 (6th Cir. 1987) and Adams v. City of Auburn Hills, 336 F.3d 515, 519 (6th Cir. 2003)). But the Sixth Circuit has also clarified that "the key distinction" of these two

**b. Sherrie**

The Officers also argue that Sherrie was not "seized" because Fox did not know she was in the residence when Fox fired at Mark. (Doc. No. 70 at 17–18.) A seizure occurs "when there is a governmental termination of freedom of movement *through means intentionally applied*." Rodriguez, 637 F.3d at 680 (quoting Brower v. Cnty. of Inyo, 489 U.S. 596–97 (1989) (emphasis in original)). In other words, an officer must "willfull[y]" apply the means by which he terminates a citizen's freedom of movement, but a seizure may "occur[] even when an unintended person or thing is the object of the detention or taking." Id. at 681 (quoting Brower, 489 U.S. at 596).

In Fisher v. City of Memphis, for example, the Sixth Circuit held that "an officer's intentionally applied exertion of force directed at a vehicle to stop it effectuates a seizure of all occupants therein," regardless of "whether the police were aware of [a] passenger's presence in the vehicle." Rodriguez, 637 F.3d at 686 (citing Fisher, 534 F.3d 312, 318–19 (6th Cir. 2000)). The Sixth Circuit reasoned that, "[b]y shooting at the driver of the moving car, [the officer] intended to stop the car, effectively seizing everyone inside, including the [passenger]." Id. at 687 (quoting Fisher, 234 F.3d at 318). And in Rodriguez v. Passinault, the Sixth Circuit held that Fisher applies

---

cases is that they "involved police firing errant shots at a *fleeing* suspect," Floyd, 518 F.3d at 405 (emphasis in original), something not present here.

even where the passenger is not struck by the officer's gunfire. Id.

Here, following the Sixth Circuit's guidance in Fisher and Rodriguez, the Court concludes that Sherrie was "seized" for Fourth Amendment purposes. It is undisputed that Fox intentionally fired at Mark as Mark opened the front door. Thus, Plaintiffs' residence "was the intended target of [Fox's] intentionally applied exertion of force." Rodriguez, 637 F.3d at 683 (quoting Fisher, 234 F.3d at 318). And by shooting at Mark, Fox intended to acquire physical control over the residence, "effectively seizing everyone inside, including" Sherrie. See id. (quoting Fisher, 234 F.3d at 318–19). Accordingly, even though the Officers were not aware of Sherrie's presence, she was also seized under the Fourth Amendment.

### 3. Qualified Immunity

The Officers next argue that they are entitled to qualified immunity on Plaintiffs' Section 1983 claims. (Doc. No. 70 at 6–17.) The Court analyzes "a defendant's assertion of qualified immunity in two steps: (1) determining whether the defendant violated a constitutional right and (2) deciding whether that right was clearly established at the time of the incident." Fazica v. Jordan, 926 F.3d 283, 289 (6th Cir. 2019) (citing Shreve v. Franklin Cnty., 743 F.3d 126, 134 (6th Cir. 2014)). As explained below, qualified immunity will be denied on Plaintiffs' excessive force claim against Officer Fox but granted on their failure-to-protect claim against Officer Austin.

### a. Excessive Force

#### I. Constitutional Violation

To determine if Officer Fox's "use of force was excessive and thus in violation of the Fourth Amendment," the Court considers "'whether [his] actions [we]re objectively reasonable in light of the facts and circumstances confronting [hi]m, without regard to . . . underlying intent or motivation.'" Bard v. Brown Cnty., Ohio, 970 F.3d 738, 753 (6th Cir. 2020) (quoting Graham v. Connor, 490 U.S. 386, 397 (1989)).

Where, as here, an officer uses deadly force, that use of force "is only constitutionally permissible if 'the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others . . . .'" Livermore ex rel. Rohm v. Lubelan, 476 F.3d 397, 404 (6th Cir. 2007) (quoting Tennessee v. Garner, 471 U.S. 1, 11 (1985)). There are "three non-exclusive factors that lower courts should consider in determining the reasonableness of force used: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the police officers or others; and (3) whether the suspect actively resisted arrest or attempted to evade arrest by flight." Jacobs, 915 F.3d at 1040 (quoting Livermore, 476 F.3d at 404).

Accepting the facts depicted by the dash- and body-cams, and accepting Plaintiffs' version of facts that are not clear from the footage, a reasonable jury could conclude that Fox's use of force was objectively unreasonable. The Officers do not attempt to argue that the first or third factors mentioned above weigh in

their favor, and for good reason. When Fox fired at Mark as he opened the front door, Plaintiffs were not committing a crime; indeed, they were not suspected of being involved in criminal activity of any kind, as it is undisputed that the Officers were dispatched to Plaintiffs' residence for a "welfare check" triggered by 9-1-1 hang-up calls. Plaintiffs also were not resisting arrest or fleeing at the time; Mark was met with gunfire within about two seconds of opening the front door part-way.

Rather, it is the second factor that is in dispute. "In excessive force cases, the threat factor is 'a minimum requirement for the use of deadly force,' meaning deadly force 'may be used only if the officer has probable cause to believe that the suspect poses a threat of severe physical harm.'" Mullins v. Cyranek, 805 F.3d 760, 766 (6th Cir. 2015) (quoting Untalan v. City of Lorain, 430 F.3d 312, 314 (6th Cir. 2005)).

The Officers argue that they "feared for their lives and considered [Mark] a threat" because Mark "advis[ed them] that he had a gun and then proceeded to open his front door with something believed to be a gun in his hand." (Doc. No. 70 at 14.) Given the totality of the circumstances, however, it was not reasonable for Fox to perceive Mark as posing an immediate threat of severe physical harm.

First, while it is undisputed that Mark stated he had a gun, it is important to put that statement in context. To recap, Fox knocked on Plaintiffs' door at 9:30 at night without comment, meaning that the Officers did not announce that they were law enforcement. About 10 seconds later, Mark said, "You

got a gun?" through the closed door. Fox responded, while unholstering his gun, "Mark . . . come on out Mark, what's up man?" Mark then repeated, "You got a gun?" Fox said, "What's going on Mark?" And at that point, with the door still closed, Mark stated, "I got one too."[10] Viewing these facts in a light favorable to Plaintiffs, Mark's statement was defensive and did not give Fox and Austin reason to think that Mark intended to use a gun imminently. See Woodcock v. City of Bowling Green, 679 F. App'x 419, 424–25 (6th Cir. 2017) (concluding it was objectively unreasonable for an officer to shoot an individual who "had told the police over the phone that he had a gun").

Moreover, it is not reasonable for an officer to use deadly force on an individual just because he believes that the individual possesses a gun. "[M]erely possessing a weapon is not enough—the officer must reasonably believe the individual poses a danger of serious physical harm to himself or others to justify deadly force." Jacobs, 915 F.3d at 1040 (citing Bouggess v. Mattingly, 482 F.3d 886, 896 (6th Cir. 2007)); see also Thomas v. City of Columbus, Ohio, 854 F.3d 361, 366 (6th Cir. 2017) ("[W]e do not hold that an officer may shoot a suspect merely because he has a gun in his hand. Whether a suspect has a weapon constitutes just one consideration in assessing the totality of the circumstances."). As explained by the Sixth Circuit, "the reasonableness of an officer's asserted fear" of an

[10] To be clear, Mark testified that he did not, in fact, have a gun at that time, but he did not know who had just knocked on his door and lied about having a gun to deter them from coming inside. (M. Campbell Dep. at 47–48.)

individual who they reasonably believed to possess a gun "will often turn on whether an armed suspect pointed h[is] weapon at another person." Hicks v. Scott, 958 F.3d 421, 435–36 (6th Cir. 2020) (collecting cases).

Here, a genuine dispute of fact exists on this point. Of the three videos submitted by the parties, only Officer Austin's body-cam depicts Mark opening the door, and only then for a split-second. (See Austin body-cam at 7:17.) This footage depicts an indistinct, shaded figure opening the door part-way; it is unclear whether Mark was holding anything in his hand, and if so, what it looked like. (Id.) Fox testified that he perceived Mark to be holding a gun when Mark opened the door. (Fox. Dep. at 25–26, 29.) But in the immediate aftermath of the shooting, at no point does Fox claim to have perceived Mark as holding a gun, either when discussing the incident with Austin or explaining what happened to other law enforcement officials who arrived on the scene. Law enforcement did not locate any weapon when they searched the residence following the incident. And Mark testified that he did not have a weapon when he opened the door (M. Campbell Dep. at 44–45), although he "think[s] [he] had [his] cell phone in [his] hand" so he could call 9-1-1 if someone was breaking into his car (id. at 48). Given the ambiguity of the video footage, and the conflicting accounts of the parties, material factual disputes preclude a finding that Fox's use of lethal force was objectively reasonable. See Hicks, 958 F.3d at 436 (collecting cases) ("[I]f a suspect possessed a gun, we will generally deny qualified immunity only if there is a genuine dispute of fact as to whether the gun was pointed at someone.").

The two cases on which the Officers primarily rely to argue to the contrary are distinguishable. (See Doc. No. 70 at 13–14 (citing Pollard v. City of Columbus, Ohio, 780 F.3d 395 (6th Cir. 2015) and Simmonds v. Genesee Cnty, 682 F,3d 438 (6th Cir. 2012)). That is, in both Pollard and Simmonds, "the officers' belief that they faced immediate danger did not rest only on indications that [the shooting targets] were armed; the belief also rested on [the targets'] menacing gestures, which were reasonably interpreted as demonstrating an intention to shoot." Knowlton, 726 F. App'x at 331 (distinguishing Pollard and Simmonds). But here, as explained above, genuine factual disputes exist as to whether Mark made a "menacing gesture[] . . . reasonably interpreted as demonstrating an intention to shoot." See id.

**ii. Clearly Established Right**

At the time Fox fired into Plaintiffs' residence, it was clearly established that "using deadly force against a suspect who does not pose a threat to anyone and is not committing a crime or attempting to evade arrest violates the suspect's Fourth Amendment rights." Thompson, 831 F.3d at 372 (citing Murray-Ruhl v. Passinault, 246 F. App'x 338, 347 (6th Cir. 2007) and Ciminillo v. Streicher, 434 F.3d 461, 467 (6th Cir. 2006)); see also Jacobs, 915 F.3d at 1040 (quoting King v. Taylor, 694 F.3d 650, 664 (6th Cir. 2012)) ("It has been clearly established in this circuit for some time that individuals have a right not to be shot unless they are perceived as posing a threat to officers or others."). Of course, the Supreme Court has cautioned that such general statements of the law "do not by themselves

create clearly established law outside 'an obvious case.'" White v. Pauly, 137 S. Ct. 548, 552 (2017) (quoting Brosseau v. Haugen, 543 U.S. 194, 199 (2004)). Thus, the Court must consider whether it was clearly established that Plaintiffs had a right to be free from the use of lethal force "in 'the specific context of the case.'" Mullenix v. Luna, 577 U.S. 7, 16 (2015) (quoting Brosseau, 543 U.S. at 198).

Considering the particularized facts of this case, there is an important factual dispute about Mark's appearance to Fox when Mark opened the front door. Accepting Plaintiffs' version of the facts, he was not holding a gun or a weapon of any kind; he testified that he may have been holding a cell phone, but the extremely brief and indistinct video footage of Mark opening the door does not show him making a menacing gesture or pointing anything at Fox and Austin. On these facts, this case is sufficiently similar to Floyd, a 2008 case in which the Sixth Circuit denied qualified immunity to officers where there was a dispute of fact about whether the shooting target was armed and performed a threatening act before the officers shot at him. See 518 F.3d 407 ("The officers' contrary assertion that Floyd was in fact armed and fired first is simply irrelevant . . . ."). As in Floyd, Fox fired "without (1) announcing [himself] as [a] police officer[], (2) ordering [Mark] to surrender, or (3) pausing to determine whether [Mark] was actually armed." See 518 F.3d at 409. Thus, as in Floyd, the Court concludes that Plaintiffs' right to be free from the use of lethal force was clearly established when

construing the facts in their favor.[11] Summary judgment is therefore inappropriate on Plaintiffs' excessive force claim.

**b. Failure to Protect**

Even accepting Plaintiffs' version of the facts, however, they have not demonstrated that Officer Austin violated their constitutional rights. Plaintiffs assert that Austin failed to protect them from Fox's use of force. To prove a constitutional violation by "a nearby officer who d[id] not actively participate in the use of excessive force," a plaintiff must "establish that '(1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring.'" Pineda, 977 F.3d at 493 (quoting Fazica v. Jordan, 926 F.3d 283, 289 (6th Cir. 2019)). The footage submitted by the parties does not support either showing.

First, in the short time period after Fox knocked on the door and before Fox discharged his gun, Austin did not have reason to know that Fox would fire. The amount of time from first knock to first shot was about 28 seconds. During this time, Fox exchanged words with Mark through the closed door, walked to the other side of Austin, and walked behind Austin with his back

---

[11] The Officers attempt to distinguish Floyd, in part, by arguing that Floyd "claimed that he halted with his hands up and stated, 'I don't have a gun' *before* being shot by unprovoked law enforcement." (Doc. No. 80 at 4 (emphasis added)). However, Floyd claimed he made that statement only "*after* hearing the first shot," which missed. Floyd, 518 F.3d at 402 (emphasis added).

to the door. Fox also drew his gun as he started walking behind Austin, but that occurred only 3 or 4 seconds before Fox fired the first shot. Austin, meanwhile, remained stationary, such that he was standing between Fox and the door when Mark began to open it. Thus, if Austin knew that Fox was about to shoot toward the door, then Austin also voluntarily stood in the line of fire. The Court will not draw that unreasonable conclusion.

Second, Austin did not have the opportunity and means to intervene in Fox's use of force because the incident did not last long enough for Austin "to both perceive what was going on and intercede to stop it." See Burgess v. Fischer, 735 F.3d 462, 475–76 (6th Cir. 2013) (collecting cases). The amount of time between Fox drawing his weapon and firing at Mark was about 3 or 4 seconds. No reasonable juror could find that Austin committed a constitutional violation by failing to prevent Fox from firing his weapon in this short amount of time. See Bard, 970 F.3d at 753 ("The video of this incident confirms that the other officers did not have the opportunity to prevent any possible harm from occurring, given that the use of force lasted approximately three seconds."). Austin then either tripped or jumped to the ground, where he was in no position to prevent Fox from firing the next six shots. The entire sequence from Fox drawing his weapon to taking his final shot lasted less than 10 seconds. Again, this brief window of time does not reflect that Austin committed a constitutional violation. See Pineda, 977 F.3d at 493 (quoting Alexander v. Carter for Boyd, 733 F. App'x 256, 265 (6th Cir. 2018)) ("[O]ur caselaw suggests that 'an excessive use of force lasting ten

seconds or less does not give a defendant 'enough time to perceive the incident and intervene' to stop such force.'").

Accordingly, the Officers will be granted summary judgment on Plaintiffs' failure-to-protect claim against Officer Austin.

### B. Municipal Liability Claim against the County

Plaintiffs also assert a municipal liability claim against the Cheatham County Municipal Government, the Sheriff's Department, and Sheriff Mike Breedlove in his official capacity. To impose municipal liability under Section 1983, Plaintiffs "must show (1) that they suffered a constitutional violation and (2) that a municipal policy or custom directly caused the violation." Hardrick v. City of Detroit, Mich., 876 F.3d 238, 243 (6th Cir. 2017) (citing Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 690–92 (1978)).

#### 1. Redundant Party

Initially, the County contends that Plaintiff's official-capacity claims against Sheriff Breedlove should be dismissed as redundant because they are essentially claims against the County, and the County itself is named as a Defendant. (Doc. No. 66 at 7.) Plaintiffs do not respond to this argument, and the Court agrees with the County. See Jackson v. Shelby Cnty. Gov't, No. 07-6356, 2008 WL 4915434, at *2 (6th Cir. 2008 Nov. 10, 2008) ("[T]he district court properly granted summary judgment to the defendants on the claims against the sheriff in his official capacity because those claims mirror the claims against the

County, and are therefore redundant."); see also Sagan v. Sumner Cnty. Bd. of Educ., 726 F. Supp. 2d 868, 876 (M.D. Tenn. 2010) ("[A] claim against an individual in her official capacity is tantamount to a claim against the employer and . . . where, as here, the employer is also sued, the official-capacity suit against the employee is simply redundant and may be dismissed."). Because Plaintiffs bring only official capacity claims against Sheriff Breedlove, he will be dismissed as a party.[12]

**2. Policy or Custom**

Turning to the substance of this claim, the Court has concluded that the Officers are not entitled to summary judgment on Plaintiffs' Fourth Amendment excessive force claim against Fox. Thus, for Plaintiffs' claims against the County to survive summary judgment, they must demonstrate that the County had a policy or custom that directly caused this asserted constitutional violation.

"There are four methods of proving a municipality's illegal policy or custom: the plaintiff may prove '(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision

[12] Although the County does not move for summary judgment on this ground, the Court also notes that Plaintiffs' municipal liability claim against the Sheriff's Department is subject to dismissal because "sheriff's departments are not proper parties to a § 1983 suit." See Mathes v. Metro. Gov't of Nashville and Davidson Cnty., No. 3:10-cv-0496, 2010 WL 3341889, at *2 (M.D. Tenn. Aug. 25, 2010) (collecting cases). However, such a dismissal would not restrict Plaintiffs' ability to pursue their municipal liability claim directly against the County.

making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations.'" Wright v. City of Euclid, Ohio, 962 F.3d 852, 880 (6th Cir. 2020) (quoting Jackson v. City of Cleveland, 925 F.3d 793, 828 (6th Cir. 2019)).

In the Complaint, Plaintiffs allege that: (1) Sheriff Breedlove, the official "responsible for implementing the County's policies," created "a culture and unwritten policy within the Sheriff's Department that encourages disrespect, arrogance, malice and abuse" by maintaining "a departmental Facebook page where it is his regular practice to mock and ridicule citizens who have been ACCUSED of crimes within the county" (Doc. No. 1 ¶¶ 72–76, 78–79); and (2) the Sheriff's Department "has inadequately trained and/or disciplined its employees in the proper use of deadly force" (id. ¶ 77). As explained below, Plaintiffs have not presented sufficient evidence to support a municipal liability claim based on these allegations.

**a. Facebook Page**

As alleged in the Complaint, Sheriff Breedlove's maintenance of the departmental Facebook page implicates two of the four methods for proving an illegal policy or custom. That is, Plaintiffs allege that the "ongoing existence" of the Facebook page maintained by Sheriff Breedlove, an official with final decision making authority, reflects that Breedlove has ratified the unconstitutional acts of Sheriff's Department employees. (See Doc. No. 1 ¶ 75.) Plaintiffs also allege that Breedlove's maintenance of the

Facebook page either created or contributed to a custom of tolerance or acquiescence of federal rights violations. (See id. ¶¶ 73, 78.)

Importantly, however, the record does not contain any evidence regarding the specific contents of the Facebook page, so the Court has no basis to conclude that either theory of municipal liability is viable. In the Complaint, Plaintiffs include a hyperlink to the Facebook page with a few purported quotes from it. (Id. ¶ 74.) But Plaintiffs "cannot merely rely on the allegations in their complaint to defeat summary judgment." Tullis v. UMB Bank, N.A., 423 F. App'x 567, 570 (6th Cir. 2011) (citation omitted).

Similarly, in their Response to the County's summary judgment Motion, Plaintiffs include a hyperlink and invite the Court to undertake "a contemporaneous viewing of the department's Facebook page" and the "public comments from citizens." (Doc. No. 78 at 11.) But the Court is not required "to sift through the record in search of evidence to support a party's opposition to summary judgment," Jackson v. Tenn. Dep't of Safety, No. 3:05-CV-231, 2009 WL 1437570, at *15 (E.D. Tenn. May 21, 2009) (quoting Fuentas v. Postmaster Gen. of U.S. Postal Serv., 282 F. App'x 296, 300 (5th Cir. 2008))—much less sift through "inadmissible external hyperlinks that lack a foundation in evidence," see F.T.C. v. OMICS Grp., 374 F. Supp. 3d 994, 1002 n.2 (D. Nev. 2019) (citing Fed. R. Evid. 901(a)). And Plaintiffs do not request that the Court take judicial notice of any specific content from the Sheriff's Department Facebook page.

At his deposition, Sheriff Breedlove discussed his maintenance of the Facebook page in general terms. (See Breedlove Dep. at 72–76.) But without any specific evidence of the Facebook page's content in the record, the Court cannot evaluate the extent to which it may or may not have created or contributed to an illegal policy or custom. Plaintiffs cannot rely on argument and unsubstantiated assertions to present their Facebook-based theories of municipal liability to a jury. See Jones v. City of Franklin, 677 F. App'x 279, 282 (6th Cir. 2017) (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990)) ("[C]onclusory allegations, speculation, and unsubstantiated assertions are not evidence, and are not sufficient to defeat a well-supported motion for summary judgment."). Accordingly, in considering Plaintiffs' municipal liability claims, the departmental Facebook page does not factor into the Court's analysis.

**b. Failure to Train**

Plaintiffs also allege that Officer Fox's use of force was directly caused by a policy of inadequate training. (See Doc. No. 1 ¶ 77.) "In order to show that a municipality is liable for a failure to train its employees, a plaintiff must establish that: 1) the [municipality's] training program was inadequate for the tasks that officers must perform; 2) the inadequacy was the result of the [municipality's] deliberate indifference; and 3) the inadequacy was closely related to or actually caused the injury." Griffith v. Franklin Cnty., Ky., 975 F.3d 554, 583 (6th Cir. 2020) (quoting Jackson, 925 F.3d at 834).

Plaintiffs argue that the Sheriff's Department inadequately trained its officers "on the requirement to

announce themselves at person's homes even when purportedly conducting 'welfare checks' on suspect's homes." (Doc. No. 78 at 7.) They also generally argue that "there was a failure of training with regard to the shooting of unarmed plaintiffs." (Id. at 9.)

As to the adequacy of the Sheriff Department's training program, Sheriff Breedlove testified that new hires receive 12 to 14 weeks of training through the state training academy on areas including constitutional law and the use of force. Breedlove also testified that all officers must complete 40 hours of annual training on areas including the use of deadly force under state law. Officers Fox and Austin each testified that they received training on the use of force.

Plaintiffs do not point to any evidence creating a genuine dispute of fact on these claims. But even assuming, without deciding, that the County's training was inadequate in some way, Plaintiffs have not demonstrated that any inadequacy was the result of the County's deliberate indifference. And because a reasonable jury could not find that the County was deliberately indifferent, the Court need not consider whether any inadequacy was closely related to or actually caused the injury. See Zavatson v. City of Warren, Mich., 714 F. App'x 512, 527 n.1 (6th Cir. 2017).

"There are 'at least two situations in which inadequate training could be found to be the result of deliberate indifference.'" Ouza v. City of Dearborn Heights, Mich., 969 F.3d 265, 287 (6th Cir. 2020) (quoting Cherrington v. Skeeter, 344 F.3d 631, 646 (6th Cir. 2003)). "First, and most commonly, a plaintiff can

demonstrate deliberate indifference by showing that the municipality has failed to act 'in response to repeated complaints of constitutional violations by its officers.'" Id. (quoting Cherrington, 344 F.3d at 646). Second, "[i]n a 'narrow range of circumstances,'" id. (quoting Bd. of Cnty. Commrs. of Bryan Cnty. v. Brown, 520 U.S. 397, 409 (1997)), "a plaintiff can show deliberate indifference based on 'single-incident liability' if the risk of the constitutional violation is so obvious or foreseeable that it amounts to deliberate indifference for the city to fail to prepare officers for it," id. (quoting Connick v. Thompson, 563 U.S. 51, 63 (2011)). Plaintiffs argue both theories of deliberate indifference, and the Court will address each in turn.

The first type of deliberate indifference requires a plaintiff to "show prior instances of unconstitutional conduct demonstrating that the County has ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury." Miller v. Sanilac Cnty., 606 F.3d 240, 255 (6th Cir. 2010) (quoting Fisher v. Harden, 398 F.3d 837, 849 (6th Cir. 2005)). To that end, Plaintiffs point to one prior instance of excessive force at the jail. (Doc. No. 78 at 10–11.) But as with the departmental Facebook page, there is not any specific evidence regarding this asserted incident properly before the Court. Rather, in their Response brief, Plaintiffs include two "inadmissible external hyperlinks that lack a foundation in evidence," see OMICS Grp., 374 F. Supp. 3d at 1002 n.2 (citing Fed. R. Evid. 901(a)), without requesting that the Court take judicial notice of any specific information. (Doc. No. 78 at 10.) Accordingly, the summary judgment record does not

include evidence of any prior instances of unconstitutional conduct.[13]

Even considering the description of this incident in Plaintiffs' Response, moreover, it is not sufficiently similar to Officer Fox's asserted constitutional violation to support a finding of "prior-instance" deliberate indifference. Plaintiffs assert that, in a highly publicized case, County employees at the jail tased an inmate "at least four times, once for a period of more than fifty seconds, while tied to a chair." (Doc. No. 78 at 10–11 (footnote omitted)). But "prior examples of wrongdoing must violate the same constitutional rights and violate them in the same way." Berry v. Delaware Cnty. Sheriff's Off., 796 F. App'x 857, 863 (6th Cir. 2019) (citing D'Ambrosio v. Marino, 747 F.3d 378, 388 (6th Cir. 2014)); see also Connick, 563 U.S. at 63 (footnote omitted) ("Because those incidents are not similar to the violation at issue here, they could not have put Connick on notice that specific training was necessary to avoid this constitutional violation."). And a jailer's use of excessive force on a restrained inmate—troubling as it is—is simply not the same type of constitutional violation as an officer's use of excessive force on a free citizen. See Coley v. Lucas Cnty., Ohio, 799 F.3d 530, 537–38 (6th Cir. 2015) (explaining the different standards for excessive force

[13] The Court notes that Plaintiffs also cite to Sheriff Breedlove's supposed testimony generally discussing this incident on pages 14, 16, and 18 of his deposition transcript. (Doc. No. 78 at 10–11.) But these pages are not included within the excerpts of Breedlove's deposition transcript submitted by the parties. (See Doc. Nos. 67-3, 71-4, 75-2 at 4–17, 78-2 at 4–10, 80-1.)

claims brought under the Fourth, Eighth, and Fourteenth Amendments on behalf of free citizens, convicted prisoners, and pretrial detainees, respectively). For all of these reasons, Plaintiffs fail to establish the County's deliberate indifference based on pattern of similar constitutional violations.

Plaintiffs also fail to demonstrate the County's deliberate indifference based on a "single-incident" theory. "'Deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." Connick, 563 U.S. at 61 (quoting Bryan Cnty., 520 U.S. at 410). "For liability to attach in the instance of a single violation, the record must show 'a complete failure to train the police force, training that is so reckless or grossly negligent that future police misconduct is almost inevitable or would properly be characterized as substantially certain to result.'" Harvey v. Campbell Cnty., Tenn., 453 F. App'x 557, 567 (6th Cir. 2011) (quoting Hays v. Jefferson Cnty., 668 F.2d 869, 874 (6th Cir. 1982)).

The record reflects that Officer Fox received training in the use of deadly force.[14] Plaintiffs have not come forward with evidence that, without providing additional training to its officers, the County "was on

---

[14] The Court notes that, in arguing that this training was inadequate, Plaintiffs again cite to pages of Sheriff Breedloves's deposition transcript that are not within the record. (See Doc. No. 78 at 9–10 (citing Breedlove Dep. at 53, 56.) To be clear, however, even taking these context-less quotes at face value, Plaintiffs have not put forth any evidence that the County was deliberately indifferent to any inadequacy in training.

notice that . . . it was so highly predictable that sheriff's deputies would misuse deadly force as to amount to conscious disregard for citizens' rights." See Harvey, 453 F. App'x at 567. Plaintiffs also do not provide any authority for the blanket proposition suggested by much of their Response—that the constitution requires an officer to announce himself as law enforcement immediately when he knocks on the door of a citizen's residence for a welfare check. Accordingly, no reasonable jury could find that the County was deliberately indifferent to any inadequacy in the Sheriff Department's training, Plaintiffs' failure-to-train claim fails, and Plaintiffs cannot impose liability on the County for Fox's asserted constitutional violation.

### C. State Law Claim

Finally, Plaintiffs assert a state law claim of intentional (or negligent, in the alternative) infliction of emotional distress against all Defendants. "In Tennessee, '[t]he elements of an intentional infliction of emotional distress claim are that the defendant's conduct was (1) intentional or reckless, (2) so outrageous that it is not tolerated by civilized society, and (3) resulted in serious mental injury to the plaintiff.'" Fisher v. Nissan N. Am., Inc., 951 F.3d 409, 423 (6th Cir. 2020) (quoting Rogers v. Louisville Land Co., 367 S.W.3d 196, 205 (Tenn. 2012)).

#### 1. Against the County

The County argues that it is entitled to sovereign immunity from Plaintiffs' state-law claim under the Tennessee Government Tort Liability Act because it

arises out of the same circumstances as Plaintiffs' civil rights claims under Section 1983. (Doc. No. 66 at 20–23.) Plaintiffs do not respond to this argument, and the Court concurs with the County. See Johnson v. City of Memphis, 617 F.3d 864, 872 (6th Cir. 2010) (quoting Tenn. Code Ann. § 29-20-205) (explaining that sovereign immunity applies to claims based on injuries arising "out of . . . civil rights," including Section 1983 claims). For this reason, Plaintiffs' claim of intentional (or negligent) infliction of emotional distress against the County will be dismissed as a matter of law.

**2. Against the Officers**

The Officers first argue that they are immune from Plaintiffs' alternatively pleaded claim for negligent infliction of emotional distress. (Doc. No. 70 at 18 n.1.) Plaintiffs do not respond to this argument, and the Court agrees with the Officers. See Adams v. Diamond, No. 3:18-cv-00976, 2019 WL 314569, at *4 (M.D. Tenn. Jan. 24, 2019) (citing Sallee v. Barrett, 171 S.W.3d 822 (Tenn. 2005)) (noting the Tennessee Supreme Court's holding that a police officer is immune from a claim for negligent infliction of emotional distress).

As the Officers recognize, however, they are not immune from Plaintiffs' claim for *intentional* infliction of emotional distress ("IIED"). They nonetheless argue that they are entitled to summary judgment because Plaintiffs have not demonstrated the second and third elements of this claim—outrageous conduct and serious mental injury.[15] (Doc. No. 70 at 21.) In Response,

[15] The Court does not consider the Officers' argument, raised for the first time in their Reply, that Fox and Austin did not act

Plaintiffs contend that they "can show all three elements" (Doc. No. 75 at 14), but they have not advanced even a cursory argument that they suffered serious mental injuries.

Plaintiffs' only reference to a mental or emotional injury of any kind is in their Statement of Fact section, where they quote Sherrie's deposition testimony that she suffered "severe anxiety" after the shooting incident. (Doc. No. 75 at 4.) And Plaintiffs contend that their IIED claims should be decided by a jury because they are similar to an IIED claim that survived summary judgment in Robinson v. City of Memphis, 340 F. Supp. 2d 864, 873–74 (E.D. Tenn. 2004). (Doc. No. 75 at 14–15.) Although Robinson also involved a police shooting, 340 F. Supp. 2d at 866, it is otherwise readily distinguishable from this case. There, the plaintiff claimed that a "decedent suffered severe mental and emotional pain and anguish" from being "hospitalized for six weeks, during which time he was paralyzed, but also conscious and aware of his surroundings." 340 F. Supp. 2d at 873. Plaintiffs offer no evidence of anything approaching such mental injuries here. Accordingly, the Officers are entitled to summary judgment on Plaintiffs' IIED claims. See Klein v. State Farm Fire & Cas., 250 F. App'x 150, 154 (6th Cir. 2007) (citing Celotex Corp. v. Catrett, 477 U.S.

---

intentionally or recklessly. (See Doc. No. 80 at 5); Traveler's Prop. Cas. Co. of Am. v. Hillerich & Bradsby Co., 598 F.3d 257, 275 (6th Cir. 2010) (citing Scottsdale Ins. Co. v. Flowers, 513 F.3d 546, 552–54 (6th Cir. 2008)) ("Arguments raised only in reply, and not in the original pleadings, are not properly raised before the district court . . . .").

317, 322–23 (1986)) ("[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.")

## IV. Conclusion

For these reasons, the County's Motion for Summary Judgment (Doc. No. 65) will be granted, and the Officers' Motion for Summary Judgment (Doc. No. 69) will be granted in part and denied in part. The only claim remaining for trial is Plaintiffs' excessive force claim against Officer Fox.

An appropriate Order is filed herewith.

/s/ Waverly D. Crenshaw, Jr.
WAVERLY D. CRENSHAW, JR.
CHIEF UNITED STATES DISTRICT JUDGE

## APPENDIX D

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

**NO. 3:19-cv-00151**

**[Filed January 5, 2021]**

| | |
|---|---|
| MARK CAMPBELL and SHERRIE CAMPBELL, Plaintiffs, | ) |
| v. | ) |
| CHEATHAM COUNTY SHERIFF'S DEPARTMENT, et al., Defendants. | ) |

**ORDER**

In accordance with the accompanying Memorandum Opinion, the County's Motion for Summary Judgment (Doc. No. 65) is **GRANTED** and the Officers' Motion for Summary Judgment (Doc. No. 69) is **GRANTED IN PART** and **DENIED IN PART**. This case will proceed to trial on Plaintiffs' excessive-force claim against Officer James Fox. Plaintiffs' remaining claims are **DISMISSED**.

IT IS SO ORDERED.

/s/ Waverly D. Crenshaw, Jr.
WAVERLY D. CRENSHAW, JR.
CHIEF UNITED STATES DISTRICT JUDGE

## APPENDIX E

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**No. 21-5044**

**[Filed October 3, 2022]**

MARK CAMPBELL; SHERRIE CAMPBELL
Plaintiffs-Appellees,

v.

CHEATHAM COUNTY SHERIFF'S DEPARTMENT, ET AL.,
Defendants,

JAMES DOUGLAS FOX,
Defendant-Appellant.

**BEFORE:** BOGGS, GIBBONS, and NALBANDIAN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Nalbandian would grant rehearing for the reasons stated in his dissent.

**ENTERED BY ORDER OF THE COURT**
/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk