No. 22-2749

In The
Supreme Court of the United States

MARK JAKOB AND FRANK MALOY
(SUBSTITUTED FOR THE LATE ALEX MALOY),

Petitioners,

v.

CLARA CHEEKS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondent argues the issue regarding whether Mr. Neil lacked due process rights was waived because Respondents claim Petitioners did not sufficiently present such an argument. However, not only does the Court have the authority to hear the issue regardless, but Petitioners have sufficiently preserved this argument at all levels. Since the issue was sufficiently presented it should be reviewed.

ARGUMENT

I. PETITIONERS' ARGUMENT WAS NOT WAIVED.

In her response, Respondent argued Petitioners' first issue regarding whether Mr. Neil lacked due process rights was waived because Petitioners did not sufficiently present such an argument. However, issues not presented before the Court of Appeals are not beyond the Supreme Court's jurisdiction to review. *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980); s*ee also Cameron v. EMW Women's Surgical Ctr.*, P.S.C., 595 U.S. 267, 275 (2022) (indicating failure to raise argument in Court of Appeals could amount to a waiver); *United States v. United Foods, Inc.*, 533 U.S. 405, 416–17 (2001) (pointing out the failure of raising an argument in the Court of Appeals deprived a respondent of the ability to address significant matters that might have been difficult points for the petitioner). Thus, even if the Court agrees with Respondent regarding waiver of the argument, it is within the Court's jurisdiction and power to hear the issue regardless. However, the Court does not need to exercise that power, as Petitioners have not waived their argument.

Respondent cited *Copeland v. ABB, Inc.*, claiming the issue was not properly presented before the district court and, therefore, not available for the Court of Appeals to address and review. 521 F.3d 1010, 1015 n.5 (8th Cir. 2008). However, in *Copeland*, the Court of Appeals declined to consider the issue on appeal, because the footnote referenced to prove the preservation of the argument had no correlation to the issue attempting to be presented. *Id.* This is not the case here, as the Petitioners' footnote eight directly addressed the point. Pet. C.A. Br. 27 n.8.

Petitioners preserved this argument at all levels. Petitioners first addressed the lack of evidence supporting the survivability of the impact as well as the lack of evidence supporting any alleged lack of aid would have had any detrimental effects to the Decedent in the Petitioners' Motion for Summary Judgement. Pet. Reply Br. App. 5a. Further, Petitioners relied upon deposition testimony in their Reply in Support of their Motion for Summary Judgment filed before the district court and referenced testimony that Decedent was very likely dead at the scene and there was no information available that anything could have been done to save Decedent. Pet. Reply Br. App. 54a.

The district court acknowledged the Petitioners' lack of evidence arguments in its Memorandum and Order for Denial of Summary Judgement. App. 40a–41a. In their brief before the Eighth Circuit, Petitioners argued a lack of verifiable medical evidence is detrimental. Pet. C.A. Br. 27. As stated above, Petitioners provided additional support for their argument in footnote eight of their opening brief before the Eighth Circuit. Pet. C.A. Br. 27 n.8.

Further, Petitioners explicitly addressed this issue in their Reply Brief before the Eighth Circuit explaining § 1983 does not provide a cause of action on behalf of a deceased for events occurring after death. (see Pet. Reply Br. App. 40a–41a),

Respondent argued the footnote was insufficient to assert an argument before the Eighth Circuit. This fails to address Petitioners' briefing and arguments, referenced above, throughout the record and during oral argument (including that a deceased does not have any constitutional right) before the Eighth Circuit. Even if this argument were newly raised in the footnote of the opening brief before the Eighth Circuit, as Respondent claims, it is well established that the Eighth Circuit was able consider new arguments explicitly raised in the Reply Brief. As long as the new argument supplements those raised in an opening brief. *Barham v. Reliance Standard Life Ins. Co.*, 441 F.3d 581, 584 (8th Cir. 2006). Respondent's argument based on waiver and *Copeland* fails as a matter of law and precedent.

This Court should not find Petitioners have waived their argument for a third reason: "Subject-matter jurisdiction can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). Petitioners' argument goes to the core of Respondent's ability to raise a cause of action regarding the death of Decedent under 42 U.S.C. § 1983: Was there an alleged deprivation of a civil right (injury in fact) to Decedent *after* he passed away? If so, 42 U.S.C. § 1983 does not recognize such a civil right or such a cause of action, so there cannot be any injury in fact, causal harm, or redressibility. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

In summary, Petitioners have not waived their argument surrounding the lack of any constitutional right of a deceased. Even if the argument were waived and presented a new but connected issue, this Court has the jurisdiction and power to address issues not raised before the lower courts. The issue is sufficiently presented in Petitioners' Petition for a Writ of Certiorari and should be reviewed. Petitioners rely on their Petition for Writ of Certiorari regarding all other points aside from the above. U.S. Sup. Ct. R. 15.6 (allowing for Reply to new point).

CONCLUSION

For all the aforementioned reasons and those in the Petitioners' opening brief, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CLARA CHEEKS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.: 4:18-CV-2091-SEP
	)	
JON BELMAR, et al.	)	
	)	
Defendants.	)	

DEFENDANTS ALEX MALOY AND MARK JAKOB'S MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

COME NOW, Defendants Alex Maloy (via substitution by Frank Maloy) and Mark Jakob ("Defendants") and for their Memorandum in Support of their Motion for Summary Judgment, state:

I. BACKGROUND

Plaintiff has raised her Second Amended Petition (Doc. 142) alleging several counts against several defendants arising out of a single vehicle crash on Airport Road in St.

Louis County, Missouri. On September 17, 2020, this Court issued an Order dismissing several claims and stating that the remaining claims in this action with respect to Defendants were "(1) failure to provide emergency medical care under 42 U.S.C. § 1983 in Count I" and state law claims which are currently stayed due to pendency of the same in state court. Doc. 186. There is no genuine dispute of material fact in this matter regarding Plaintiff's failure to establish each element of her cause of action and the application of qualified immunity to Plaintiff's remaining federal claim against Defendants. Defendants are therefore entitled to summary judgment on the remaining federal count, and this matter should be completely stayed pending the state court proceedings.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) requires "the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In *Celotex*, the Court noted, "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the

just, speedy and inexpensive determination of every action.'" *Id.* at 327 (quoting Fed. R. Civ. P. 1). The burden on the party moving for summary judgment "is only to demonstrate . . . that the record does not disclose a genuine dispute of a material fact." *City of Mt. Pleasant, Iowa v. Assoc. Elec. Co-op.*, 838 F.2d 268, 273 (8th Cir. 1988).

Once the moving party demonstrates that the record does not disclose a genuine issue of material fact, the burden shifts to the non-moving party to go beyond his pleadings and present, by affidavit or by "deposition, answers to interrogatories, and admissions on file," specific facts that show there is a genuine issue to be resolved at trial. Fed. R. Civ. R. 56(e) (emphasis added); *Celotex*, 477 U.S. at 323; *City of Mt. Pleasant*, 838 F.2d at 273. The non-movant "may not rely on mere denials or allegations," but must designate specific facts showing there is a genuine issue of fact for trial. *Hernandez v. Jarman*, 340 F.3d 617, 622 (8th Cir. 2003).

"All matters set forth in the moving party's Statement of Uncontroverted Material Facts shall be deemed admitted for purposes of summary judgment unless specifically controverted by the opposing party. E.D. Mo. L.R. 4.01(E). It is not sufficient merely to state that a fact is disputed and then cite to the record. *See, e.g., Crossley v. Georgia-Pacific*

Corp., 355 F.3d 1112, 1114 (8th Cir. 2004) ("Judges are not like pigs, hunting for truffles buried in briefs.").

Nor does "the mere existence of *some* alleged factual dispute between the parties . . . defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247–48 (1986) (emphasis in original). Evidence of a disputed factual issue that is merely colorable or not significantly probative will not prevent the entry of summary judgment. *Id.* at 248.

A properly supported Motion for Summary Judgment will not be defeated by self-serving testimony. *Bacon v. Hennepin Cty. Med. Ctr.*, 550 F.3d 711, 716 (8th Cir. 2008) (citation omitted); *Gander Mountain Co. v. Cabela's Inc.*, 540 F.3d 827, 831 (8th Cir. 2008) (citation omitted). A plaintiff "must substantiate allegations with sufficient probative evidence that would permit a finding in his favor." *Bacon*, 550 F.3d at 716; *Gander*, 540 F.3d at 831. The plaintiff's opinions, coupled with unsubstantiated allegations, are not sufficient to raise a genuine issue of fact. *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 319 (8th Cir. 1986).

III. ARGUMENT

A. Issue

The issue is whether the law was clearly established on August 10, 2018, that:

1) Defendant Officers had an affirmative obligation to personally render medical aid to Mikel Neil, Sr.;

2) Where an alleged deliberate indifference to a serious medical need did not cause any detrimental effect, any constitutional right would be violated and whether such is sufficient to proceed on a cause of action alleging deliberate indifference to a serious medical need; and

3) Where there is no evidence Defendant Officers actually saw the Neil vehicle crash into the tree, that the subjective prong of a deliberate indifference claim could be met thereby rendering a violation of the Constitution.

B. Rule

Section 1983 is a remedial statute allowing for a person acting under "color of any statute, ordinance, regulation, custom, or usage, of a State or Territory or the District of Columbia" to be held liable for the "deprivation of any rights, privileges, or immunities secured by the Constitution and its laws." 42 U.S.C. § 1983. The statute is "merely a vehicle for seeking a federal remedy for violations

of federally protected rights." *Foster v. Wyrick,* 823 F.2d 218, 221 (8th Cir. 1987). In a § 1983 action, two essential elements must be present: (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct complained of deprived a plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. *DuBose v. Kelly,* 187 F.3d 999, 1002 (8th Cir. 1999). Like common law torts, constitutional torts require proximate cause. *See Carey v. Piphus*, 435 U.S. 247, 257–58 (1978) (recognizing that the tort rules defining elements of damages and the prerequisites for the recovery of damages provide the appropriate starting point for the inquiry under § 1983 as well); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 409 (1970) (Harlan, J. concurring); *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1072 n.12 (9th Cir. 2012); *Temple v. Temple*, 172 F.3d 49 (6th Cir. 1998).

Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). "Qualified immunity shields an officer from suit when [he] makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances [he] confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). The privilege is "an

immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Id.* Qualified immunity shields public officials and reduces "the risks that fear of personal monetary liability and harassing litigation will unduly inhibit [public] officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). "Law-enforcement officers should not, on pain of having to pay damages out of their own pockets, be required to anticipate how appellate judges will apply maxims of constitutional adjudication about which even those judges sometimes disagree … it would be unworkable." *McCurry v. Tesch*, 824 F.2d 638, 642 (8th Cir. 1987).

The applicability of qualified immunity is a question of law and, "the burden is on the plaintiff to plead and, if presented with a properly supported motion for summary judgment, to present evidence from which a reasonable jury could find the defendant officer has violated the plaintiff's constitutional rights." *Moore v. Indehar*, 514 F.3d 756, 764 (8th Cir. 2008). There is a two-part inquiry to determine whether a § 1983 action can proceed in the face of an assertion of qualified immunity. *Akins v. Epperly*, 588 F.3d 1178, 1183 (8th Cir. 2009). The first is the question whether the government official's conduct violated a constitutional

right. *James ex rel. James v. Friend*, 458 F.3d 726, 730 (8th Cir. 2006); *Burton v. Richmond*, 370 F.3d 723, 727 (8th Cir. 2004). The second is to determine whether the right was clearly established. *James*, 458 F.3d at 730; Burton, 370 F.3d at 727. If the answer to either question is no, then the officer is entitled to qualified immunity. *Keil v. Triveline*, 661 F.3d 981, 985 (8th Cir. 2011). The Court must exercise its sound discretion in deciding which of these two parts should be addressed first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Individual defendants are entitled to qualified immunity unless their alleged conduct violated "clearly established [federal] statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The law is "clearly established" if it gives the defendant official "fair warning" that his conduct violated an individual's rights when the official acted. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). In other words, any reasonable official would understand that his conduct violated the law. Qualified immunity "allows officers to make reasonable errors so they do not always 'err on the side of caution'" for fear of being sued. *Habiger v. City of Fargo*, 80 F.3d 289, 295 (8th Cir. 1996) (internal citation omitted). Qualified immunity provides "ample room

for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 343 (1986). "Although the defendant bears the burden of proof for this affirmative defense [of qualified immunity], the plaintiff must demonstrate that the law was clearly established." *Smith v. City of Minneapolis*, 754 F.3d 541, 546 (8th Cir. 2014).

As the U.S. District Court for the Eastern District of Missouri has summarized:

> The Due Process Clause of the Fourteenth Amendment requires that the police must provide medical care to "persons . . . who have been injured while being apprehended by the police." *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983). This duty is fulfilled, however, by promptly "summoning the necessary medical help or by taking the injured detainee to the hospital." *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1415 (9th Cir. 1986). Absent unusual circumstances, a police officer cannot be held liable under § 1983 for failing to provide first aid or CPR so long as he has summoned the necessary medical help. *See Tagstrom v. Enockson*, 857 F.2d 502, 504 (8th Cir. 1988) (holding officer who called ambulance, but failed to administer CPR to injured motorcyclist did not violate Due Process Clause when ambulance arrived in approximately six minutes); *Tatum v. City & County of San Francisco*, 441 F.3d 1090, 1099 (9th Cir. 2006) (holding that police

> officers who called an ambulance for a handcuffed suspect due to his difficulty breathing did not violate Due Process Clause by failing to administer CPR); *Wilson v. Meeks*, 52 F.3d 1547, 1556 (10th Cir. 1995) (refusing to find that police officers never have a duty to render first aid, but finding that police officer who promptly summoned medical help and left a detainee laying on the ground face down with labored breathing and a gun shot wound did not give rise to a duty to render first aid); *Rich v. City of Mayfield Heights*, 955 F.2d 1092, 1097 (6th Cir. 1992) (holding that aside from summoning medical help, police have no duty to cut down an inmate discovered hanging in his jail cell).

Teasley v. Forler, 548 F. Supp. 2d 694, 709 (E.D. Mo. 2008); *see also Powell v. Shelton*, No. 4:17CV2017 HEA, 2020 U.S. Dist. LEXIS 252917, at *3–4 (E.D. Mo. June 8, 2020) ("Indeed, the absence of an affirmative duty encompasses officers with the type of training Defendants received in the course of their employment as police officers."). The Eighth Circuit has evaluated such a claim under the standard regarding deliberate indifference to a serious medical need. *Tagstrom v. Enockson*, 857 F.2d 502, 504 (8th Cir. 1988); *Chalepah v. City of Omaha*, No. 8:18-CV-381, 2019 U.S. Dist. LEXIS 27552, at *18 (D. Neb. Feb. 21, 2019) (evaluating such a claim under a deliberate indifference standard, citing *Tagstrom*, and stating the due process clause

does not require law enforcement officers to give CPR or first aid to arrestees).

As the U.S. District Court for the District of Minnesota has recently summarized:

> However, to plead the "deliberate indifference" necessary to sufficiently set forth an Eighth Amendment—or in the present case, Fourteenth Amendment—violation, a plaintiff must demonstrate (1) that he had an objectively severe medical need, and (2) that prison officials knew of, but deliberately disregarded, that need. In alleging deliberate indifference, Plaintiff must demonstrate "more than negligence, more even than gross negligence . . . Deliberate indifference is akin to criminal recklessness . . . . Specifically, the prisoner must show both (1) that a prison official had actual knowledge that the prisoner's medical condition created a substantial risk of serious harm to the prisoner's health, and (2) that the prison official failed to act reasonably to abate that risk.

> The failure to treat a medical condition does not constitute punishment within the meaning of the Eighth Amendment unless prison officials knew that the condition created an excessive risk to the inmate's health and then failed to act on that knowledge. As long as this threshold is not crossed, inmates have no constitutional right to receive a particular or requested course of treatment, and prison doctors remain free to exercise their independent medical judgment. The Eighth Amendment, while requiring medical treatment, does not require that the precise treatment requested be provided, nor does it require treatment at the time of the patient's choosing. Rather, it merely requires an absence of deliberate disregard.

Peaker v. Stillwater Med. Grp., No. 20-cv-1195 (NEB/LIB), 2021 U.S. Dist. LEXIS 81192, at *9 (D. Minn. Mar. 22, 2021) (internal citations and quotations omitted). As the Eighth Circuit has recently stated:

> This court has defined a "serious medical need" as "one that has been diagnosed by a physician as requiring treatment, or one

that is so obvious that even a layperson would easily recognize the necessity for a doctor's attention."

. . .

Under the subjective prong, to show deliberate indifference, the official must know[] of and disregard[] the inmate's serious medical need. In other words, the evidence must show that the [official] recognized that a substantial risk of harm existed and knew that their conduct was inappropriate in light of that risk. Generally, the actor manifests deliberate indifference by intentionally denying or delaying access to medical care, or intentionally interfering with treatment or medication that has been prescribed. When considering whether an official deliberately disregarded a risk, this court must avoid determining the question with hindsight's perfect vision.

Davis v. Buchanan Cty., 2021 U.S. App. LEXIS 25293, at *31-32 (8th Cir. Aug. 24, 2021) (internal citations and quotations omitted).

> As the Eighth Circuit has recently reaffirmed:
>
> > When an inmate claims that a delay in medical care violates the Eighth Amendment, the objective seriousness of the deprivation should also be measured by reference to the *effect of* delay in treatment. A prisoner alleging a delay in treatment must present verifying medical evidence that the prison officials ignored an acute or escalating situation or that these delays adversely affected his prognosis. And if the treatment is for a sophisticated medical condition, testimony is required to show proof of causation.

Redmond v. Kosinski, 999 F.3d 1116, 1121 (8th Cir. Jun. 7, 2021) (internal quotations and citations omitted). Sophisticated injuries require proof of causation by a medical expert. *Gibson v. Weber*, 433 F.3d 642, 646 (8th Cir. 2006). In the absence of such medical evidence, a plaintiff "fail[s] to raise a genuine issue of fact on an essential element of his claim." *Laughlin v. Schriro*, 430 F.3d 927, 929 (8th Cir. 2005).

C. Explanation

In *Laughlin*, a prisoner had a heart attack and pressed a call button in his cell several different times to hail medical

attention. *Id.* at 928. He pushed the call button at 7:30 a.m. with no response, then at 8:15 a.m. with a response at 8:35 a.m. *Id.* A different guard came twenty minutes later and then summoned medical assistance arriving fifteen minutes later. *Id.* The prisoner was examined and prescribed an antacid. *Id.* At 2:43 p.m., medical assistance responded again, where the prisoner was ultimately transferred to a hospital and diagnosed with a "small acute myocardial infarction" and received angioplasty treatment eight days later. *Id.*

The Eighth Circuit held "While [the prisoner] submitted evidence documenting his diagnosis and treatment, he offered no evidence establishing that any delay in treatment had a detrimental effect and thus failed to raise a genuine issue of fact on an essential element of his claim. As such, the grant of summary judgment in favor of the Appellee was proper." *Id.* at 939 (internal quotations and citations omitted).

D. Application

Plaintiff has alleged Defendants "failed to provide immediate, and necessary medical treatment to the occupants of the vehicle, thereby demonstrating complete indifference and disregard for constitutional protections of Plaintiff and contributing to the death of Plaintiff." Doc. 42, ¶ 57. In Count

I (*id.* at ¶¶ 79–93), Plaintiff alleged, purportedly under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution:

> The Defendant Police Officers failed to provide or alert medical attention to an obviously injured citizen suspect, subject to police action and thereby refused to provide medical care to a citizen in obvious need. Returning to the scene almost an hour after the accident had occurred, this delay in care and or providing medical care was malicious, deliberately indifferent, constitutes an intent to harm, was an administration of unconstitutional cruel and unusual punishment of a citizen suspect subject to police action, being in any form of custody, constructive or otherwise and may have insured the death of plaintiff.

Id. at 86. This Court briefly discussed Plaintiff's allegation in this regard and stated that Count I "does not specify the constitutional basis for the claim" and that it was not "subject to dismissal based on the motions before" the Court at the time. Doc. 186, pp. 23–25. The pleadings have since closed without further amendment.[1]

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[1] Under the Parties' Amended Joint Proposed Scheduling Plan, Plaintiff's deadline for joinder of additional parties or amendment of pleadings was November 30, 2020. No amendments to this Court were filed despite this Court's reference to the unhelpful nature of the subject allegations. Doc. 186, p. 24.

Plaintiff purported to disclose Geoffrey Alpert as her sole Fed. R. Civ. P. 26(a)(2)(B) expert (Ex. A1, Fed. R. Civ. P. 26(a)(2) disclosures, and Ex. A2, Geoffrey Alpert Dep. Aug. 17, 2021).[2] Dr. Alpert is not a medical physician (Ex. A2, Alpert Dep. 55:12–13) and had no opinions regarding whether stopping to render first aid would have allowed Mr. Mikel Neil ("Decedent") to survive the accident (*id.* at 20:18–21:12).

Plaintiff purported to disclose four Missouri State Highway Patrol officers who authored the initial incident report, the technical crash investigative report, the crash report, and the supplemental report, as well as Chief Jon Belmar of St. Louis County. Ex. B, Fed. R. Civ. P. 26(a)(2)(C) disclosures.[3] None of these purported experts

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[2] Mr. Alpert professes to have expertise in police practices. Defendants have objected to the manner of disclosing Mr. Alpert (attaching a deposition taken in the state court case) for failure to provide a report under Fed. R. Civ. P. 26(a)(2)(B). Defendants are attempting to confer with Plaintiff's attorney over this aspect, though the issue does not impact the Court's consideration regarding the present motion.

[3] Defendants have objected to these disclosures for failure to follow the requirements of Fed. R. Civ. P. 26(a)(2)(C) and are meeting and conferring regarding this. This does not impact the Court's considerations regarding this motion.

have been disclosed to provide any medical opinions concerning medical treatment, aid, or causation. *See id.*

Eyewitness Ryane Vann testified that on August 10, 2018, she heard the gold car (Neil vehicle) crash into the tree. Ex. C, Ryane Vann Dep. 12:20–13:2; 26:13–27:1, Dec. 7, 2020. She testified it was a "few seconds" between the time she heard the crash and the time she called 911 and later clarified it was between ten and thirty seconds, but "[n]o more than 30 seconds." *Id.* at 51:17–52:8. Such a delay in time, even assuming, *arguendo*, either of the Defendants observed the crash and called instantaneously, was not clearly established as being a violation of the constitution. *See Smith v. Kilgore*, 926 F.3d 479, 486 (8th Cir. 2019) (qualified immunity to officers who called within a minute of incident).

Not only has Plaintiff failed to make her burden (which is sufficient to grant summary judgment to Defendants, *Celotex Corp.* 477 U.S. at 331), but Defendants' affirmative evidence negates Plaintiff's element of causation (*see id.*). Dr. Mary Case, Chief Medical Examiner for St. Louis County, has testified to a reasonable degree of certainty that any delay of ten to thirty seconds in calling 911 or in directly rendering aid did not alter the outcome. Ex. D, Dr. Mary Case Dep. 50:2–23, Sept. 9, 2021. The officers were not equipped with anything which would have changed the

outcome if they approached Mikel Neil, Sr., right after the time this took place. *Id.* at 44:24–46:15.

In addition and separately, Plaintiff has not submitted evidence Alex Maloy or Mark Jakob actually observed the collision sufficient to confer actual knowledge required to maintain a claim of deliberate indifference to a serious medical need. In fact, Officer Jakob testified that he did not observe the Neil vehicle impact the tree. Ex. E, Mark Jakob Dep. 79:7–80:6; 211:11–23, 226:5–14 Jun. 16, 2021. Accordingly, without actual knowledge, qualified immunity should be afforded to Defendants for failure to meet the second prong of a deliberate indifference claim. *See Travis v. United States*, No. 2:14CV00122-JLH-JJV, 2015 U.S. Dist. LEXIS 139779, at *7 (E.D. Ark. May 15, 2015) (granting qualified immunity where defendants lacked actual knowledge of plaintiff's mold exposure) (citing *Santiago v. Blair*, 707 F.3d 984, 990 (8th Cir. 2013)).

E. Conclusion

Defendants are entitled to qualified immunity in that the law was not clearly established on August 10, 2018:

1) Defendant Officers had an affirmative obligation to personally render medical aid to Mikel Neil, Sr.;

2) Where an alleged deliberate indifference to a serious medical need did not cause any detrimental effect, any constitutional right would be violated and whether such is sufficient to proceed on a cause of action alleging deliberate indifference to a serious medical need; and

3) Where there is no evidence Defendant Officers actually saw the Neil vehicle crash into the tree, that the subjective prong of a deliberate indifference claim could be met thereby rendering a violation of the constitution.

Plaintiff has failed to meet her burden in setting forth any affirmative evidence establishing the element of causation in the sole remaining federal claim of deliberate indifference to a serious medical need. Further, Defendants'

affirmative evidence negate Plaintiff's essential element of her deliberate indifference to a serious medical need claim.

WHEREFORE, Defendants respectfully request that this Court enter an Order granting Defendants' Motion for Summary Judgment, and stay the remainder of the claims (state law) against Defendants until a resolution in the state court proceeding, for costs, and for such further relief this Court deems just and proper.

/s/ Robert T. Plunkert

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APPENDIX B

NO. 22-2749

In the United States Court of Appeals

for the Eighth Circuit

CLARA CHEEKS

Appellee/Plaintiff,

v.

MARK JAKOB (INDIVIDUAL CAPACITY) AND FRANK MALOY (SUBSTITUTED FOR THE LATE ALEX MALOY, INDIVIDUAL CAPACITY),

Appellants/Defendants.

On Appeal from the United States District Court
For the Eastern District of Missouri, Eastern Division
Cause No. 4:18-cv-2091-SEP
The Honorable Sarah E. Pitlyk, District Judge

REPLY BRIEF OF APPELLANTS / DEFENDANTS

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JURISDICTIONAL STATEMENT

Plaintiff failed to cite to any specific argument of Defendants or to the record in arguing this Court lacks jurisdiction. This Court recently reaffirmed its jurisdiction pertaining to reviewing an order denying qualified immunity at the summary judgment stage, stating such jurisdiction extends

> . . . only to abstract issues of law, not to determinations that the evidence is sufficient to permit a particular finding of fact after trial. Thus, a defendant entitled to invoke a qualified immunity defense may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a genuine issue of fact for trial. And we typically may not consider any other grounds for granting summary judgment on the merits of the case at this interlocutory stage.

Clinton v. Garrett, 49 F.4th 1132, 1138 (8th Cir. Sept. 21, 2022) (internal quotations and citation omitted). This Court is "constrained by the version of facts that the district court assumed or likely assumed in reaching its decision, to the extent that version is not blatantly contradicted by the record." *McGuire v. Cooper*, 952 F.3d 918, 922 (8th Cir. 2020) (internal quotations and citation omitted). There are *no* facts in the record upon which the district court assumed or likely assumed to support a detrimental effect of an alleged

delay or denial of aid or that Decedent was ever taken into custody. In addition, the video record blatantly contradicted lone testimony of a purported witness (even if this Court disagrees, the facts assumed or likely assumed by the district court did not constitute a violation of clearly established law). Defendants' appeal falls within this Court's jurisdiction.

ARGUMENT

Defendants provided extensive factual and legal support in their opening brief and explained the issues in this matter surrounding qualified immunity. Plaintiff failed to address the majority of points, both on a factual and legal level, in her response brief and in order to meet her burden to show clearly established law regarding factually similar circumstances. For example, pursuant to 8th Cir. R. 28A(i), Plaintiff was to include a list of the most apposite cases in her Statement of Issues. Plaintiff lists *McCoy v. City of Monticello*, 342 F.3d 842 (8th Cir. 2003), *Brown v. City of Golden Valley*, 574 F.3d 491 (8th Cir. 2009), and *Craighead v. Lee*, 399 F.3d 954 (8th Cir. 2005). Resp. Br., p. 2. These cases are not cited elsewhere in the brief (aside from table of contents references without accompanying pagination). The cases are inapposite, as they pertain to Fourth Amendment issues surrounding an alleged seizure and unreasonable use of force. *See McCoy*, 342 F.3d at 845–46; *Brown*, 574 F.3d at 496; *Craighead*, 399 F.3d at 961. If Plaintiff were to provide this Court with controlling precedent or a robust consensus of cases under similar factual circumstances (*see Quraishi v. St. Charles County, Missouri*, 986 F.3d 831, 835 (8th Cir. 2021)), such cases should be found here. Plaintiff fails to

meet her burden in this aspect in the Statement of Issues and in the remainder of her brief.

Defendants first address the insufficiency of Plaintiff's brief regarding citation to facts in the record as well as the inconsequential nature of certain factual arguments made. Defendants then address the failure of Plaintiff to cite to clearly established law to counter points raised by Defendants in their opening brief.

I. PLAINTIFF'S FACTUAL ASSERTIONS LACK SUFFICIENT CITATION TO THE RECORD AND ARE INCONSEQUENTIAL TO THE ISSUES BEFORE THIS COURT IN REVIEWING THE DENIAL OF QUALIFIED IMMUNITY.

Though this Court does not have jurisdiction to resolve factual disputes absent a finding that a factual contention is blatantly contradicted by the video evidence (*see McGuire v. Cooper*, 952 F.3d 918, 922 (8th Cir. 2020)), Plaintiff is not relieved from her obligation to include sufficient citations to the record. *See* Fed. R. App. P. 28(a)(6) and (b)(3) (requiring the statement of the case to contain "appropriate references to the record"); Fed. R. App. P. 28(a)(8)(A) and (B) (requiring argument section to have "citations to the authorities and parts of the record on which the appellant relies"); *see also Oil & Gas Transfer L.L.C. v.*

Karr, 928 F.3d 1120, 1124 n.3 (8th Cir. 2019) (rejecting arguments unsupported by any citation to the record, citing *DiCarlo v. Keller Ladders, Inc.*, 211 F.3d 465, 468 (8th Cir. 2000) (discussing importance of citations to the record)). This Court "will not mine a summary judgment record searching for nuggets of factual disputes to gild a party's arguments." *Johnson Tr. of Operating Engineers Local #49 Health & Welfare Fund v. Charps Welding & Fabricating, Inc.*, 950 F.3d 510, 524 (8th Cir. 2020) (internal citation and quotations omitted).

A. Plaintiff's Statement of the Case

In Plaintiff's Statement of the Case, Plaintiff makes several factual assertions without any citation to the record. *See* Resp. Br., pp. 3–8. Regardless, the factual recitation does not meet the merit of Defendants' argument. Specifically, contentions made by Plaintiff regarding whether there was a violation of departmental policy (*see id.* at pp. 3–5, 8) does not equate to a constitutional violation, and is therefore inconsequential to the issues before this Court. *See Christiansen v. Eral*, 52 F.4th 377, 379 (8th Cir. Oct. 31, 2022) (even accepting conclusory allegation, "knowing violation of department policy doesn't transform [] actions into unconstitutional behavior"). Other factual assertions do not address the facts pertaining to the summary judgment

issues or, for this Court's purposes, pertaining to the question of clearly established law based on facts assumed or likely assumed by the district court. App. at 0369–71; R. Doc. 248, at ¶¶ 1–6 (Pl.'s Resp. to Statement of Uncontroverted Facts). Rather, whether the subject police cruiser collided with the vehicle operated by Decedent (a few select facts address this, but are blatantly contradicted by the video record) pertains to Defendants' argument that Decedent was not in the custody of Defendants and that Defendants did not place Decedent in a position of danger of violence from a third person. *See* Defs.' Br., pp. 17–19.

Other factual assertions appear internally inconsistent and to contradict even Plaintiff's position before the district court. *Compare* Resp. Br., p. 7 ("Had Defendants Jakob and Maloy stopped their car to render aid immediately, Neil would not need to wait for 15–20 minutes for 911.") (citing App. at 0969; R. Doc., at 248-4 at 13:9–12 (stating it was 15–20 minutes before "first police officer" arrived on scene)) *with* App. at 0370 R. Doc. 248, at ¶ 4 ("It took first responders/emergency responders approximately 5 minutes to respond to the incident. . . [t]here is no way that Jacob could have determined whether or not he could've saved the lives of Neil and his passenger on August 10, 2018."); *see also* Resp. Br. p., 8 ("Chief Jon Belmar testified under oath that he

believes officer Malloy [sic] and Jacob [sic] witnessed the crash and left the scene [without rendering aid]) (citing App. at 0706, 708; R. Doc. 248-1, at 54:24, 56:1–3 (stating he does not believe Defendants left the scene of an accident, but in between cited pages, stated he believe Defendants "either did or should have seen the accident")).

Regardless, the purported facts in Plaintiff's Statement of the Case are inconsequential. For those pertaining to the issues on appeal, they are blatantly contradicted by the video record and do not purport to refute Defendants' other arguments pertaining to clearly established law.

B. Plaintiff's Argument

Plaintiff fails to provide citations to parts of the record on which she relies for *any* of her contentions in her argument in contravention of Fed. R. App. P. 28(a)(8)(A). This is particularly significant, given Plaintiff's burden to provide this Court with controlling precedent or a robust consensus of cases under similar factual circumstances. *See Quraishi*, 986 F.3d at 835 (internal citations omitted). Even if this Court were to assume the assertion of facts by Plaintiff in the argument section for purposes of this appeal only, these do not touch upon Defendants' arguments on appeal. For example, Plaintiff argues Maloy and Jakob witnessed the

crash. Resp. Br., p. 16. Defendants' dispute of this fact at the trial level is not at issue or within this Court's jurisdiction regarding the points Defendants have raised.

Plaintiff's argument section supplies no citation to the record or factual assertion otherwise in order to dispute several key facts, including the following:

- The video record (taken from 8249 Airport Road depicting the vehicles separated by four seconds and 325 feet) showing any contact between the car or otherwise not blatantly contradicting the lone testimony of Lorenzo Johnson there was contact (*see* App. at 0972–74, 986–87; R. Doc. 248-4, at 16:6–18:6, 30:3–31:3; App. at 0388; R. Doc. 254-4; App. at 0380–81; R. Doc. 254, at 9–10;[1] App. at 0403; R. Doc. 254-5, at p. 14);
- That the location of the alleged contact was within or nearly within the view of the Airport Elementary School camera (R. Doc. 254-5, at p. 14);
- Neither of the Defendants took Decedent into custody;
- Defendant Jakob was not the driver of the patrol vehicle and could not have / did not manipulate the

[1] Ex. J to Defendants' Reply in Support of Their Motion for Summary Judgment was delivered to the Court and is not available electronically in the ECF system.

patrol vehicle, or its driver, to engineer contact with the Hyundai or take custody of Decedent;

- There is no verifying medical evidence in the record to establish any detrimental effect of delay in medical treatment;
- EMS was independently contacted within ten to thirty seconds of the crash and arrived on scene to attempt to render aid to Decedent within approximately *five minutes* of the crash (App. at 1189, 1205–06; R. Doc. 248-5, at 51:17–52:8, 67:8–12); and
- There is no evidence Decedent survived the impact of the crash.

Accordingly, Plaintiff's failure to cite to the record and to address the relevant predicate facts (*see Clinton v. Garrett*, 49 F.4th 1132, 1143 (8th Cir. 2022) (internal citation omitted)) central to the qualified immunity analysis regarding a lack of clearly established law indicates reversal is appropriate in this matter.

II. PLAINTIFF HAS FAILED TO MEET HER BURDEN TO ESTABLISH DEFENDANTS VIOLATED ANY CLEARLY ESTABLISHED RIGHT OF DECEDENT AND HAS FAILED TO RESIST DEFENDANTS' LEGAL ARGUMENTS.

A. Plaintiff has failed to meet her burden to show controlling case law or a robust consensus of cases with persuasive authority clearly establishing a right of Decedent violated by Defendants.

Decedent did not have a clearly established right, including under the Fourteenth Amendment, as of August 10, 2018:

- To have Defendants render him aid where he was neither in their custody nor subject to any non-custodial relationship;
- Where medical aid was summoned ten to thirty seconds within the time of the crash, to have Defendants summon medical attention;
- To have medical care summoned by Defendants where the outcome of the crash would not have been altered; and
- Whatsoever, where there is no evidence Decedent survived the crash upon impact.

Plaintiff does not address these issues particularized to the facts of the case and does not expand upon the facts of any case law in an attempt to analogize the facts to show similar circumstances. *See White v. Pauly*, 580 U.S. 73, 552 (2017) ("The panel majority misunderstood the 'clearly established' analysis: It failed to identify a case where an officer acting

under similar circumstances as Officer White was held to have violated the Fourth Amendment.").

The cases cited by Plaintiff do not contain a factually similar circumstances such that a reasonable person would have known of a violation of rights:

- *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 240–41, 241 n.3 (1983): officers who summoned a private ambulance for a suspect who was shot attempting to flee from police and in police custody fulfilled the constitutional standard ("[w]hatever the standard may be");
- *Estelle v. Gamble*, 429 U.S. 97, 107–08 (1976): an injured prisoner who was seen on seventeen occasions spanning a three-month period for back, high blood pressure, and heart problems, was "[a]t most. . . medical malpractice" and not actionable under 42 U.S.C. § 1983, and stated, "In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."
- *McRaven v. Sanders*, 577 F.3d 974, 978–79 (8th Cir. 2009): a pretrial detainee, booked for driving while intoxicated, who tested positive for marijuana, benzodiazepines, and opiates and admitted to taking

Seroquel, Hydrocodone, Depakote, and Ambien (with twenty-one missing Chlorzoxazone pills from a bottle), showed poor coordination with a flush face, slurred speech, and droopy eyelids. The detainee entered a holding cell at 12:30 p.m. and videotapes showed him moving only once in the next five hours. At 5:00 p.m., another detainee notified officers he was not breathing, at 5:35 p.m. an officer entered the cell, and at 5:42 p.m. paramedics arrived. This Court found a clearly established right to be free from deliberate indifference to a serious medical need;

- *Kahle v. Leonard*, 477 F.3d 544, 554 (8th Cir. 2007): a female prisoner had a clearly established right to be free from being sexually assaulted and that a supervisor could be deliberately indifference to a substantial risk she would be seriously harmed where the supervisor would have been notified by colored lights of three separate entries by the correctional officer into the female prisoner's cell;
- *Tlamka v. Serrell*, 244 F.3d 628, 630–31, 635 (8th Cir. 2001): inmate suffering heart attack given CPR by other inmates, correctional officers instructed other inmates to cease CPR (despite insistence otherwise by inmates) with no apparent explanation for the delay,

and two-to-ten-minute period of time until nurse could resume CPR successfully stated claim of deliberate indifference to a serious medical need; and

- *Tagstrom v. Enockson*, 857 F.2d 502, 503–04 (8th Cir. 1988): Defendants have previously discussed the facts and distinguished this case at length.

Defendants, in their opening brief, have already addressed several other cases Plaintiff has cited and not discussed.[2] None of these cases has facts similar to this case, in that none of them addresses the issues (recreated at the beginning of this section).

B. Plaintiff has failed to address or resist Defendants' arguments.

Plaintiff has failed to resist Defendants' argument no duty was imposed on Defendants by the Fourteenth Amendment as there was no custodial and other setting in

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[2] *Teasley v. Forler*, 548 F. Supp. 2d 694, 709 (E.D. Mo. 2008) (claim of failure to train amounting to a deliberate indifference in light of a fatal shooting), *Tatum v. City & Cnty. of San Francisco*, 441 F.3d 1090, 1099 (9th Cir. 2006) (claim of excessive force and wrongful arrest, finding decision not to perform CPR was not violative of rights but that promptly summoning medical assistance sufficed), *Wilson v. Meeks*, 52 F.3d 1547, 1556 (10th Cir. 1995) (finding duty discharged when summoned medical help) (*abrogated on other grounds recognized by Stuart v. Jackson*, 24 Fed.Appx. 943, 954 n.5 (10th Cir. 2001)), and *Rich v. City of Mayfield Heights*, 955 F.2d 1092, 1097 (6th Cir. 1992) (finding calling paramedics rather than cutting down hanging prisoner was not a violation of a clearly established right).

which the state has limited the individuals' ability to care for themselves; and second, when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced. *Gregory v. City of Rogers, Ark.*, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc). To the extent this is implicitly made regarding the alleged PIT maneuver, Defendants have otherwise addressed these arguments and purported facts.

Even assuming such a duty was imposed based on the rhetoric of *Gregory*, *arguendo*, Plaintiff has failed to resist Defendants' arguments that there was no "custody" obtained, as defined by *Gladden v. Richbourg*, 759 F.3d 960, 965 (8th Cir. 2014).

Even assuming such a duty was imposed *and* a custody event under *Gladden*, *arguendo*, Plaintiff has failed to resist Defendants' arguments that Plaintiff had to, but did not, place verifying medical evidence in the record to establish the detrimental effect of delay in medical treatment. *See Jackson v. Riebold*, 815 F.3d 1114, 1119 (8th Cir. 2016) (internal citation omitted). Plaintiff fails to even reference *Jackson* or the tenet of law stated in *Jackson*, and only references *Coleman v. Rahija*, 114 F.3d 778, 784 (8th Cir. 1997) for a separate, general rule. Plaintiff fails to address Defendants' arguments regarding the district court's

interpretation of denial versus delay and has failed to cite any clearly established law that a detrimental effect of an alleged denial of medical care is an improper requirement for a claim of deliberate indifference to a serious medical need. *See Bailey v. Feltmann*, 810 F.3d 589, 594 (8th Cir. 2016). It remains undisputed that the law on August 10, 2018, was not clearly established that the alleged delay or denial of medical care without verifying medical evidence in the record to establish any detrimental effect can rise to the level of a constitutional violation.

Plaintiff has further failed to show any clearly established law existing to show any potential violation of rights where there is no evidence Decedent survived impact of the collision. *See Riley v. St. Louis County of Mo.*, 153 F.3d 627, 632 n.1 (8th Cir. 1998) (holding that section 1983 does not provide a cause of action on behalf of a deceased for events occurring after death).

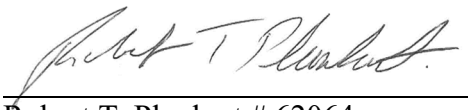
CONCLUSION

This is a case of burdens and Plaintiff's failure to meet them. Plaintiff has failed to meet her burden to set forth any evidence Decedent survived the initial impact. Plaintiff failed to meet her burden showing any alleged failure of Defendants to call 911 had any detrimental impact regarding the outcome

of the crash. Plaintiff failed to meet her burden showing Defendants violated any clearly established right as of August 10, 2018, including citation to any factually similar situations.

In light of Plaintiff's failure to provide any factually similar case and any clearly established law pertinent to the issues regarding qualified immunity, this Court should resolve this matter by finding that no evidence in the record shows the alleged delay or denial of medical care detrimentally altered the outcome of the crash, and therefore qualified immunity bars Plaintiff's remaining claims in light of *Jackson v. Riebold*, 815 F.3d 1114 (8th Cir. 2016), *Bailey v. Feltmann*, 810 F.3d 589, 594 (8th Cir. 2016), *Riley v. St. Louis County of Mo.*, 153 F.3d 627, 632 n.1 (8th Cir. 1998), and *Coleman v. Rahija*, 114 F.3d 778 (8th Cir. 1997). In such an event, the remaining issues would not need to be addressed. Regardless, this Court should reverse the district court's order denying summary judgment based on qualified immunity for the reasons stated in Defendants' opening brief and above.

Respectfully submitted,



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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CLARA CHEEKS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.: 4:18-CV-2091-SEP
	)	
JON BELMAR, et al.	)	
	)	
Defendants.	)	

DEFENDANTS MALOY AND JAKOB'S REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

COME NOW, Defendants Frank Maloy (substituted for the late Alex Maloy) and Mark Jakob ("Defendants"), and for their Reply in Support of their Motion for Summary Judgment, state:

I. INTRODUCTION

On September 28, 2021, Defendants filed their Motion for Summary Judgment. Doc. 218, 219, 220. On October 21, 2021, Plaintiff has sought, without obtaining, additional time to conduct discovery. Doc. 223. Discovery closed on December 30, 2021. Doc. 202, at 3(f). On February 3, 2022, Plaintiff purported to respond to Defendants' motion. Doc. 248.[3] To the extent this Court determines Plaintiff's response is timely filed, Defendants submit this Reply to respond to matters raised in the response. Defendants avoid repeating arguments.

II. ARGUMENT

As this Court has noted, Plaintiff's remaining federal claim is for "failure to provide emergency medical care under 42 U.S.C. § 1983 in Count I." Doc. 186. Defendants have moved for summary judgment on qualified immunity in that the following three issues were not clearly established on August 10, 2018:

> 1) Defendant Officers had an affirmative obligation to personally render medical aid to Mikel Neil, Sr.;

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[3] The undersigned has attempted to confer with counsel for Plaintiff regarding the mistaken pertaining to filing. Plaintiff's counsel has provided a corrected Response, but has not filed the corrected response at the time of this filing. In order to timely reply, Defendants attach Plaintiff's corrected Response as Exhibit M; *see also* Exhibit N.

> 2) Where an alleged deliberate indifference to a serious medical need did not cause any detrimental effect, any constitutional right would be violated and whether such is sufficient to proceed on a cause of action alleging deliberate indifference to a serious medical need; and
> 3) Where there is no evidence Defendant Officers actually saw the Neil vehicle crash into the tree, that the subjective prong of a deliberate indifference claim could be met thereby rendering a violation of the Constitution.

Doc. 219, at 3–4, 12. A finding of qualified immunity regarding any one of these items obviates the need for this Court to decide either of the other two issues. Accordingly, Defendants will address these points out of order so that, in the interests of judicial economy, this Court need not unnecessarily address all points.

A. Plaintiff fails to meet her burden establishing clearly established law.

The Eighth Circuit has repeatedly held the plaintiff has the burden of establishing that both a constitutional right was violated and that the law was clearly established at the time of the alleged violation. *Wilson v. Lamp*, 901 F.3d 981, 986 (8th Cir. 2018) (internal citation omitted); *see also Graham v. Barnette*, 5 F.4th 872, 887 (8th Cir. 2021); *Smith v. City of Minneapolis*, 754 F.3d 541, 546 (8th Cir. 2014); *but*

see Wright v. United States, 813 F.3d 689, 696 (8th Cir. 2015) (internal citations omitted) (resolving issue with full knowledge of precedent). Plaintiff must "point to existing circuit precedent that involves sufficiently similar facts to squarely govern [Defendants'] conduct in the specific circumstances at issue, or, in the absence of binding precedent, to present a robust consensus of persuasive authority constituting settled law." *Bus. Leaders in Christ v. Univ. of Iowa*, 991 F.3d 969, 980 (8th Cir. 2021) (internal citation omitted).

1. It was not clearly established on August 10, 2018, that where an alleged deliberate indifference to a serious medical need did not cause any detrimental effect, any constitutional right would be violated.

Defendants, in their Memorandum in Support, engaged in a thorough explanation of the Eighth Circuit's requirements that Plaintiff must show through medical expert evidence any alleged delay in summoning aid or rendering assistance adversely affected Decedent's prognosis. Doc. 219, at 4–11. Plaintiff has not disguished any case cited by Defendants, including without limitation *Laughlin v. Schriro*, 430 F.3d 927, 929 (8th Cir. 2005). Rather, Plaintiff cites to general tenets of Eighth Circuit law regarding elements and the cause of action regarding deliberate indifference to a

serious medical need under the Fourteenth and Eighth Amendments. Ex. M, at 6–8. The U.S. Supreme Court has "repeatedly stressed that courts must not define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (internal quotations and citations omitted). Plaintiff has not met her burden to show clearly established law as of August 10, 2018, with sufficiently similar facts which squarely govern Defendants alleged conduct with respect to an alleged deliberate indifference without having an adverse defect regarding Decedent. Specifically, the law was not clearly established on August 10, 2018, that where an alleged deliberate indifference to a serious medical need did not cause any detrimental effect, any constitutional right would be violated and whether such is sufficient to proceed on a cause of action alleging deliberate indifference to a serious medical need.

Accordingly, under *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), this Court need only address this prong to determine Defendants are entitled to qualified immunity regarding the remaining federal claim, and that the state

wrongful death issues be remanded to state court (as it is already pending in state court) to dispose of this case entirely.

2. Plaintiff has cited to no case to suggest Defendants had an obligation to affirmatively render aid.

As Plaintiff's sole remaining federal claim is an alleged failure to provide emergency medical care under 42 U.S.C. § 1983, Plaintiff has failed to meet her burden showing the law was clearly established on August 10, 2018, either of the Defendants had an obligation to affirmatively render aid. This alone is grounds for granting qualified immunity in favor of Defendants. Regardless of Plaintiff's failure to meet her burden, there is no such clearly established law. *Tagstrom v. Enockson*, 857 F.2d 502, 504 (8th Cir. 1988) ("However, Tagstrom points to no cases that clearly establish that Enockson had such a duty. *See Maddox v. City of Los Angeles*, 792 F.2d 1408, 1415 (9th Cir. 1986) (the due process clause imposes no affirmative duty on police officers to give first aid to pretrial detainees)."). Indeed, the due process clause requires an officer "secure" medical care, not "render" it. *Maddox*, 792 F.2d at 1415 (citing, *inter alia*, *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244

(1983)).[4] To the extent Plaintiff's remaining cause of action is directed toward Defendants allegedly failing to render aid, Defendants are entitled to qualified immunity. To the extent it is directed toward an alleged failure of securing aid where 911 was contacted no more than thirty seconds from the crash, the issue of causation is addressed dispositively elsewhere in Defendants' arguments. *See supra*, Section II.A.1.

B. Plaintiff has failed to create a genuine dispute of material fact regarding his remaining federal claim.

As one Court recently has summarized:

> The record must indicate an absence of a genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Northport Health Servs. of Ark., LLC v. Posey*, 930 F.3d 1027, 1030 (8th Cir. 2019). Facts that, if altered, affect the outcome of a lawsuit under applicable substantive law, are material. [*Cottrell v. Am. Family Mut. Ins. Co., S.I.*, 930 F.3d 969, 972 (8th Cir. 2019)]. A material fact dispute is "genuine" if each party has supplied some evidence that is sufficient

[4] Plaintiff's own evidence establishes eyewitness Ryane Vann called 911 no more than thirty seconds from the time she heard the crash. Doc. 248-5, at 52:1–8; *see also* Doc. 248-8 (statement of Ms. Vann regarding calling 911).

> for a reasonable jury to return a verdict for the nonmoving party. *Id.*

Baker v. Union Pac. R.R. Co., No. 8:20CV315, 2022 U.S. Dist. LEXIS 8761, at *18-19 (D. Neb. Jan. 18, 2022) (full cites added). *Ross v. Scott*, 593 S.W.3d 627, 630 (Mo. App. E.D. 2019) ("A genuine dispute is one that is real, substantial, and not merely argumentative, imaginary, frivolous, or based on conjecture, theory, or possibilities.").

"If 'opposing parties tell two different stories,' the court must review the record, determine which facts are material and genuinely disputed, and then view those facts in a light most favorable to the non-moving party—as long as those facts are not so 'blatantly contradicted by the record . . . that no reasonable jury could believe' them." *Reed v. City of St. Charles, Mo.*, 561 F.3d 788, 790 (8th Cir. 2009) (*quoting Scott v. Harris*, 550 U.S. 372, 380 (2007) (record to be viewed in light of the video). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Plaintiff is required to offer evidence which could be presented at trial in admissible form to dispute facts asserted by Defendants. *Lipp v. Cargill Meat Sols. Corp.*, 911 F.3d 537, 544 n.6 (8th Cir. 2018); Fed. R. Civ. P. 56(C)(2); *see also* Local Rule 4.01(E).

Defendants arguments are not factually complex—Defendants set forth six materal facts. Doc. 220. Plaintiff has admitted the crash occurred on August 10, 2018, and did not dispute Ryane Vann actually heard the Neil vehicle collided with the tree (this impacts the date by which law must have been clearly established for purposes of qualified immunity). Doc. 248, at ¶¶ 1–2. The remainder of the facts are discussed, *infra*.

Plaintiff has failed to meet her burden in 1) her complete failure of proof concerning the essential element of causation and 2) her failure to set forth material facts genuinely disputing Defendants had no actual knowledge of the crash. Accordingly, Defendants are entitled to qualified immunity for failure to establish a violation of a clearly established right.

1. There is a complete failure of proof concerning the essential element of causation regarding Plaintiff's remaining federal claim.

Plaintiff has set forth no expert medical evidence, evidence which could be admissible before a jury, or *any* evidence whatsoever, that Defendants' alleged failure to secure or even render medical aid (assuming, *arguendo*, a clearly established right), that such failure caused adversely affected Decedent's prognosis. *See Laughlin*, 430 F.3d at 929.

Plaintiff's failure to meet her burden is sufficient to entitle Defendants to qualified immunity and summary judgment.

However, Defendants have also set forth evidence affirmatively negating the element of causation without any genuine dispute. Plaintiff admitted their liability expert is not a medical physican (this shows the expert cannot offer opinions which could be admissible at trial regarding deliberate indifference to a serious medical need. Doc. 248 at ¶ 3. Plaintiff failed to dispute that any delay of ten to thirty seconds in calling 911 did not alter the medical outcome of the Decedent's death (this is material with respect to evidence affirmatively negating the element of causation). *Id.* at ¶ 4.

Plaintiff purported to deny that the officers were not equipped with anything which would have changed the outcome if they approached Decedent at the time this took place, though failed to cite to any evidence which could be admissible to do so. *Id.* at ¶ 5. Plaintiff's cite to the Belmar deposition does not address the material fact stated. *See* Doc. 248-1, at 41:21–42:15 (Chief Belmar has no way to determine whether Jakob could have saved the lives of Decedent, had an opportunity to intervene, or whether they could or could not have done had the officers stopped regarding the injuries). Plaintiff's cite to Mary Case's deposition does not refute material fact. Doc. 248-6, at 10:1–23 (cannot tell exactly how

long it would have taken for Decedent to die, but it would be "very likely" he was immediately rendered unconscious; Decedent was dead at the scene); *see* Doc. 219-5, Ex. D, Dr. Case Dep. 44:24–46:15 ("So I - - I have no informaoin that would let me think that there would be anything that could be done to save these men."). Plaintiff's last cite does not identify an exhibit or deposition, though it does not appear to correspond with Dr. Case or Chief Belmar's testimony. Regardless, even assuming, *arguendo*, an obligation to stop and render aid, Plaintiff has failed to set forth any evidence which could be admissible at trial to show Defendants' failure to stop and render aid caused Decedent's death.

Accordingly, Defendants are entitled to qualified immunity. This Court should grant summary judgment in favor of Defendants, remand the state claims (as there are already state claims pending), and dispose of this matter entirely.

2. Plaintiff's dispute regarding of the material fact that Defendants did not actually observe the crash is not genuine.

As stated above, if this Court were to find in favor of Defendants regarding Section II.A.1 or Section II.B.1., the Court need not address this point. However, to the extent the Court addresses this argument, Plaintiff has failed to show a

genuine dispute of material fact Defendants had actual knowledge of the crash at the time it occurred.

Plaintiff's facts can be placed into two categories: a) Defendant Maloy operated the police vehicle to perform a PIT maneuver (not genuine and contrary to video evidence); and

b) facts which are immaterial to actual knowledge, such as whether Defendants *should have* actual knowledge of the subject crash. Accordingly, there is no genuine dispute of material fact Defendants had no actual knowledge of the subject incident, and Defendants are therefore entitled to qualified immunity.

a. Plaintiff's dispute that Defendant Maloy operated the police vehicle to perform a PIT maneuver is not genuine and is blatantly contradicted by the video evidence.

Plaintiff relies on Lorenzo Johnson and her liablity expert, Geoffrey Alpert,[5] in arguing Defendant Maloy operated the police vehicle to perform a PIT maneuver. Lorenzo Johnson refused to provide answers to questions

[5] Geoffrey Alpert's opinions are subject to Defendants' *Daubert* motion in this and other regards. Doc. 232, 233, 238. Namely, Dr. Alpert is not an accident reconstructionist and lacks expertise to opine with respect to whether there was contact between the vehicles.

including regarding the identity of the individual with him on the evening in question. Doc. 248-4, Lorenzo Johnson Dep. 59:9–70:15, Dec. 7, 2020. He refused to appear for a Court ordered deposition where he was required to be complete with his testimony. *See* Ex. F (non-appearance), G (Order), H (return service of subpoena). Mr. Johnson is the only individual identified who claims to have eyewitnessed contact between a police vehicle and a car. Doc. 248-4, Johnson Dep. 16:6–18:6. He marked a circle where he was when he believed saw the contact and an "X" where he believed the contact occurred between the vehicle and the gold vehicle (the vehicle driven by Decedent). *Id.* at 30:3–31:3; *see* Ex. I (Dep. Ex. 1A, marked by Mr. Johnson). This testimony and location blatantly contradict the video evidence in that the video from Airport Elementary School Video (8249 Airport Road) depicted the vehicles separated by four seconds and 325 feet.[6] Ex. J; Ex. K (Fred Semke, Accident Reconstructionist, Report), p. 14. Johnson's alleged location of the contact was nearly within the view of the Airport

[6] This is comparable to the approximately 2.4-second distance between vehicles shown at 8119 Airport Road (Precious Days Learnings Academy). Ex. M. At that point, the Hyundai was traveling between eighty-nine and ninety-four miles per hour, while the police vehicle was traveling between eighty-seven and ninety-five miles per hour, trailing by about 325 feet. Ex. K, p. 14, Ex. L, Kempke Dep. 58:59–59:4.

Elementary School camera. Ex. F. In fact, Ex. F shows a vehicle ahead of the police vehicle as it begins to lose control of the vehicle with the police vehicle not in close proximity. To a reasonable degree of professional certainty and based on the forensic evidence, Mr. Johnson was mistaken in his recollection about the accident events. Ex. F. For the reasons stated above, Mr. Johnson's testimony does not create a genuine dispute of material fact that there was no contact between the police vehicle and the vehicle operated by Decedent (according to two accident reconstructions and the sole surviving occupant of any vehicle).

Here, as stated, Mark Jakob did not have actual knowledge of the incident. *See* Doc. 219-6, Ex. E, Jakob Dep. Master Sergeant Paul Kempke of the Missouri State Highway Patrol concluded, to a reasonable degree of certainty, that there was no contact between the police vehicle operated by Alex Maloy and the Neil vehicle causing the Neil vehicle to hit the tree. Ex. L, 6:5–7, 11:4–13 (CV), 11:20–15:5 (qualifications), 28:9–23 (police vehicle was 240 to 400 feet behind Hyundai when the Hyundai entered into a critical speed yaw), 35:6–11 (photographs did not reflect any kind evidence of a PIT maneuver), 39:8–12 (opinions to a reasonable degree of scientific certainty), 40:18–41:6 (no evidence of the vehicles touching because the police vehicle

is "not close"), 61:15–62:15 (no PIT maneuver occurred in the portion of the roadway between the Precious Days and Elementary School videos), 90:3–8 ("I don't believe there was a PIT maneuver to cause them to lose control at the very end."), 90:16–22 ("I don't believe a PIT maneuver caused them to go into a yaw. I'm unaware of any evidence that shows a PIT maneuver caused them to yaw"), 91:20–25 (no evidence of paint transfer, through not required to show PIT maneuver), 92:15–94:3 (would expect to see tighter radius of yaw if contact between vehicles, no evidence of fishtailing, and police vehicle was 250 to 400 feet behind the Neil video before at the time the Neil vehicle loses control), 99:11–12 (no PIT maneuver between Airport and Family Dollar video segments). As the Neil vehicle begins to lose control on video in Ex. J (the police vehicle is not in close proximity) and as the Neil vehicle's collision with a tree is captured on video (the police vehicle is not in close proximity), the assertion that a PIT maneuver was performed is blatantly contradicted by the video evidence.

b. Plaintiff has set forth evidence immaterial to the issue raised, including whether Defendants *should have* known of the crash.

Defendants have set forth Fourteenth Amendment law showing Plaintiff is required to set forth evidence showing

Defendants had actual knowledge of the medical condition as an element of her remaining federal claim.

Plaintiff has set forth facts regarding conduct after the crash, which do not indicate Defendants had actual knowledge of the incident. *See* Ex. M, at 2–5 (investigation by O'Neill, termination of Defendants, discussion regarding disagreement over termination). Individuals who were outside of vehicles, who purportedly heard the crash, aslo do not confer actual knowledge on Defendants. *See id.* at 3. Further, whether Belmar believes Defendants should have seen the crash is speculation without foundation and could not be admissible at trial. *See id.* at 4; *Binkley v. Entergy Operations, Inc.*, 602 F.3d 928, 931 (8th Cir. 2010) (summary judgment facts may not be based on conjecture or speculation). Further, whether Belmar believes Defendants should have seen the crash is immaterial to the Fourth Amendment subjectiveness inquiry.[7]

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[7] Plaintiff also attempts to introduce statements of Alex Maloy, where Defendants have not attempted to do the same. Accordingly, any such statements, at this time, cannot be admissible at trial. *See Scott v. Pub. Sch. Ret. Sys. of Mo.*, 764 F. Supp. 2d 1151, 1166 (W.D. Mo. 2011); Fed. R. Evid. 601 (state law used regarding competency); Mo. Rev. Stat. § 491.010 (deceased statements inadmissible where other party has not attempted to offer same).

Plaintiff's cite to R.S.Mo. § 577.060 is immaterial, as the statute requires actual knowledge. Further the statute and the alleged violation of any general orders are irrelevant in that any such violation does not have a tendancy to prove a violation of the U.S. Constitution. *See Scott v. Harris*, 550 U.S. 372, 375 n.1 (2007) ("It is irrelevant to our analysis whether Scott had permission to take the precise actions he took."); *Cole v. Bone*, 993 F.2d 1328, 1334 (8th Cir. 1993) ("We need not determine whether Trooper Rice violated Missouri Highway Patrol policy, however, for under section 1983 the issue is whether the government official violated the Constitution or federal law, not whether he violated the policies of a state agency. Conduct by a government official that violates some state statutory or administrative provision is not necessarily constitutionally unreasonable.") (internal citations omitted).

III. CONCLUSION

WHEREFORE, Defendants respectfully request that this Court enter an Order granting summary judgment in their favor and against Plaintiff based on qualified immunity and failure to establish causation, that this Court remand the wrongful death issues to state court as Plaintiff is already a Plaintiff in a suit at the state level, dispose of this case

entirely, grant costs in favor of Defendants, and for such further relief this Court deems just and proper.

/s/ Robert T. Plunkert

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I hereby certify that a copy of the foregoing filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following or U.S. mail for parties not registered with CM/ECF, on this 14th day of February, 2022:

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