

**APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI**

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APPENDIX A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 26a0046p.06

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

Jennifer Kilnapp,
Plaintiff-Appellee,
v. No. 25-3149
City of Cleveland, Ohio,
Defendant,
Bailey Gannon,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Ohio at Cleveland.
No. 1:22-cv-01225-Christopher A. Boyko, District
Judge.

Argued: October 23, 2025

Decided and Filed: February 18, 2026

Before: MOORE, BUSH, and DAVIS, Circuit Judges.

COUNSEL

ARGUED: James R. Russell, Jr., CITY OF
CLEVELAND, Cleveland, Ohio, for Appellant.
Matthew D. Besser, BOLEK BESSER GLESIUS
LLC, Cleveland, Ohio, for Appellee. **ON BRIEF:**

James R. Russell, Jr., Affan Ali, CITY OF CLEVELAND, Cleveland, Ohio, for Appellant. Matthew D. Besser, BOLEK BESSER GLESIUS LLC, Cleveland, Ohio, for Appellee.

MOORE, J., delivered the opinion of the court in which DAVIS, J., concurred. BUSH, J. (pp. 23-31), delivered a separate opinion concurring in part, dissenting in part, and concurring in the judgment.

OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiff Jennifer Kilnapp brought this action against Defendants Bailey Gannon and the City of Cleveland, alleging in relevant part that Gannon used excessive force against her in violation of her Fourth Amendment rights when he shot her while the two were on duty as City of Cleveland police officers. Gannon intentionally fired his weapon in response to the threat posed by a suspect. He did not specifically intend to shoot Kilnapp. But that latter fact is immaterial to the question of whether Kilnapp was seized. We hold today that when an officer intentionally shoots their firearm in circumstances that objectively manifest an intent to restrain, any individual struck by the bullet is thereby seized, regardless of whether that individual was the officer's specific intended target. Because this law was not clearly established at the time of Kilnapp's shooting, however, we conclude that Gannon is entitled to qualified immunity on Kilnapp's Fourth Amendment claim. We therefore

VACATE the decision of the district court and **REMAND** for further proceedings.

I. BACKGROUND

A. Factual Background

In the early morning on July 20, 2020, Plaintiff Jennifer Kilnapp and Defendant Bailey Gannon, police officers with the City of Cleveland, responded to a call about a man (later identified as Darryl Borden) armed with a gun at a boarding house in Cleveland. D. 12 (Appellant Br. at 5); D. 13 (Appellee Br. at 4). The officers were told by dispatch that a woman reported that a man had shot a hole in the floorboards. R. 77 (D. Ct. Op. 2/13/2025 at 1) (Page ID #3966). When the officers arrived, the building was completely dark. *Id.*; *see generally* R. 67 (Ex. B, Body Cam Video) [hereinafter Body Cam Video]. Although both officers activated their body cameras, only Gannon's turned on. R. 77 (D. Ct. Op. 2/13/2025 at 1-2) (Page ID #3966-67); R. 60-1 (Kilnapp Dep. at 70:9-13) (Page ID #1144). The officers entered the building with their firearms drawn—Kilnapp's firearm had an attached flashlight and “[Gannon] had a flashlight in his right hand and his firearm in his dominant left hand.” R. 77 (D. Ct. Op. 2/13/2025 at 1-2) (Page ID #3966-67); R. 60-1 (Kilnapp Dep. at 36:11-18) (Page ID # 1110); R. 59-1 (Gannon Dep. at 63:23-25) (Page ID #892). They approached the staircase to the second floor. “The staircase had two flights: a set going up in one direction, followed by a landing, and then a second set going up in the

opposite direction.” D. 13 (Appellee Br. at 4); R. 77 (D. Ct. Op. 2/13/2025 at 2) (Page ID #3967).

Gannon proceeded up the stairs first, followed by Kilnapp. R. 77 (D. Ct. Op. 2/13/2025 at 2) (Page ID #3967). Neither officer identified themselves as police as they moved through the house. *Id.* Kilnapp twice called out “Moose,” Borden’s nickname. *Id.*; Body Cam Video at 1:18, 1:35. Once upstairs, the female caller yelled to the officers from where she was downstairs that Borden was in the bathroom. R. 77 (D. Ct. Op. 2/13/2025 at 2) (Page ID #3967). The woman added that the bathroom was “behind [them].” Body Cam Video at 1:35-1:39. Gannon turned down a narrow hallway to the right of the staircase and encountered a door on the righthand side, which he opened. R. 77 (D. Ct. Op. 2/13/2025 at 2) (Page ID #3967); R. 69 (Pl. Summ. J. Opp’n at 3) (Page ID #3210); R. 59-1 (Gannon Dep. at 116:23-117:2) (Page ID #945-46).

From this point, the Parties’ accounts differ.¹ Gannon alleges that when he opened the bathroom

¹ Although both Parties rely on it extensively, the body-cam-video evidence in this case is of limited utility. As to whether and how Borden presented a firearm, Gannon appears to assert that the video shows Borden lifting his right arm and pointing a firearm toward Gannon. *See* R. 61 (Def. Gannon Summ. J. Mot. at 4) (Page ID #1292) (citing the video). Kilnapp counters that the same video shows “Borden’s left hand on the door itself when Gannon opens it, meaning he could not possibly have been holding the gun ‘in both hands’ with both arms high and outstretched.” D. 13 (Appellee Br. at 9). Having reviewed the video many times, at various speeds (including as slowly as 0.12x), as well as frame by frame, we conclude that it does not

door he saw Borden standing “at full presentation” in “a firing range position”—that is, with both his arms raised in front of him, aiming a firearm at Gannon. R. 59-1 (Gannon Dep. at 64:1-6) (Page ID #893); *see also id.* at 118:2-6 (Page ID #947) (stating that Borden was “facing the door or the hallway”); R. 77 (D. Ct. Op. 2/13/2025 at 2) (Page ID #3967). Gannon “retreated,” R. 59-1 (Gannon Dep. at 114:19) (Page ID #943), in “a quick fashion,” *id.* at 132:24-25 (Page ID #961), and turned and ran down the stairs. R. 77 (D. Ct. Op. 2/13/2025 at 2) (Page ID #3967). Gannon can be heard on the body cam video yelling (presumably to Kilnapp) “Get back.” Body Cam Video at 1:50. “[G]unshots ensued soon after.” R. 59-1 (Gannon Dep. at 79:16-17) (Page ID #908). According to Gannon, Borden fired shots first. *Id.* at 79:2-5, 80:13-15, 84:9-15 (Page ID #908, 909, 913). Gannon did not see Borden fire his weapon. *Id.* at 81:20-24 (Page ID #910). At some point while on the first flight of stairs, Gannon “tried to return fire in the direction of” Borden. *See id.* at 64:14-15 (Page ID #893). In initial, post-incident police interviews, Gannon reported that he fired at Borden while

clearly depict anything at all when the bathroom door opens, corroborating neither party’s version of events. *See* Body Cam Video at 1:49-1:51. As to when and where Gannon fired, the body cam video does appear to show Gannon raising his left arm, which held his firearm, while making the turn at the landing. *Id.* at 1:51-1:52. The balusters of the first flight of stairs (down from the second floor to the landing) and the stairs behind them are visible, meaning that Gannon was facing them, moments after his left arm appears in frame. At the time the balusters and stairs are visible, Gannon’s arm is no longer in frame. *Id.* at 1:52.

Gannon was still in the bathroom doorway. *Id.* at 70:1-3 (Page ID #899) (“Initially during those interviews, I thought I was standing at that door.”). However, by the time of his deposition, Gannon recognized that his prior statement was inaccurate. *Id.* at 70:3-7, 115:12-21 (Page ID #899, 944).

Gannon testified at his deposition that he could not recall exactly where he was when he fired. *Id.* at 70:11-13, 115:22-116:4 (Page ID #899, 944-45). He was also unsure where he was holding his weapon relative to his face. *Id.* at 135:13-136:3 (Page ID #964-65). Gannon further testified that he could not recall whether he saw Borden at the time Gannon fired his weapon. *Id.* at 84:18-85:14 (Page ID #913-14). Nor could he recall whether he saw Borden leave the bathroom, *id.* at 116:12-15 (Page ID #945), or heard Borden chasing him, *id.* at 116:5-8 (Page ID #945). In response to Kilnapp’s requests for admission, Gannon admitted that he “could not see Darryl Borden when [Gannon] opened fire” on the morning of the incident. R. 69-4 (Gannon Resp. to Reqs. for Admis. at 5) (Page ID #3608); *see also* R. 59-1 (Gannon Dep. at 124:22-23) (Page ID #953) (“I’m not saying I’m changing my answer.”). Gannon agreed, based on the layout of the boarding house, that one would not be able to see into the bathroom once one was on the stairs or the landing. R. 59-1 (Gannon Dep. at 140:18-141:14) (Page ID #969-70).

Kilnapp disputes that Borden was pointing a gun at Gannon. *See* R. 77 (D. Ct. Op. 2/13/2025 at 8-9) (Page ID #3973-74); R. 69 (Pl. Summ. J. Opp’n at 4-5) (Page ID #3211-12). She did not, however, see

Borden herself at any point, R. 60-1 (Kilnapp Dep. at 59:14-18) (Page ID #1133), and could not see into the bathroom, *id.* at 60:11-18 (Page ID #1134); R. 77 (D. Ct. Op. 2/13/2025 at 9) (Page ID #3974). Kilnapp does not concede that Borden shot first. Although Kilnapp previously stated in a police interview that she “thought [she] heard the shots fired before [she] really started going down the stairs,” R. 60-1 (Kilnapp Dep. at 43:13-21) (Page ID #1117), at her deposition she testified that she heard gunshots when she was standing at the top of the stairs on the second floor, *id.* at 63:12-21 (Page ID #1137). *See also id.* at 65:21-23 (Page ID #1139). According to Kilnapp, she felt extreme pain (from being shot) while descending the first flight of stairs. *Id.* at 44:22-45:7, 65:25-66:3 (Page ID #1118-19, 1139-40); R. 77 (D. Ct. Op. 2/13/2025 at 2) (Page ID #3967). She estimated that she felt the pain five or seven footsteps away from the bathroom door, on the first or second step of the first flight of stairs. R. 60-1 (Kilnapp Dep. at 66:17-67:18) (Page ID #1140-41). Kilnapp further testified at her deposition that she did not see anyone (including Borden) come out of the bathroom. R. 60-1 (Kilnapp Dep. at 43:2-4, 90:8-13) (Page ID #1117, 1164).

The Parties agree that Gannon fired two shots.² *See* R. 59-1 (Gannon Dep. at 68:12-20) (Page ID

² Ballistics evidence shows that Borden at some point fired two shots that traveled through the bathroom door and lodged in the hallway wall across from the bathroom. R. 60-1 (Kilnapp Dep. at 86:15-17) (Page ID #1116); R. 69 (Pl. Summ. J. Opp’n at 10) (Page ID #3217); *see also* R. 69-1 (Bureau of Criminal

#897); R. 69 (Pl. Summ. J. Opp’n at 7) (Page ID #3214). Gannon’s first shot was intentional. *See* R. 59-1 (Gannon Dep. at 78:5-7) (Page ID #907) (“[M]y intent at the time was to fire upon Mr. Borden.”); *id.* at 132:6-10 (Page ID #961) (“My — obviously my objective [with the first trigger pull] was to stop the threat of Mr. Borden.”); *id.* at 69:23-25 (Page ID #898) (“I tried my best to protect myself and Officer Kilnapp by returning fire.”); *id.* at 130:11-15 (Page ID #959); R. 69 (Pl. Summ. J. Opp’n at 9) (Page ID #3216); R. 77 (D. Ct. Op. 2/13/2025 at 2) (Page ID #3967). The Parties agree that this first round in fact hit Kilnapp as she was running behind Gannon. R. 69 (Pl. Summ. J. Opp’n at 9) (Page ID #3216); R. 59-1 (Gannon Dep. at 72:14-19) (Page ID #901) (“I believe the one that struck [Kilnapp] is the one that I fired in defense trying to protect ... her and myself from ... Mr. Borden, the suspect.”). That “bullet went into and through Kilnapp’s forearm, exited upward, hit her bicep, entered her right armpit and lodged in her back.” D. 12 (Appellant Br. at 7); R. 69 (Pl. Summ. J. Opp’n at 9) (Page ID #3216).

The Parties further agree that Gannon “ducked” as he retreated and fired a second shot. R. 77 (D. Ct. Op. 2/13/2025 at 2) (Page ID #3967). Gannon describes this second shot as inadvertent. *See* R. 59-1 (Gannon Dep. at 67:22-68:1) (Page ID #896-97). Gannon testified at his deposition that he did not recall exactly where he was when he fired the inadvertent shot, although he thought he knew in

Investigation Scene Documentation Report at 4-5) (Page ID #3235-36).

previous police interviews. *Id.* at 68:23-69:9 (Page ID #897-98). Kilnapp disputes whether the second shot was accidental, noting that Gannon’s weapon “require[d] additional force to pull the trigger.” R. 69 (Pl. Summ. J. Opp’n at 9 n.2) (Page ID #3216). “[A]t some point” while “retreating down the stairs,” Gannon checked that Kilnapp was “trailing behind” him and “exiting the building with [him].” R. 59-1 (Gannon Dep. at 128:14-129:5) (Page ID #957-58). Gannon testified that he could not recall whether he checked that Kilnapp was behind him before or after he pulled the trigger. *Id.* at 129:9-13 (Page ID #958).

B. Procedural Background

Kilnapp filed the instant case against Gannon in his official and personal capacity, the City of Cleveland, and Dornat Drummond in his official capacity as City of Cleveland Chief of Police. R. 1 (Compl. at 1) (Page ID #1). The complaint asserts two claims for relief: one for excessive force under the Fourth Amendment, and one for excessive force under the Fourteenth Amendment. *Id.* at 16-19 (Page ID #16-19). Gannon answered the complaint in his personal capacity, R. 14 (Answer) (Page ID #70), and moved for judgment on the pleadings the same day, arguing that he was shielded from suit by qualified immunity and entitled to dismissal of Kilnapp’s claims against him. R. 15 (Mot. Judgment on the Pleadings) (Page ID #83). The district court denied Gannon’s motion. R. 29 (D. Ct. Op. 12/9/22) (Page ID #397). Gannon appealed, and a prior panel of this court affirmed the district court’s decision. *Kilnapp v. City of Cleveland*, No. 22-4059, 2023 WL

4678994 (6th Cir. July 21, 2023). Gannon then petitioned for rehearing and rehearing en banc. *See* Def.-Pet’r Bailey Gannon’s Pet. for Rehr’g with Suggestion for Reh’rg En Banc, *Kilnapp v. City of Cleveland* (No. 22-4059) (R. 27). The court denied the petition.

The Parties then proceeded to discovery. Gannon moved for summary judgment, renewing his qualified-immunity arguments. R. 61 (Def. Gannon Mot. for Summ. J.) (Page ID #1280). The district court denied his motion. R. 77 (D. Ct. Op. 2/13/2025) (Page ID #3966). Gannon now appeals that order to this court.

II. JURISDICTION

We have jurisdiction to review the district court’s denial of summary judgment on qualified-immunity grounds pursuant to the collateral-order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985). “This Court’s jurisdiction regarding orders denying qualified immunity, however, is narrow.” *Harrison v. Ash*, 539 F.3d 510, 517 (6th Cir. 2008). Review “is limited to ‘only purely legal questions.’” *Gordon v. Bierenga*, 20 F.4th 1077, 1081 (6th Cir. 2021) (quoting *McGrew v. Duncan*, 937 F.3d 664, 669 (6th Cir. 2019)). A defendant seeking interlocutory review “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.” *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995). “[T]o the extent that the denial of qualified immunity is based on a factual

dispute, such a denial falls outside of the narrow jurisdiction of this Court.” *Harrison*, 539 F.3d at 517. “[T]his limitation ensures that” appellate courts’ review of such decisions “remains confined to the denials of qualified immunity and does not bleed over into a review of district courts’ evaluation of genuine disputes of material fact.” *Brown v. Chapman*, 814 F.3d 436, 444 (6th Cir. 2016). Where a denial of qualified immunity is based on a factual dispute, a defendant may nonetheless “invoke [this court’s] jurisdiction by conceding the plaintiff’s version of the facts.” *Anderson-Santos v. Kent County*, 94 F.4th 550, 554 (6th Cir. 2024); *id.* (“A defendant who adopts the plaintiff’s view can proceed before us by arguing that, even assessing the facts in the light most favorable to the plaintiff, there was no violation of the plaintiff’s clearly-established rights.”).

III. DISCUSSION

A. Standard of Review and Background Legal Principles

We review de novo a district court’s denial of summary judgment based on qualified immunity. *Clark v. Abdallah*, 131 F.4th 432, 444 (6th Cir. 2025). “A public official is entitled to qualified immunity at summary judgment when, viewing the facts in the light most favorable to the plaintiff, the challenged conduct did not violate ‘clearly established ... constitutional rights of which a reasonable person would have known.’” *Heeter v. Bowers*, 99 F.4th 900, 908 (6th Cir. 2024) (alteration

in original) (quoting *Jackson v. City of Cleveland*, 64 F.4th 736, 745 (6th Cir. 2023)). In this case Kilnapp alleges that Gannon violated her Fourth Amendment right to be free from excessive force.³ “The Fourth Amendment protects individuals from unreasonable seizures, which includes those involving excessive force by law enforcement officers.” *Guptill v. City of Chattanooga*, 160 F.4th 768, 776 (6th Cir. 2025). To be constitutional, a use of force must be “objectively reasonable.” *Graham v. Connor*, 490 U.S. 386, 397 (1989). Under *Graham*, factors to be considered when assessing reasonableness include “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.” *Id.* at 396.

B. Law of the Case

We first address the preliminary matter of whether we are bound by the prior panel’s decision pursuant to the law-of-the-case doctrine. Under that doctrine, “a court ‘should not reconsider’ a legal issue it ‘resolved’ at a prior stage of the same case.” *Ermold v. Davis*, 130 F.4th 553, 559 (6th Cir. 2025) (quoting *Howe v. City of Akron*, 801 F.3d 718, 739

³ It is irrelevant that Kilnapp herself was also a law-enforcement officer at the time of the shooting. “[P]olicemen ... are not relegated to a watered-down version of constitutional rights.” *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967); *Pennington v. Metro. Gov’t*, 511 F.3d 647, 651 (6th Cir. 2008) (“The Fourth Amendment’s prohibition against ‘unreasonable searches and seizures’ ... applies to police officers.”)

(6th Cir. 2015)). That is, “when the ‘*same* issue’ is presented ‘in the *same case*’ to the ‘*same court*,’ the ‘*same result*’ should follow.” *Id.* (quoting *Howe*, 801 F.3d at 739). In general, there are three exceptions to the law-of-the-case doctrine: “(1) where substantially different evidence is discovered between appeals, (2) where the controlling legal precedent changes between appeals, and (3) where a decision is clearly erroneous and would work a manifest injustice.” *Id.* (internal citation and quotation marks omitted). The doctrine, however, “is not an inexorable command,” *Kanuszewski v. Mich. Dep’t of Health & Hum. Servs.*, 141 F.4th 796, 803 (6th Cir. 2025) (citation modified), and “we recognize that” the doctrine “is discretionary when applied to a coordinate court or the same court’s own decisions,” *Bowles v. Russell*, 432 F.3d 668, 677 (6th Cir. 2005) (citation omitted), *aff’d on other grounds*, 551 U.S. 205 (2007). In this case, a prior panel of this court reviewing the district court’s denial of Gannon’s motion to dismiss held that Kilnapp properly alleged that she was seized under the Fourth Amendment when she was shot by Gannon and “allege[d] sufficient facts to establish that Gannon’s behavior was objectively unreasonable.” *Kilnapp*, 2023 WL 4678994, at *5.

Gannon argues that the doctrine does not apply here because the prior appeal was decided under a different standard and on an undeveloped factual record. D. 14 (Appellant Reply at 7-9). Gannon points to several allegations in Kilnapp’s complaint previously assumed to be true that Gannon asserts “are now confirmed to be completely unsupported by

the evidence produced during discovery.” *Id.* at 9-12. In particular, Gannon directs us to the complaint’s allegation that Gannon shot Kilnapp under the mistaken belief that she was Borden and was following Gannon. *Id.* at 11. He argues that this allegation did not survive discovery, and that this changed fact is determinative and thus warrants departure from the law-of-the-case doctrine. Contrary to Gannon’s assertion, we conclude that whether or not this is a case of mistaken identity is irrelevant. But because determining whether the law-of-the-case doctrine is appropriate here in fact requires an examination of the merits, we forgo the former and proceed to the latter. *See Daunt v. Benson*, 999 F.3d 299, 308 (6th Cir. 2021) (“[T]he law-of-the-case doctrine ... is primarily ‘intended to enforce a district court’s adherence to an appellate court’s judgment, and so is applied only loosely when we reconsider our own decisions.’” (quoting *Moody v. Mich. Gaming Control Bd.*, 871 F.3d 420, 425 (6th Cir. 2017))).

C. Violation of Constitutional Rights

1. Seizure of Kilnapp

This case begins and ends with the question of whether Kilnapp was seized within the meaning of the Fourth Amendment when she was struck by the bullet Gannon fired. The central issue we must resolve is whether a police officer “seizes” an individual when the officer intentionally fires their gun with an intent to restrain and the bullet hits an individual if that individual was not the particular

target of their firing. Cases involving such so-called unintended-target shootings have bedeviled our sibling circuits, generating circuit splits and unprincipled line-drawing. But we now have the benefit of the Supreme Court’s recent decision in *Torres v. Madrid*, 592 U.S. 306 (2021). With *Torres*, Supreme Court caselaw makes plain the answer: When an officer intentionally shoots their firearm in circumstances that objectively manifest an intent to restrain, any individual struck by the bullet is thereby seized, regardless of whether that individual was the officer’s specific intended target.

We begin with the relevant Supreme Court caselaw. First, in *Brower v. County of Inyo*, the Supreme Court stated that “[a] seizure occurs even when an unintended person or thing is the object of the detention or taking, but the detention or taking itself must be willful.” 489 U.S. 593, 596 (1989) (internal citations omitted). A seizure, therefore, does not occur via “an unknowing act[,]” *id.*, but only via “a governmental termination of freedom of movement *through means intentionally applied.*” *Id.* at 596-97. Building on this proposition from *Brower*, the Court in *Brendlin v. California* held that a passenger in a vehicle is seized when that vehicle is stopped by police. 551 U.S. 249, 263 (2007). In *Brendlin*, police officers pulled a vehicle over in a routine traffic stop to verify that a temporary operating permit matched the vehicle. *Id.* at 252. An officer recognized a passenger (Brendlin) and, after the officer returned to his cruiser, confirmed that Brendlin “was a parole violator with an outstanding no-bail warrant for his arrest.” *Id.* The officer

returned to the vehicle and ordered Brendlin out. Upon searching Brendlin incident to his arrest, officers found drug paraphernalia on Brendlin's person and in the vehicle. *Id.* In his subsequent prosecution, Brendlin moved to suppress the evidence as fruits of an unconstitutional seizure. *Id.* at 253. The Supreme Court of California held that Brendlin, as only a passenger in the vehicle and not the vehicle's driver, was not seized by the traffic stop. *Id.* at 253-54. The Supreme Court of the United States reversed, unanimously.

The Court in *Brendlin* stated that “[a] person is seized by the police and thus entitled to challenge the government’s action under the Fourth Amendment when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement *through means intentionally applied.*” *Id.* at 254 (citation modified). “Thus, an ‘unintended person ... [may be] the object of the detention,’ so long as the detention is ‘willful’ and not merely the consequence of ‘an unknowing act.’” *Id.* (alterations in original) (quoting *Brower*, 489 U.S. at 596). The Court then turned to *United States v. Mendenhall* as supplying the “test” for determining “when a seizure occurs in response to authority, and when it does not.” *Id.* at 255. *Mendenhall* states a reasonable-person test: “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)). Applying that test, the *Brendlin* Court concluded that “any reasonable passenger would

have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission.” *Id.* at 257.

The *Brendlin* Court rejected the California Supreme Court’s reasoning that there was no evidence that the officer even knew Brendlin was in the vehicle before the stop: “[T]hat view of the facts ignores the objective *Mendenhall* test of what a reasonable passenger would understand.” *Id.* at 259-60. The state court’s approach improperly “shift[ed] the issue from the intent of the police as objectively manifested to the motive of the police for taking the intentional action to stop the car, and we have repeatedly rejected attempts to introduce this kind of subjectivity into Fourth Amendment analysis.” *Id.* at 260. The Court then explained how its prior decisions in *Brower* and *County of Sacramento v. Lewis* were in accord with its reasoning. In *Lewis*, no seizure had taken place because “the officer stopped Lewis’s movement by accidentally crashing into him, not ‘through means intentionally applied.’” *Id.* at 261 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998)). And in *Brower*, the Court’s “point was not that Brower alone was the target but that officers detained him ‘through means intentionally applied’; if the car had had another occupant, it would have made sense to hold that he too had been seized when the car collided with the roadblock.” *Id.*

For many years, *Brendlin* was lower courts’ primary guide in unintended-target-shooting cases. It was, it turns out, an imperfect guide, and its application led to splits of authority. In 2021, the

Supreme Court decided *Torres v. Madrid*. There, the plaintiff was shot by police while fleeing, but that did not immediately terminate her flight. She fled the scene and was not arrested until the following day. 592 U.S. at 309-10. The Supreme Court held that the plaintiff was seized when shot, even though that force “d[id] not succeed in subduing” her. *Id.* at 309. In so holding, the Court emphasized that there are two types of seizures: seizure by *force* and seizure by *control*. *See id.* at 322. Importantly, the common law distinguished the former from the latter—seizure by force “enjoys a separate common law pedigree that gives rise to a separate rule” from seizure by control. *Id.* The majority faulted the dissent for “improperly eras[ing] the distinction between” the two. *Id.* “[A] seizure by acquisition of control,” the Court explained, “involves either voluntary submission to a show of authority or the termination of freedom of movement,” and “actual control is a necessary element for this type of seizure.” *Id.* “But that requirement of control or submission never extended to seizures by force.” *Id.*

The Court stressed that not “every physical contact between a government employee and a member of the public” is a Fourth Amendment seizure. *Id.* at 317. Per the proper common-law rule, “[a] seizure requires the use of force *with intent to restrain*. Accidental force will not qualify... [,] [n]or will force intentionally applied for some other purpose.” *Id.* (citing *Lewis*, 523 U.S. at 844). Furthermore, the Court instructed, “the appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain, for we rarely probe

the subjective motivations of police officers in the Fourth Amendment context.” *Id.* “[T]he subjective perceptions of the seized person” also do not determine the seizure. *Id.* The Court concluded that the plaintiff was seized by force when she was shot. *Id.* at 318.

There are several lessons to be drawn from *Torres*. First, courts ought to disambiguate seizures by force and seizures by control. As the *Torres* Court acknowledged, it “ha[s] not always been attentive to this distinction when a case did not implicate the issue.” *Id.* at 322 (citing *Brendlin*, 551 U.S. at 254). But the common law “distinguished” the two, and they retain distinct features in modern constitutional jurisprudence. *Id.* at 311. Second, a seizure by force requires intent to restrain. That is, the potentially seizing act by an officer must be done intentionally, as in non-accidentally, and with an intent to restrain, not “for some other purpose.” *Id.* at 317. Finally, intent must be determined by dint of the *objective* circumstances, not the officer’s *subjective* intent. *Id.*

Straightforward application of these principles in the instant case leads to the clear conclusion that Gannon seized Kilnapp. The seizure at issue is unequivocally one by force. *See id.* at 316-17; *see also Tennessee v. Garner*, 471 U.S. 1, 7 (1985); *Ciminillo v. Streicher*, 434 F.3d 461, 466 (6th Cir. 2006); *Yatsko v. Graziolli*, Nos. 20-3574/3576/3643, 2021 WL 5772527, at *6 (6th Cir. Dec. 6, 2021). It is undisputed that Gannon fired his weapon

intentionally, not accidentally.⁴ And the circumstances objectively manifested an intent to restrain. The two officers were responding to reports of an armed man. Gannon encountered the suspect. The two officers retreated. Gannon fired his firearm. *See Torres*, 592 U.S. at 317 (noting that “the amount of force remains pertinent in assessing the objective intent to restrain”). He fired his weapon in the direction of the suspect. In these conditions, it cannot reasonably be disputed that the objective circumstances show that Gannon fired with intent to restrain. Accordingly, when Gannon’s bullet struck Kilnapp, she was seized.

Our own circuit precedent does not dictate a different conclusion. Gannon hangs his hat on *Claybrook v. Birchwell*, 199 F.3d 350 (6th Cir. 2000). There, the plaintiff challenged on appeal the district court’s dismissal of only her Fourteenth Amendment due-process claim. 199 F.3d at 359. Before addressing the substance of that claim, the court remarked that, although an excessive-force claim would normally be “assessed under Fourth Amendment objective reasonableness standards[,]” that standard “does not apply to section 1983 claims which seek remuneration for physical injuries *inadvertently inflicted upon an innocent third party* by police officers’ use of force while attempting to seize a perpetrator, because the authorities could not ‘seize’ any person other than one who was a

⁴ Although there is some dispute over Gannon’s second shot, it is undisputed that his first shot, which is the one that struck Kilnapp, was not fired accidentally.

deliberate object of their exertion of force.” *Id.* (citation modified). For this proposition, the court cited *Brower*. The court continued, “constitutional tort claims asserted by persons collaterally injured by police conduct who were not intended targets of an attempted official ‘seizure’ are adjudged according to substantive due process norms.” *Id.* (citing *Lewis*, 523 U.S. 833).

This language from *Claybrook* was incidental to the court’s holding and does not bind us now. Indeed, one could excise the text in *Claybrook* beginning “[o]rdinarily” until the end of that paragraph without affecting the court’s holding. Because only the Fourteenth Amendment claim was actually before the court in *Claybrook*, the court’s opining as to what is or is not covered under the Fourth Amendment is dicta and is not controlling on this court. See *Williams v. United States*, 927 F.3d 427, 435-36 (6th Cir. 2019) (“[D]ictum in a prior decision ... does not bind future panels.” (quoting *In re Campbell*, 874 F.3d 454, 464 (6th Cir. 2017))). The dissent insists that *Claybrook* necessarily states a holding as to the Fourth Amendment because consideration of a Fourteenth Amendment claim is proper only where the Fourth Amendment is inapplicable. See Dissent at 23-24. But the fact remains that the *Claybrook* plaintiff brought only her Fourteenth Amendment claim to this court. In so doing, she effectively conceded that she had no Fourth Amendment claim. We merely followed that implicit concession. It would have been exceedingly odd for the court to reach beyond the briefing and resurrect an unappealed claim. In any event, and

more fundamentally, *Claybrook* predates, and thus necessarily fails to take account of, both *Brendlin* and *Torres*.

Far from putting this court out on a limb, our decision today helps make sense of existing divisions among our sibling circuits.⁵ The same *Torres* principles that dictate the conclusion in this case can clarify the muddled water of previous lower-court decisions in other unintended-target cases. The confused nature of this body of law can largely be attributed to a misapplication of the proper *objective* intent standard, inappropriate blurring of the two types of seizures, or a mixture of both errors. Although some of these cases may seem far afield of the instant controversy, we think it important to

⁵ The dissent harps on a supposed 7 to 1 circuit split created by our decision. This is pure hyperbole. Nearly all of the cases from our sibling circuits were decided before *Torres*, and many before even *Brendlin*. As explained at length in the remainder of this opinion, many cases inappropriately muddled the analysis pertinent to seizures by force and by control, as was common pre-*Torres*, and which distinction the dissent acknowledges is meaningful. See Dissent at 28. In fact, the only circuits to have weighed in since *Torres* and with which we could plausibly be said to be creating a split are the Fifth and Eighth. *Singleton v. Casanova*, No. 22-50327, 2024 WL 2891900, at *16 (5th Cir. June 10, 2024); *Irish v. McNamara*, 108 F.4th 715, 717 (8th Cir. 2024). As we explain below, those decisions are not persuasive. See *infra* at 17 n.8, 18-19. Separately, the Ninth Circuit appears to be at odds with itself post-*Torres*. Compare *Hawatmeh v. City of Henderson*, 159 F.4th 591 (9th Cir. 2025), with *Cheairs v. City of Seattle*, 145 F.4th 1233 (9th Cir. 2025), and *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012).

highlight the *Torres* principles' effectiveness as a unifying rule of decision. We therefore address the caselaw at some length before returning to the particular fact pattern at hand.

Compare, first, hostage shootings (in which an officer shoots a hostage while attempting to apprehend the hostage-taker) and mistaken-identity shootings (in which an officer shoots an individual whom he mistakenly believed to be the suspect). Courts that have considered hostage cases have all held that the hostages were not seized.⁶ Courts considering mistaken-identity cases, by contrast,

⁶ *Hawatmeh*, 159 F. 4th at 601 (holding that the hostage was not seized because the officers "were attempting to save" the hostage's life, not restrain him); *Childress v. City of Arapaho*, 210 F.3d 1154, 1155-57 (10th Cir. 2000) (holding that hostages who were passengers in a minivan driven by a suspect were not seized when officers' bullets struck the hostages because the officers "intended to restrain the minivan and the fugitives," not the hostages); *Medeiros v. O'Connell*, 150 F.3d 164, 169 (2d Cir. 1998) (holding that the hostage was not seized because he was "hit by a bullet intended for the hostage-taker," rendering it an "unintended consequence of government action" and the officers "did not intend to restrain [the hostage]" (citation modified)); *Schaefer v. Goch*, 153 F.3d 793, 796-97 (7th Cir. 1998) (holding that the hostage was not seized but not addressing the shot itself); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 795-96 (1st Cir. 1990) (holding that a hostage shot by police was not seized because the officers' action was not "directed toward" shooting the hostage as a "specific individual").

We previously held that hostages were not seized in a case concerning a seizure by *control*. *Ewolski v. City of Brunswick*, 287 F.3d 492, 507 (6th Cir. 2002).

have uniformly held that such circumstances do constitute a seizure.⁷ The divergent conclusions in the two types of cases can be explained by the courts' shared error in relying on the officer's *subjective* intent. On the one hand, the flawed reasoning goes, hostages are not seized because the force was not directed specifically at them; on the other, individuals mistaken for an intended target are seized by force intentionally directed at them.

If the hostage and mistaken-identity cases represent opposite ends of the spectrum of specific-target intent, then innocent-bystander-shooting,

⁷ *Belton v. Loveridge*, 129 F.4th 271, 277-78 (4th Cir. 2025) (holding that a police officer seized a fellow officer when she shot him believing him to be a suspect); *Milstead v. Kibler*, 243 F.3d 157, 163-64 (4th Cir. 2001) (holding that an officer seized an individual whom they shot mistakenly believing to be a suspect); *Curley v. Klem*, 298 F.3d 271, 279 (3d Cir. 2002); *Jensen v. City of Oxnard*, 145 F.3d 1078, 1083 (9th Cir. 1998); *Herndon v. Gillis*, No. 21-16720, 2022 WL 14935785, at *2-3 (9th Cir. Oct. 26, 2022); *see also, e.g., Wilkins v. City of Oakland*, 350 F.3d 949, 955-56 (9th Cir. 2003) (addressing whether an officer's actions were objectively reasonable in mistaken-identity shooting of fellow officer without specifically addressing the initial seizure question); *Ngo v. Storlie*, 495 F.3d 597, 602-04 (8th Cir. 2007) (same). *Cf. Hill v. California*, 401 U.S. 797, 804-05 (1971) (recognizing that arrestee was seized in case of mistaken identity); *Miller v. Prince George's County*, 475 F.3d 621, 629-30 (4th Cir. 2007) (holding in probable-cause-for-arrest case that an individual was seized even though he was "mistakenly thought to be another"); *Nerio v. Evans*, 974 F.3d 571, 574-75 (5th Cir. 2020) (mistaken-identity arrest); *Blackwell v. Barton*, 34 F.3d 298, 302-04 (5th Cir. 1994) (same); *Sharp v. County of Orange*, 871 F.3d 901, 909-10 (9th Cir. 2017) (same).

canine-bite, and vehicle-passenger-shooting cases land somewhere in the middle, with courts facing similar fact patterns but reaching disparate conclusions. Take, for example, cases addressing unintended-target canine bites. In some cases, courts have held that an unintended person is seized by a canine bite because the canine is trained to bite the first person it finds, making the use of force purposeful. In *Vathekan v. Prince George's County*, for example, a canine was released for search into a house where an unsuspecting woman (unknown to officers and lawfully present) was sleeping. 154 F.3d 173, 175-77 (4th Cir. 1998). The canine bit the woman and she suffered serious injuries to her head and face. *Id.* at 177. Holding that the woman was seized when the dog bit her, the Fourth Circuit reasoned that the officer, once he had given his command, “intended the dog to find anyone in the house,” knowing that the dog would “go in and bite someone.” *Id.* at 178. Further, the officer knew that some person was behind the closed door where the woman was sleeping, so by allowing the dog to enter through that door he “intended that the dog *find and bite that person.*” *Id.* “The seizure of [the plaintiff] was therefore purposeful, even if [the officer] would not have seized her had he known she was innocent. Since [the officer] intended the dog to seize [the plaintiff] because he thought she might be a burglar, he seized her for Fourth Amendment purposes even though she turned out to be innocent.” *Id.* (citing *Hill*, 401 U.S. at 802-05) (citation modified).

The Ninth Circuit reasoned similarly in *Rogers v. City of Kennewick*, 206 F. App'x 657 (9th Cir.

2006). There, the court held that a man bitten by a police dog given a search (and bite) command while officers searched for someone else was seized by the bite. *Id.* at 658; see *Rogers v. City of Kennewick*, No. CV-04-5028-EFS, 2005 WL 8158740, at *2 (E.D. Wash. Mar. 21, 2005) (recounting the facts). Relying on *Brower*, the circuit court reasoned that “it is of no consequence that the officers were not looking for [the plaintiff] specifically, so long as their actions were intentional.” *Rogers*, 206 F. App’x at 658. The officer “had control over the dog when it bit [the plaintiff], and [the officer] had effectively ordered the dog to find and bite the individual he was tracking. Therefore, under these factual assumptions, it is of no legal consequence whether [the officers] ... intended to restrain [the plaintiff] specifically, or merely intended to restrain an unidentified person the officers were tracking” *Id.*

Reaching the opposite conclusion in *Dunigan v. Noble*, this court held that a woman was not seized when a police canine not given a bite command bit her while officers attempted to apprehend her son. 390 F.3d 486, 492-93 (6th Cir. 2004). The court quoted *Brower* for the proposition that a seizure “requires an intentional acquisition of physical control,” implicating the Fourth Amendment only “when there is a governmental termination of freedom of movement *through means intentionally applied*.” *Id.* at 492. The court reasoned that no evidence suggested the officer “introduced [the canine] into the home intending to seize Plaintiff or that he actually seized Plaintiff ‘through means

intentionally applied.” *Id.* Additionally, the canine had not been commanded to bite. *Id.*

These cases can be harmonized by refocusing on a proper analysis of objectively manifested intent to restrain. Although *Vathekan* focuses erroneously on the officer’s subjective intent, the court nonetheless properly identified certain factors relevant to assessing whether the circumstances objectively manifested an intent to restrain, such as the officer’s commands to the dog and the known presence of a person behind the door. And in *Dunigan*, examination of the objective circumstances likely would have led to the same result the court reached: the officer had not given a command to the dog, who was still on-leash at the time of the bite. *Rogers* correctly reasons that the officer used force with intent to restrain, resulting in a seizure of the person to whom the force was applied.⁸

⁸ Post-*Torres*, the Eighth Circuit has held that an officer was not seized when bitten by a fellow officer’s canine. *Irish*, 108 F.4th at 717. The court highlighted language from *Torres* that courts “rarely probe[] the subjective motivations of police officers” but observed, “[r]arely, not never.” *Id.* at 719. The court stated that “[t]his qualified language is consistent with the Court’s repeated observation that officers’ subjective intent ‘is relevant to an assessment of the Fourth Amendment implications of police conduct’ insofar as ‘that intent has been conveyed to the person confronted.’” *Id.* (citation omitted). The Eighth Circuit reads too much into the *Torres* Court’s invocation of “rarely.” The case that the court relies on for the proposition that subjective intent is relevant “to the extent that that intent has been conveyed to the person confronted,” *Michigan v. Chesternut*, 486 U.S. 567, 575 n.7 (1988), predates the Supreme Court’s decisions in *Brower*, *Brendlin*, and *Torres*.

We can perform the same exercise for innocent-bystander-shooting cases. As with the hostage cases, the bystander cases almost all err by considering the officer's subjective intent as to a specific target. Courts have largely held that bystander shootings do not constitute seizures.⁹ Two cases, however, hold

More to the point, it is a seizure-by-control case. As the Court has since made abundantly clear, seizure by control requires that the officer actually acquire control. One consideration often relevant in such circumstances is whether a reasonable person under the circumstances would feel free to leave. The notion that an officer's subjective intent is relevant *if conveyed to the individual* is therefore relatively uncontroversial (albeit somewhat unartfully worded in light of more recent Supreme Court caselaw). But the requirement of actual control, and the considerations relevant thereto, do not apply in the case of seizures by *force*. The *Irish* court thus improperly muddles the two types of seizures in injecting inappropriate subjectivity into its analysis. *See also Hight v. Williams*, 164 F.4th 672, 673-77 (8th Cir. 2026) (relying on *Irish* and holding that there is no seizure "[w]hen an officer fires at a dog" and "the stray bullet hits [the dog's owner] instead"). The dissent claims that Gannon would not have seized Kilnapp even under *Hight*, which the dissent acknowledges "disclaim[s] the role of subjective intent in the seizure inquiry." Dissent at 30 n.5. But the court in *Hight* had a distinct task from ours, contending with an intended target of a *dog* versus an actual *human* victim. The court reasoned that "[t]he only thing [the officer] conceivably intended to restrain was the dog, which is an effect, not a person." *Hight*, 164 F.4th at 677 (citation modified). We need not wrestle here with how intent to restrain may interact with non-human entities.

⁹ *See, e.g., Arruda ex rel. Arruda v. County of Los Angeles*, 373 F. App'x 798, 799-800 (9th Cir. 2010) (holding that an officer did not seize another officer by shooting him when he stepped into the line of fire because "none of the evidence ... permit[ted] an inference that [the shot officer] could be mistaken for the

otherwise. In *Singleton v. Casanova*, a police officer fired two shots into the living room of a house, allegedly aiming at a particular individual whom he believed had a gun. No. 22-50327, 2024 WL 2891900, at *16 (5th Cir. June 10, 2024). One bullet struck the intended target, and the other bullet struck and killed another individual also in the room. *Id.* The officer argued that, because he aimed at and intended to hit the allegedly armed individual, the decedent was not “seized.” *Id.* The Fifth Circuit noted that in some circumstances, “an officer’s intentional conduct may target more than one person.” *Id.* at *17. The court concluded that it was unclear from the evidence whether the armed individual was the police officer’s “*only* target,” or whether the shots fired were intended for others

suspect”); *Simpson v. City of Fork Smith*, 389 F. App’x 568, 571 (8th Cir. 2010) (holding that a bystander shot by an officer in a shootout with a suspect was not seized because there was “no evidence that [she] was struck by anything other than an errant bullet”); *Emanuel v. District of Columbia*, 224 F. App’x 1, 2 (D.C. Cir. 2007) (holding that the officer did not seize a passenger when he shot through the car she was sitting in, aiming at an armed plainclothes officer, because “[t]here is no evidence that [the shooting officer] intended to shoot [the passenger]”); *Rucker v. Harford County*, 946 F.2d 278, 281 (4th Cir. 1991) (holding that a bystander shot by an officer who was aiming at the tires of a suspect’s vehicle was not seized because he “was not the intended object of the shooting by which he was injured”); *see also Blair v. City of Dallas*, 666 F. App’x 337, 341-42 (5th Cir. 2016) (holding that a woman and her child were not seized where an officer fired into their apartment and did not hit them because the officer did not know they were inside and his use of force, therefore, was not “deliberately applied” to them).

instead of or in addition to the allegedly armed person. *Id.* The court therefore remanded on that issue. *Id.* In *Moore v. Indehar*, an officer shot at a fleeing, armed suspect and hit another fleeing suspect, the plaintiff, who was running ahead of the first. 514 F.3d 756, 758 (8th Cir. 2008). The court concluded that a reasonable jury could find that the officer intentionally shot the plaintiff “in an effort to effect his apprehension,” such that the plaintiff was seized. *Id.* at 761-62. Again, *Singleton*, *Moore*, and the cases finding no seizure of a shot bystander all incorrectly rely on the officer’s subjective intent as to specific target. *Torres’s* application would lead to more uniform results.

From this survey of caselaw,¹⁰ it is clear that no intelligible principle categorically distinguishes the

¹⁰ Vehicle-passenger shootings present another common type of unintended-target cases. As the Supreme Court recognized in *Plumhoff v. Rickard*, circuit courts have reached differing conclusions as to whether a passenger in a vehicle who is shot by police is thereby seized. 572 U.S. 765, 778 n.4 (2014). Some courts, including our own on two occasions, have held that that a passenger is seized because the officers intended to stop the entire vehicle. *Rodriguez v. Passinault*, 637 F.3d 675, 686-87 (6th Cir. 2011); *Fisher v. City of Memphis*, 234 F.3d 312, 317-19 (6th Cir. 2000). Most other circuits have reached the same conclusion. *See, e.g., Villanueva v. California*, 986 F.3d 1158, 1167 (9th Cir. 2021); *Davenport v. Borough of Homestead*, 870 F.3d 273, 279 (3d Cir. 2017); *Vaughan v. Cox*, 343 F.3d 1323, 1328-29 (11th Cir. 2003). *But see Schultz v. Braga*, 455 F.3d 470, 479-81 (4th Cir. 2006) (holding that a passenger shot through the vehicle window at a traffic stop was not seized, relying on hostage cases). Many of the vehicle-passenger cases err by blending and confusing seizure-by-control and seizure-by-force, and by focusing incorrectly on subjective intent.

mistaken-identity-shooting cases from the hostage-shooting and bystander-shooting cases. Cases implicating seizures by force should be analyzed in light of *Torres*. Per *Torres*, it matters not what an officer subjectively intended when he deliberately deployed force; rather, the pertinent question is whether the circumstances *objectively* manifest an intent to restrain. The present case well demonstrates the inherent difficulty in relying on an officer's subjective intent. At oral argument, the Parties bitterly contested whether Kilnapp was able to continue to advance a theory that Gannon shot her believing her to be Borden—that is, whether this is a mistaken-identity case. Oral Arg. 5:35-6:44, 7:47-8:22, 15:12-16:43, 18:15-18:37, 30:24-31:24.

As it stands, the evidence in the record suggests that we will never, and can never, know for certain one way or the other whether this is a mistaken-identity case. Gannon testified repeatedly in his deposition that he does not remember who or what he did or did not see at the time he fired his weapon. The only way we could determine whether this was a case of mistaken identity would be to get into Gannon's head at the time of the shooting. This is, of course, impossible, and is precisely the kind of subjectivity the Court unequivocally eschewed in *Torres*. What we can do is what the *Torres* Court instructs we must: determine whether the circumstances objectively manifested an intent to

Because these cases are often more accurately characterized as seizure-by-control cases, they are particularly poor guides for the instant matter.

restrain.¹¹ See *Watkins v. Davis*, 156 F.4th 1084, 1102 (11th Cir. 2025) (applying *Torres*’s objective test); see also *Gardner v. Bd. of Police Comm’rs*, 641 F.3d 947, 952-53 (8th Cir. 2011) (applying an objective test per *Brendlin*). Here, the circumstances objectively manifest an intent to restrain.

We emphasize that the requirement of an objective intent to restrain is a true limitation on the scope of “seizure by force.”¹² Consider, for example, a bystander struck by a police officer’s bullet fired while the officer is training at a shooting range. True, the officer fired their weapon intentionally. But that is not sufficient to effect a seizure. The objective circumstances in such an instance would rarely exhibit an intent to restrain. As another example, imagine a police officer responding to a protest. The crowd has not responded to orders to leave. The officer fires their gun up into the air. Unfortunately, the bullet strikes someone on its descent. The objective circumstances will dictate

¹¹ The dissent accuses us of making too much of this language from *Torres*. See Dissent at 26. But the dissent hangs entirely on the word “rarely.” The dissent takes the *Torres* Court’s hedge about “rare” circumstances in which an officer’s subjective intent is relevant as carte blanche to make subjectivity into an all-encompassing and determinative principle.

¹² We grappled with “intent to restrain” in a pre-*Brendlin* and *Torres* case. *Ciminillo v. Streicher*, 434 F.3d 461, 465-66 (6th Cir. 2006). Without *Brendlin* and *Torres* to guide it, that case muddled seizure by control and seizure by force and is not helpful here.

whether that person was seized. Perhaps the crowd is peaceful, but obstructing traffic. Officers have several times ordered the crowd to leave the area without effect. The officer points their weapon and fires directly in the open air above the officer. In such a situation, a factfinder might reasonably conclude the officer's conduct does not manifest an intent to restrain, but rather an intent to disperse, for example. *Cf. Cheairs v. City of Seattle*, 145 F.4th 1233, 1241-43 (9th Cir. 2025) (applying *Torres* and holding that whether circumstances objectively manifested an intent to restrain in a case of an individual injured by a blast ball thrown by an officer was not resolvable on summary judgment). On the other hand, if we modify the facts such that the protest has become a riot, other officers are using takedowns, and the officer in question fires their gun generally toward the crowd and strikes someone, a factfinder might reasonably conclude that that conduct manifests an intent to restrain.¹³ *Cf. Sanderlin v. Dwyer*, 116 F.4th 905, 912-13 (9th Cir. 2024) (applying *Torres* and holding that the circumstances objectively manifested an intent to restrain in a case of an individual injured by a foam baton fired by an officer).

We also reiterate that the fact of a seizure does not alone establish a Fourth Amendment violation—

¹³ We do not intend to express a position on the correct outcomes in circumstances like those presented in the hypotheticals. Nor do we address any possible implications of the hypotheticals as regards seizure by control, or regarding the use of munitions other than firearms.

the seizure must be *unreasonable*.¹⁴ Without a doubt, there will be many cases in which an unintended target shot by police is seized, but the officer's use of force was objectively reasonable and thus did not violate the individual's Fourth Amendment rights. One could imagine that many hostage-shooting cases might fall into this category, for example. Our holding today does not suggest that every hostage shooting is automatically a Fourth Amendment violation, but that courts should not improperly torture the seizure analysis and should, where a seizure has indeed taken place, evaluate each hostage shooting for objective reasonableness on its own merits.¹⁵

¹⁴ On this subject, we take a moment to underscore the logical infirmity of the theory the dissent urges. Consider a scenario in which an officer is pursuing a suspect on foot and the suspect runs into a densely packed crowd of people. The officer responds by firing into the crowd, striking an unsuspecting member thereof. As a matter of common sense, it is easy to see how the officer's actions were likely unreasonable. And, the Supreme Court tells us, a mere touch can effectuate a seizure. But under the dissent's view, because the officer did not think the struck bystander was in fact the suspect—the officer merely fired into the crowd and hoped his bullet might find the suspect—the bystander was not seized and never even gets to the question of reasonableness.

¹⁵ John F. Preis, *Officer Intent and Excessive Force*, 86 Ohio St. L.J. 147, 184 (2025) (arguing that the “excessive force doctrine is perfectly capable of giving weight to an officer’s” actions in attempting to rescue a hostage who they inadvertently shoot “by evaluating their reasonableness. When injuries like this are declared nonseizures, a Fourth Amendment reasonableness analysis becomes impossible.”).

* * *

In sum, because Gannon intentionally (not accidentally) fired his weapon in circumstances that objectively manifested an intent to restrain, Kilnapp was seized when that bullet struck her.

2. Reasonableness of Gannon’s Use of Force

Having determined that Kilnapp was seized, our analysis normally would turn to the question of whether Gannon’s use of force was objectively reasonable. Because, however, the law regarding the seizure of an unintended target was not clearly established at the time of Kilnapp’s shooting, as discussed below, we need not address the reasonableness question.

D. Clearly Established

The second prong of the qualified-immunity analysis requires us to determine whether the right at issue was clearly established at the time of the violation. “A right is clearly established when every reasonable official would have understood that what he is doing violates that right.” *Reed v. Campbell County*, 80 F.4th 734, 742 (6th Cir. 2023) (citation modified). “In assessing whether a right is clearly established, ‘we look first to decisions of the Supreme Court, then to our own precedents, and then to decisions of other courts of appeal’ in limited circumstances” *Guptill*, 160 F.4th at 781 (quoting *Hearring v. Sliwowski*, 712 F.3d 275, 280 (6th Cir. 2013)).

We conclude that the seizure of an individual struck by a bullet when an officer intentionally shoots their firearm in circumstances that objectively manifest an intent to restrain was not clearly established at the time of Kilnapp's shooting. Kilnapp was shot on July 20, 2020. Although the principles that guided us to our decision today were largely established in *Brower* and *Brendlin*, see *Gardner*, 641 F.3d at 952-53, the Court's decision in *Torres* crystallized them, as discussed at length above. *Torres* was decided in 2021, after the incident at issue in this case. Because *Torres* was crucial to defining the right violated in this case, that right was not clearly established when Kilnapp was shot in 2020. Kilnapp therefore cannot prevail on the clearly-established-law prong of qualified immunity, and Gannon is entitled to qualified immunity on Kilnapp's Fourth Amendment claim.

E. Fourteenth Amendment Claim

The district court did not decide Kilnapp's Fourteenth Amendment claim, reasoning that "[b]ecause ... the Fourth Amendment applies, there is no need to analyze Plaintiff's alternative claim of a Fourteenth Amendment violation." R. 77 (D. Ct. Op. 2/13/2025 at 6) (Page ID #3971). Gannon urges us to grant him judgment on that claim. D. 12 (Appellant Br. at 35-37). Because the district court did not reach the issue, we decline to address it in the first instance. See *Freed v. Thomas*, 976 F.3d 729, 741 (6th Cir. 2020) ("While this court has exercised discretion to decide issues on appeal that were not addressed by the district court, 'typically,' we 'will

not address issues unless ruled upon by the trial court below.” (internal citation omitted) (quoting *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 554-55 (6th Cir. 1998))).

IV. CONCLUSION

We hold today that when an officer intentionally shoots their firearm in circumstances that objectively manifest an intent to restrain, any individual struck by the bullet is thereby seized, regardless of whether that individual was the officer’s specific intended target. But because the law was not clearly established prior to *Torres*, we **VACATE** the decision of the district court and **REMAND** with instructions to grant Gannon’s summary-judgment motion as to the Fourth Amendment claim, to address the Fourteenth Amendment claim, and for further proceedings consistent with this opinion.

CONCURRENCE / DISSENT

BUSH, Circuit Judge, concurring in part, dissenting in part, and concurring in the judgment. I agree that we should vacate and remand for consideration of Kilnapp's Fourteenth Amendment claim. I disagree, however, with the majority that Gannon's conduct violated the Fourth Amendment. In order to find a seizure under the Fourth Amendment, the majority disregards the holding of a prior panel of this circuit and creates a split with at least seven of our sister circuits.

I.

"[T]his circuit follows the rule that the holding of a published panel opinion binds all later panels unless overruled or abrogated en banc or by the Supreme Court." *Wright v. Spaulding*, 939 F.3d 695, 700 (6th Cir. 2019). That rule should settle the Fourth Amendment issue. That's because a prior panel of this court held that "[42 U.S.C. §] 1983 claims which seek remuneration for physical injuries *inadvertently inflicted upon an innocent third party* by police officers' use of force while attempting to seize a perpetrator" are not cognizable under the Fourth Amendment "because the authorities [can]not 'seize' any person other than one who was a deliberate object of their exertion of force." *Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000) (citing *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989)). Kilnapp alleges that Gannon violated her Fourth Amendment rights when he inadvertently injured her while attempting to seize Borden. So *Claybrook*

should resolve her claim without need for further discussion.

The majority concludes otherwise. It views *Claybrook's* Fourth Amendment holding as dicta because “only the [plaintiff's] Fourteenth Amendment claim was actually before the court” Majority Op. at 13. This conclusion both misreads *Claybrook* and ignores an important aspect of § 1983 jurisprudence. The Supreme Court held that “[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.” *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality op.)).

Here is the normal order of operations when assessing a § 1983 claim that may implicate the Fourth Amendment: first, the court must decide whether the conduct falls within the ambit of the Fourth Amendment; if the answer is no, then the court proceeds to analyze the Fourteenth Amendment claim. *See, e.g., Estate of George ex rel. George v. Michigan*, 63 F. App'x 208, 211-14 (6th Cir. 2003); *Schaefer v. Goch*, 153 F.3d 793, 796-97 (7th Cir. 1998). But if the challenged conduct does fall within the ambit of the Fourth Amendment, the Fourteenth Amendment claim fails as a matter of law. *See Lewis*, 523 U.S. at 842. So, had the *Claybrook* plaintiff been seized under the meaning of the Fourth Amendment, her Fourteenth Amendment

claim would have failed. *Claybrook*'s Fourth Amendment discussion was therefore not dicta—it was a necessary holding on a “threshold issue” *Id.*; see also *Fisher v. City of Memphis*, 234 F.3d 312, 318-19 (6th Cir. 2000) (“In ... [*Claybrook*], this Circuit applied *Brower* in determining whether a victim of an errant bullet in a shootout fell within the scope of Fourth Amendment seizure.”). This logic contradicts the majority’s treatment of *Claybrook*’s Fourth Amendment holding as dicta.

The majority also conflicts with subsequent decisions of this court that have treated *Claybrook* as a binding Fourth Amendment holding. For example, *Fisher v. City of Memphis* reaffirmed and relied on *Claybrook*’s Fourth Amendment holding in reaching its result:

Claybrook emphasized that police officers do seize any person who is a “deliberate object of their exertion of force.” Here, Becton’s car was the intended target of Defendant’s intentionally applied exertion of force. By shooting at the driver of the moving car, he intended to stop the car, effectively seizing everyone inside, including the Plaintiff.

234 F.3d at 318-19 (quoting *Claybrook*, 199 F.3d at 359) (cleaned up). And in *Rodriguez v. Passinault*, we distinguished *Claybrook* while treating it as good law. 637 F.3d 675, 687 (6th Cir. 2011) (distinguishing cases like *Claybrook* “on the basis” of a lack of “intentional acquisition of physical control” of the innocent third party); *id.* at 686 n.5; see also

Buck v. City of Highland Park, 733 F. App'x 248, 252 (6th Cir. 2018) (treating *Claybrook's* Fourth Amendment holding as binding). *Fisher* and *Rodriguez* would not have had to distinguish *Claybrook* if its Fourth Amendment holding was dicta. Simply put, our cases treat *Claybrook* as binding. The majority should have been so bound.

Finally, the majority opinion itself belies the majority's argument that *Claybrook's* Fourth Amendment holding is dicta because "one could excise" it without affecting the disposition of that case. Majority Op. at 13. One could also excise roughly half of the majority opinion—Section III.C, to be precise—without affecting Gannon's ultimate entitlement to qualified immunity. But the majority's Fourth Amendment holding is not dicta. Neither is *Claybrook's*.

II.

The majority contends that even if *Claybrook* would otherwise bind it, *Torres v. Madrid*, 592 U.S. 306 (2021), has effectively overruled *Claybrook*. Not so.

It is important to delineate what *Torres* did and did not do. In *Torres*, the Supreme Court held that "a seizure occurs when an officer shoots someone who temporarily eludes capture after the shooting." *Id.* at 309. It also emphasized the "distinction between seizures by *control* and seizures by *force*." *Id.* at 322. And it explained that while a seizure by control "involves either voluntary submission to a show of authority or the termination of freedom of

movement,” *id.* at 322, a seizure by force involves “[t]he application of physical force to the body of a person with intent to restrain,” *id.* at 309, and it analogized a seizure by force to an arrest, *id.* at 312. In other words, *Torres* is about timing—it tells us *when* the seizure takes place during the police encounter (when force is applied). *See id.* at 318 (“We therefore conclude that the officers seized Torres for the instant that the bullets struck her.”).

But *Torres* said nothing relevant to this case. It did not answer the question of whom an officer must intend to restrain—it could not have, because *Torres* dealt with the intentional shooting of a fleeing suspect. *Id.* at 310. It did not address accidental injuries to bystanders, hostages, or other third parties. Nor did it establish a broad new rule of constitutional law that an officer’s subjective intent is never part of the Fourth Amendment inquiry. *See id.* at 317. In other words, *Torres* is not about substance—it does not tell us *what* an officer must do to seize a subject.¹

The majority puts much weight on the following language from *Torres*: “the appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain, for we rarely probe the

¹ Indeed, in this regard, *Torres* broke no new ground. The Court just applied the holding in *Hodari D.* that “the mere grasping or application of physical force with lawful authority [i]s an arrest, whether or not it succeeded in subduing the arrestee.” *Torres v. Madrid*, 592 U.S. 306, 311 (2021) (quoting *California v. Hodari D.*, 499 U.S. 621, 624 (1991)) (quotation marks omitted).

subjective motivations of police officers in the Fourth Amendment context.” *Id.* at 317. But that language cannot bear that weight. Most obviously, the officers in *Torres* intentionally shot the plaintiff. So *Torres* does not address, much less resolve, whether an unintended target can be seized. Additionally, the *Torres* quote indicates that there are at least some situations where an officer’s subjective motivation matters under the Fourth Amendment. Simply stated, the majority overreads *Torres*.

Furthermore, although *Claybrook* “predates” and therefore “fails to take account of” *Brendlin v. California*, 551 U.S. 249 (2007), Majority Op. at 14, *Brendlin* does not resolve this case or overrule *Claybrook*. The majority implicitly agrees; otherwise, it would have found the law to be clearly established at the time of the shooting. Regardless, it is worth explaining why in more detail.

In *Brendlin*, the Supreme Court held what it had long stated in dicta in previous cases: a traffic stop entails the seizure of all passengers in the stopped vehicle. 551 U.S. at 255-56. There are three reasons why this holding is not inconsistent with *Claybrook*.

First, unintended-target cases such as *Claybrook* are logically distinguishable from passenger cases such as *Brendlin*. An officer who stops a vehicle knows he will stop every passenger inside because it is impossible to stop a car but not all its passengers.²

² This same logic resolves the hypothetical in the majority opinion’s footnote 14. An officer who indiscriminately shoots into a densely packed crowd of people necessarily intends to put

See *Fisher*, 234 F.3d at 318-19. So each passenger is a direct object of the seizure. *Id.* In unintended-target cases, on the other hand, the officer intends to seize only one person, but instead accidentally seizes someone else—the bystander. *Claybrook*, 199 F.3d at 355, 359. The seizure of the bystander is purely accidental, whereas the seizure of all the vehicle passengers is deliberate. So *Brendlin* does not overrule the holding in *Claybrook*.

Second, the caselaw treats passenger cases as distinguishable from unintended-target cases. *Brendlin* built itself on a long and detailed line of Supreme Court cases establishing that traffic stops constitute seizures. See 551 U.S. at 255-58. No such line exists for unintended-target cases, and courts have treated them as separate issues. The strongest evidence for this is that at the time *Brendlin* was decided, all nine circuits that had addressed the passenger-seizure issue had held that passengers are seized under the Fourth Amendment during traffic stops. *Id.* at 258-59 (collecting cases). But many of those same circuits held—without finding any contradiction—that unintended targets (usually bystanders or hostages) accidentally shot by officers who intended to shoot suspects were not seized within the meaning of the Fourth Amendment.³

the whole crowd within the range of the shot at risk. So the crowd itself is the direct object of the seizure, even though the officer “hoped his bullet might find the suspect” Majority Op. at 20 n.14.

³ Compare *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 794-95 (1st Cir. 1990) (applying *Brower* to find that a hostage who was

None of these circuits, including our own, found any inconsistency between providing Fourth Amendment protection to a passenger during a traffic stop but not to an unintended target accidentally struck by a

accidentally injured when police shot at a robber was not seized under the Fourth Amendment), *Rucker v. Harford County*, 946 F.2d 278, 281 (4th Cir. 1991) (holding *Brower* “directly foreclosed” the Fourth Amendment claim of a bystander accidentally shot by an officer who intended to hit a fleeing suspect), *Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000) (relying on *Brower* and holding the Fourth Amendment doesn’t apply to “physical injuries *inadvertently inflicted upon an innocent third party* by police officers’ use of force while attempting to seize a perpetrator”), *Moore v. Indehar*, 514 F.3d 756, 760 (8th Cir. 2008) (holding that “bystanders are not seized for Fourth Amendment purposes when struck by an errant bullet in a shootout”), and *Childress v. City of Arapaho*, 210 F.3d 1154, 1156-57 (10th Cir. 2000) (applying *Brower* to find that a hostage who was accidentally injured when police shot at a suspect was not seized under the Fourth Amendment), with *United States v. Kimball*, 25 F.3d 1, 5 (1st Cir. 1994) (explaining that “[w]hen a police officer effects an investigatory stop of a vehicle, *all* occupants of that vehicle are subjected to a seizure, as defined by the Fourth Amendment”), *United States v. Rusher*, 966 F.2d 868, 874 n.4 (4th Cir. 1992) (stating that passengers in a car that was subject to a traffic stop had been seized within the meaning of the Fourth Amendment), *United States v. Perez*, 440 F.3d 363, 369 (6th Cir. 2006) (holding that a traffic stop “affects the Fourth Amendment interests of all the occupants” of the car, including a passenger), *United States v. Ameling*, 328 F.3d 443, 446-47 & n.3 (8th Cir. 2003) (allowing a passenger to make a Fourth Amendment challenge to the admissibility of evidence gleaned from an allegedly illegal traffic stop), and *United States v. Erwin*, 875 F.2d 268, 270 (10th Cir. 1989) (“[W]e see no reason why a person’s Fourth Amendment interests in challenging his own seizure should be diminished merely because he was a passenger, and not the driver, when the stop occurred.”).

police officer's bullet during an exchange of gunfire. And to whatever extent inconsistency exists, *Brendlin* did not address it, let alone resolve it.

Third, as *Torres* recognized, *Brendlin* was a seizure-by-control case with little relevance to seizure-by-force cases like the one before us. *Torres*, 592 U.S. at 322.

In sum, the majority relies on a patchwork of general statements and selected language from Supreme Court cases that are not really on point. A little bit of equivocal language from *Torres* here, and a lot of reliance on *Brendlin* there—but that is not enough to overrule *Claybrook* or to avoid the circuit split that the majority creates.

III.

The majority holds, for the first time, that an officer's subjective intent has no bearing on whether a Fourth Amendment seizure occurred. In so doing, the majority strands our circuit on the wrong side of a split—with seven of our sister circuits opposed.

In *Rucker v. Harford County*, the Fourth Circuit held that the Fourth Amendment's protection against unreasonable seizures does not extend to unintentionally injured bystanders. 946 F.2d 278, 218 (4th Cir. 1991). Three other circuits have agreed in unpublished opinions. *See Singleton v. Casanova*, No. 22-50327, 2024 WL 2891900, at *16 (5th Cir. June 10, 2024); *Arruda ex rel. Arruda v. County of Los Angeles*, 373 F. App'x 798, 799 (9th Cir. 2010); *Emanuel v. District of Columbia*, 224 F. App'x 1, 2

(D.C. Cir. 2007) (per curiam); *see also United States v. Lockett*, 919 F.2d 585, 590 n.4 (9th Cir. 1990). Our sister circuits are also unanimous in holding that hostages unintentionally injured by officers are not seized under the Fourth Amendment—and that the officer’s lack of subjective intent is the decisive factor. *See Hawatmeh v. City of Henderson*, 159 F.4th 591, 600 (9th Cir. 2025); *Childress v. City of Arapaho*, 210 F.3d 1154, 1156-57 (10th Cir. 2000); *Medeiros v. O’Connell*, 150 F.3d 164, 169 (2d Cir. 1998); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 795-96 (1st Cir. 1990).

Torres does not appear to have changed this landscape. In *Singleton v. Casanova*, a post-*Torres* case, the Fifth Circuit explained that “with excessive force claims, each plaintiff seeking relief must establish that the defendant-officer intended to use force against his or her person, not someone else’s.” 2024 WL 2891900, at *16. Finding that “[u]ltimately, the question is one of intent,” the court remanded for further consideration of whom the officer targeted when he was firing. *Id.* at *17-18. In other words, the dispositive issue was the officer’s subjective intent.

The same applies in hostage cases. In *Hawatmeh v. City of Henderson*, another post-*Torres* case, the Ninth Circuit held that a hostage accidentally shot by an officer who intended to hit the suspect was not seized under the Fourth Amendment because the officer lacked the requisite intent to restrain the hostage. 159 F.4th at 600. Relying on *Torres*, the Ninth Circuit held that the intent to restrain is not present when the officer does not intend to apply

force to the innocent third party. *Id.* at 600-01 (citing *Torres*, 592 U.S. at 317). So the majority’s assertion that its rule “would lead to more uniform results,” Majority Op. at 18, is deeply ironic. Every circuit to have considered the issue at hand, including our own in *Claybrook*, has held that there is no Fourth Amendment seizure. The only contrary holding is the majority’s opinion.

The majority insists that rather than creating a split, it announces a rule that harmonizes disparate caselaw. But no such disharmony exists. Take the majority’s discussion of several canine-bite cases. These cases are perfectly reconcilable if we recognize the legitimate role of the officer’s subjective intent in the Fourth Amendment inquiry.

For example, *Vathekan v. Prince George’s County* is a mistaken-identity case. 154 F.3d 173 (4th Cir. 1998). The officer intended the canine to bite a person in the room where it had been sent—the officer was simply mistaken in his belief that the person in the room was the suspect. *Id.* at 178. Existing caselaw that recognizes the role of subjective intent readily distinguishes unintended-target cases from mistaken-identity cases. *Landol-Rivera*, 906 F.2d at 796 (explaining that “mistakes of identity” are different from “inadvertent ‘acquisitions of physical control’” because “[i]t is intervention directed at a specific individual that furnishes the basis for a Fourth Amendment claim”); *Medeiros*, 150 F.3d at 169; *Moore*, 514 F.3d at 760. In unintended-target cases, the officer does not intend to apply means to the seized individual. In

mistaken-identity cases, the officer intentionally applies means to the seized individual, and is merely mistaken about to whom he has applied those means. *Vathekan* and *Rogers v. City of Kennewick*, 206 F. App'x 657 (9th Cir. 2006), are examples of mistaken-identity cases.⁴

Contrary to the majority's view, the caselaw is in fact harmonious. Accounting for subjective intent is that "intelligible principle [that] categorically distinguish[es] the mistaken-identity-shooting cases from the hostage-shooting and bystander-shooting cases." Majority Op. at 18-19; see *Landol-Rivera*, 906 F.2d at 796 (distinguishing unintended-target cases from mistaken-identity cases on the basis of subjective intent); *Medeiros*, 150 F.3d at 169 (same); *Moore*, 514 F.3d at 760 (same).

What will create disharmony is the majority's adoption of a rule that squarely conflicts with seven other circuits. See *Hawatmeh*, 159 F.4th at 600; *Singleton*, 2024 WL 2891900, at *16; *Moore*, 514 F.3d at 760; *Emanuel*, 224 F. App'x at 2; *Childress*, 210 F.3d at 1156-57; *Medeiros*, 150 F.3d at 169; *Rucker*, 46 F.2d at 218; *Landol-Rivera*, 906 F.2d at

⁴ This court's decision in *Dunigan v. Noble*, 390 F.3d 486 (6th Cir. 2004), is essentially an accidental-discharge case. There, the officer had not given the canine a bite command when it bit the bystander. *Id.* at 492. In cases like *Dunigan*, where the application of means is purely accidental, there is no seizure, and the Supreme Court has recognized that since *Brower*, 489 U.S. at 596-97.

795-96.⁵ Perhaps sensing that an extraordinary break with our sister circuits requires extraordinary justification, the majority defends its new rule by arguing that a subjective-intent inquiry is so difficult as to be functionally impossible, because we cannot simply “get into Gannon’s head at the time of the shooting.” Majority Op. at 19. This impossibility will be news to our sister circuits, who have been analyzing the subjective intent of officers in Fourth Amendment cases for decades.⁶ It will also be news

⁵ The Eighth Circuit recently disclaimed the role of subjective intent in the seizure inquiry. See *Hight v. Williams*, ---F.4th---, 2026 WL 90996, at *1-2 (8th Cir. Jan. 13, 2026). But even under that circuit’s test, Gannon did not seize Kilnapp. The Eighth Circuit held that in bystander-shooting cases, “[t]he intent does not transfer because the force used must be ‘intentionally applied’ to whomever or whatever the officer is trying to seize.” *Id.* at *3 (quoting *Torres*, 592 U.S. at 317). It beggars belief that a reasonable person would think that Gannon—a greenhorn police officer confronting an armed suspect in total darkness—intended to shoot Kilnapp rather than Borden. Under the Eighth Circuit’s test, because Borden was the only person Gannon “conceivably intended to restrain,” no seizure occurred. *Id.* The majority takes a quite different tack. Though it styles it an objective test, the majority is really announcing a transferred—intent doctrine. See Majority Op. at 12-13; cf. Restatement (Third) of Torts § 110 (Am. L. Inst., Tentative Draft 2015). Under the majority’s new rule, whether the officer objectively manifested an intent to restrain *the person who was actually shot* is irrelevant. The majority therefore splits us with the Eighth Circuit as well, albeit along different lines.

⁶ The majority’s only defense on the circuit-split point is that many of our sister circuits’ cases “were decided before *Torres*, and many before even *Brendlin*.” Majority Op. at 14 n.5. But the majority’s retort begs the question of whether *Torres* meaningfully bears on bystander-shooting cases. For the

to litigants in intentional tort suits where a government employee claims qualified immunity for good-faith actions taken within the scope of employment, *see, e.g., Bletz v. Gribble*, 641 F.3d 743, 757 (6th Cir. 2011), or where subjective intent to injure is an element of the tort, *see, e.g., Broyles v. Kasper Mach. Co.*, 517 F. App'x 345, 353 (6th Cir. 2013). And it will be news to the juries whom we usually charge with making these difficult factual determinations.

IV.

The majority's Fourth Amendment holding disregards binding precedent and creates a split with seven of our sister circuits. The district court's judgment should be vacated simply because Gannon's shooting of Kilnapp did not violate the Fourth Amendment.

Future panels will need to determine whether the majority's Fourth Amendment holding runs afoul of *Claybrook*. It is the rule in our circuit that, "when a later decision of this court conflicts with one of our prior published decisions, we are still bound by the holding of the earlier case." *Darrah v. City of Oak Park*, 255 F.3d 301, 310 (6th Cir. 2001). Therefore, if a future panel determines that there is such a

reasons laid out in Section II of this dissent, it does not. As for *Brendlin*, the majority implicitly concedes that it was insufficient to resolve bystander-shooting cases; otherwise, its analysis in Section III.D would go the other way. So *Brendlin*'s timing is irrelevant.

conflict, it must follow *Claybrook*. See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 580 (6th Cir. 2018); *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 508 F. App'x 498, 504 (6th Cir. 2012) (Moore, J., concurring in the judgment).

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 25-3149

FILED

Feb 18, 2026

KELLY L. STEPHENS, Clerk

JENNIFER KILNAPP,

Plaintiff - Appellee,

v.

CITY OF CLEVELAND, OHIO,

Defendant,

BAILEY GANNON,

Defendant - Appellant.

Before: MOORE, BUSH, and DAVIS, Circuit Judges.

JUDGMENT

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

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

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VACATED, and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/h/w signature/
Kelly L. Stephens, Clerk

APPENDIX B

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JENNIFER KILNAPP,	)	CASE NO. 1:22CV1225
	)	
Plaintiff,	)	JUDGE
	)	CHRISTOPHER A.
	)	BOYKO
	)	
vs.	)	<u>OPINION AND ORDER</u>
	)	
CITY OF CLEVELAND, et al.,	)	
	)	
Defendants.	)	

[Filed February 13, 2025]

CHRISTOPHER A. BOYKO, J.:

This matter comes before the Court upon the Motion (ECF DKT #61) of Defendant Bailey Gannon for Summary Judgment. For the following reasons, the Motion is denied.

I. BACKGROUND

In August of 2017, Plaintiff Jennifer Kilnapp became a police officer with the Cleveland Division of Police (“CDP”). Defendant Bailey Gannon became a Cleveland police officer in May of 2020 and began his one-year probationary period with the CDP. In the summer of 2020, Plaintiff was assigned to

partner with Defendant as his training officer and among other things, to teach him the right protocol for handling calls. (Kilnapp Deposition, ECF DKT #60-1 at 26).

In the early morning hours of July 20, 2020, Plaintiff and Defendant responded to a call from dispatch that a female reported a man had shot a hole into the floorboards in a boarding house. When they arrived at the address, Plaintiff and Defendant encountered the female caller outside a two-story house. They learned that a man, since identified as Darryl Borden and nicknamed “Moose,” was upstairs. The building was completely dark. The officers entered with their weapons in hand. Plaintiff’s firearm had an attached flashlight. Defendant had a flashlight in his right hand and his firearm in his dominant left hand. The officers routinely activated their body cameras at the same time upon arrival at the scene. (ECF DKT #60-1 at 70). On this occasion Defendant’s went on; Plaintiff’s did not. (*Id.*).

The staircase had two flights: a set of stairs going one direction, a landing and then a second set going the opposite direction. Defendant went upstairs first. Plaintiff felt this was a “good training opportunity” for him. (ECF DKT #60-1 at 76). Plaintiff called out the nickname, “Moose” on the way upstairs but received no response. Plaintiff does not remember announcing that she was a police officer. (ECF DKT #60-1 at 58). Once upstairs, Plaintiff saw the door ajar to Room 4, and she looked inside for the individual. The female downstairs

shouted that he was in the bathroom. Defendant pushed a door open, not knowing which room was a bathroom, and then jumped back yelling. Defendant saw a man with a gun pointed directly at him in full presentation, “firing range position.” (Gannon Deposition, ECF DKT #59-1 at 64). Defendant frantically retreated down the stairs. Both Plaintiff and Defendant heard gunshots. (ECF DKT #60-1 at 42; ECF DKT #59-1 at 69, 78-79, 81-82; Wearable Camera System (“WCS”) footage, ECF DKT #72, Exhibit G). Defendant fired two gunshots in return; he says in an effort to protect himself and his fellow officer. (ECF DKT #59-1 at 72). First, Defendant turned and fired his gun in Borden’s direction. (ECF DKT #59-1 at 64). Then, Defendant ducked his head and wildly shot a round that went into the molding or door frame. (ECF DKT #59-1 at 71-72).

Plaintiff was trailing behind Defendant down the stairs and exiting the building with him. (ECF DKT #59-1 at 128-129). While on the upper flight of stairs, Plaintiff felt pain and dropped her gun. (ECF DKT #60-1 at 43-45). Both officers were concerned that Borden might come out after them and continue shooting. (*Id.* at 48). While running, Plaintiff shouted: “I’m shot.” (WCS footage, ECF DKT #72, Exhibit G; ECF DKT #59-1 at 148). A bullet went into and through Plaintiff’s forearm, exited upward, hit her bicep, entered her right armpit and lodged in her back. (ECF DKT #60-1 at 55-56).

Neither Plaintiff nor Defendant knew whose bullet struck Plaintiff. Early investigation determined that it was Borden who shot Plaintiff

and he was charged with Attempted Murder of a police officer. Plaintiff did not learn until March of 2021 that she was actually shot by a bullet from Defendant's firearm. The charge of Attempted Murder against Borden was dropped and he ultimately pled guilty to Attempted Felonious Assault (Peace Officer).

Plaintiff brought the above-captioned Complaint under 42 U.S.C. § 1983 on July 13, 2022, alleging that Defendant Bailey Gannon used excessive force against her in violation of the Fourth and Fourteenth Amendments. On September 22, 2022, Defendant Gannon moved for judgment on the pleadings on the basis of qualified immunity, which this Court denied. That denial was affirmed by the Sixth Circuit Court of Appeals on July 21, 2023. The captioned matter is now before the Court upon Defendant Gannon's Motion for Summary Judgment (ECF DKT #61). Defendant contends that he "is shielded from suit and liability by qualified immunity because: 1) Plaintiff cannot demonstrate a violation of her constitutional rights under the Fourth or the Fourteenth Amendments for an unintentional injury that he may have caused; and 2) any alleged constitutional violation was not clearly established at the time of the conduct."

II. LAW AND ANALYSIS

Civil Rule 56 Standard

A summary judgment shall be granted only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to

judgment as a matter of law.” *See* Fed. R. Civ. P. 56(a). The burden is on the moving party to conclusively show no genuine issue of material fact exists, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Lansing Dairy, Inc. v. Espy*, 39 F. 3d 1339, 1347 (6th Cir. 1994). The moving party must do so by either pointing to “particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials” or by “showing that the materials cited (by the adverse party) do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” *See* Fed. R. Civ. P. 56(c)(I)(a), (b). A court considering a motion for summary judgment must view the facts and all inferences in the light most favorable to the nonmoving party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Once the movant presents evidence to meet its burden, the nonmoving party may not rest on its pleadings, but must come forward with some significant probative evidence to support its claim. *Celotex*, 477 U.S. at 324; *Lansing Dairy*, 39 F. 3d at 1347.

This Court does not have the responsibility to search the record *sua sponte* for genuine issues of material fact. *Betkerur v. Aultman Hospital Ass’n.*, 78 F. 3d 1079, 1087 (6th Cir. 1996); *Guarino v. Brookfield Township Trustees*, 980 F. 2d 399, 404-06 (6th Cir. 1992). The burden falls upon the nonmoving party to “designate specific facts or evidence in dispute,” *Bias v. Advantage*, 905 F.2d

1558, 1563 (C.A.D.C., 1990); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); and if the nonmoving party fails to make the necessary showing on an element upon which it has the burden of proof, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 323. Whether summary judgment is appropriate depends upon “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.” *Amway Distributors Benefits Ass’n v. Northfield Ins. Co.*, 323 F. 3d 386, 390 (6th Cir. 2003) (quoting *Anderson*, 477 U.S. at 251-52).

42 U.S.C. § 1983

To sustain an action under 42 U.S.C. § 1983, a plaintiff must show that the conduct complained of was committed by a person acting under color of state law; and that the conduct deprived the plaintiff of a federal constitutional or statutory right. See *Haines v. Saginaw Police Dept.*, 35 F.3d 565 (6th Cir. 1994) (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978)). Deprivation of a plaintiff’s rights, privileges, or immunities secured by the Constitution and federal laws is the threshold requirement of a Section 1983 action.

Qualified Immunity

Qualified immunity protects governmental officials from suit as long “as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have

known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In the Sixth Circuit, courts apply a two-step analysis. First, “whether the facts, when taken in the light most favorable to the party asserting the injury, show the officer’s conduct violated a constitutional right[.]” *Mullins v. Cyranek*, 805 F.3d 760, 765 (6th Cir. 2015). Then a court must determine whether the right was “clearly established” at the time of the alleged violation such “that a reasonable official would understand that what he is doing violates that right.” *Saucier v. Katz*, 533 U.S. 194, 201–02 (2001) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

Constitutional Violation

The Fourth Amendment prohibits police from using excessive force while making an arrest or seizure. “[V]iolation of the Fourth Amendment requires an intentional acquisition of physical control. As a result, a seizure occurs even when an unintended person or thing is the object of the detention or taking, so long as the detention or taking itself is willful.” *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989). The act of firing a gun is intentional, even if the result is not the one anticipated. See *Rodriguez v. Passinault*, 637 F.3d 675 (6th Cir. 2011). “Seizure” does not apply to an unknowing act. *Brower*, 489 U.S. at 596. In *Brendlin v. California*, 551 U.S. 249 (2007), the Supreme Court reaffirmed that an unintended person may be seized so long as the seizure is not the result of “an unknowing act.” *Id.* at 254.

Defendant insists now, as he did in his earlier Motion for Judgment on the Pleadings, that under the authority of *Claybrook v. Birchwell*, 199 F.3d 350 (6th Cir. 2000), when an officer accidentally shoots a fellow officer while confronting an armed suspect there is no Fourth Amendment seizure because the officer could not “seize” any person other than the deliberate object of his exertion of force. As the Sixth Circuit noted in its affirmance of this Court’s denial of judgment on the pleadings, the Supreme Court decision in *Brendlin* holds clearly otherwise and controls over the earlier appellate decision in *Claybrook*. *Kilnapp v. City of Cleveland*, No. 22-4059, 2023 WL 4678994, fn. 4 (6th Cir. Jul. 21, 2023).

Defendant fired his gun intentionally, though the individual impacted by the bullet he fired was unintended. Plaintiff was seized and is protected under the Fourth Amendment. Because the Court finds that the Fourth Amendment applies, there is no need to analyze Plaintiff’s alternative claim of a Fourteenth Amendment violation.

Clearly Established Right

“The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Ciminillo v. Streicher*, 434 F.3d 461, 468 (6th Cir. 2006)). “[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.” *Tennessee v. Garner*, 471 U.S. 1, 7

(1985) (citing *United States v. Mendenhall*, 446 U.S. 544 (1980)). Plaintiff's "status as a police officer does not remove her from the protections of the Fourth Amendment." *Kilnapp v. City of Cleveland*, No. 22-4059, 2023 WL 4678994, at *5.

For his part, Defendant argues the prevailing rule is that bystanders [and fellow officers] are not "seized" for Fourth Amendment purposes when inadvertently or accidentally shot. Defendant points again to the *Claybrook* case as illustrating established law in the Sixth Circuit. However, the Sixth Circuit has already dispatched that contention based upon subsequent controlling Supreme Court authority. Defendant also asserts that there is no clearly established right under the facts here; and he directs the Court's attention to the out-of-Circuit case of *Neal v. St. Louis Cnty. Bd. of Police Comm'rs*, 217 F.3d 955 (8th Cir. 2000). Defendant argues: "An officer does not violate the constitutional rights of another when he accidentally shoots a fellow officer during a shootout with an armed suspect potentially threatening the officer. *Id.*, 957." (ECF DKT #61 at 20). After reading the *Neal* opinion, the Court determines that, despite the factual similarities, it is of no assistance to Defendant's position and is distinguishable. *Neal* is analyzed under the "conscience shocking" rubric of the Fourteenth Amendment, and not as a Fourth Amendment seizure.

For a clearly established right, there does not need to be "a case directly on point." *al-Kidd*, 563 U.S. at 741. "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.” *Jacobs v. Alam*, 915 F.3d 1028, 1040 (6th Cir. 2019) (quoting *King v. Taylor*, 694 F.3d 650, 664 (6th Cir. 2012)). Although there may be few available case decisions involving officers wounding their fellow officers, “officials can still be on notice that their conduct violates established law even in novel factual circumstances.” *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). “The exact circumstances of the particular case need not have been previously held illegal for the right to be “clearly established,” but the right must be clear in a particularized way to put the official on notice that his conduct is illegal. See *Scicluna v. Wells*, 345 F.3d 441, 446 (6th Cir. 2003); *Bell v. Johnson*, 308 F.3d 594, 602 (6th Cir. 2002).

Reasonableness

“[T]he reasonableness of the use of force is the linchpin of the case.” *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 903 (6th Cir. 1998). The use of deadly force is excessive and unreasonable unless there is probable cause to believe that the suspect poses an immediate threat to the officer or to others. *Garner*, 471 U.S. at 11. A probable cause determination turns on the facts and circumstances of each particular case. *Graham v. Connor*, 490 U.S. 386, 396 (1989). The reasonableness test is an objective one, to be “judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.*

Plaintiff believes the evidence shows that Defendant's use of force was unreasonable. Plaintiff disputes the threat posed by Darryl Borden. While Defendant testifies that when he opened the bathroom door Borden pointed a gun directly at him, Plaintiff contends that the body cam footage does not confirm that. Sergeant Mitchell Sheehan (Internal Affairs), who was on scene after the incident and was part of the Force Investigation Team ("FIT") studying this officer-involved shooting, admits on deposition that the footage is not clear and how exactly Borden's gun was held or aimed is not clear from the recording. (Sheehan Deposition, ECF DKT #66-1 at 61, 64-65).

Plaintiff argues that screen shots taken from the WCS recording show Borden's one hand on the door; thus calling into question the "firing range position" that Defendant describes seeing upon opening the bathroom door. Keeping in mind that the boarding house was completely dark except for the officers' flashlights, Plaintiff is compelled to admit that she never saw the suspect (ECF DKT #60-1 at 59) nor the inside of the bathroom (ECF DKT #60-1 at 62).

Neither Plaintiff nor Defendant could say whether Borden came out of the bathroom when they heard the shots. Both officers were hurrying frantically down the stairs and out of the house. (ECF DKT #60-1 at 167-168). Nevertheless, Plaintiff insists that subsequent BCI scans of the structure and of the bullets' approximate trajectory illustrate that Borden never left the bathroom and shot at least twice through the door into the wall in the

hallway. (Plaintiff's Opposition, ECF DKT #69 at 9-12).

Plaintiff contends that Defendant used deadly force in an unreasonable manner. The possible trajectory of the bullets, combined with Defendant's height and his movement down the stairs, illustrates he may have been holding his weapon over his head or at least above eye-level. (*Id.* at 11-12). On the other hand, Defendant testifies that while retreating, he turned in Borden's direction and returned fire with his left hand. (ECF DKT #59-1 at 64). Defendant later learned that this first shot must have been the one that struck Plaintiff. Defendant ducked his head and "inadvertently" shot a second time. This bullet went into the molding or door frame. (*Id.* at 71).

Although the CDP internal investigation concluded Defendant's use of lethal force was justified, Plaintiff questions whether it was reasonable for him to turn and shoot when Plaintiff was likely following behind in the line of fire. In this regard, Defendant admits that he had no visible, verifiable target because he could not see Borden. (ECF DKT #59-1 at 134-135). Then again, would proper protocol permit Plaintiff to trail behind Defendant and place herself in the crossfire between the stairway and the bathroom on the upper floor? Plaintiff was admittedly Defendant's training officer and Defendant was a probationary rookie at the time of the incident. At the moment Borden's and Defendant's gunshots rang out, only Defendant's

camera was operating. There might be more clarity if Plaintiff's body camera had also been functioning.

The Court must view the facts in the light most favorable to Plaintiff on Defendant's Motion for Summary Judgment. *Matsushita*, 475 U.S. at 587. "Qualified immunity in cases involving claims of excessive use of deadly force is difficult to determine on summary judgment because an officer's liability turns upon the Fourth Amendment's reasonableness test." *Withers v. City of Cleveland*, 640 Fed. App'x at 419; *Sova*, 142 F.3d at 902. It bears repeating that the use of force should be judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. "[S]ummary judgment is inappropriate where there are contentious factual disputes over the reasonableness of the use of deadly force. When 'the legal question ... is completely dependent upon which view of the facts is accepted by the jury,' the District Court cannot grant a defendant police officer immunity from a deadly force claim." *Sova*, 142 F.3d at 903 (quoting *Brandenburg v. Cureton*, 882 F.2d 211, 215–16 (6th Cir. 1989)). When the question of qualified immunity turns upon which version of the facts is accepted, the jury must determine liability. *Scozzari v. Miedzianowski*, 454 Fed. App'x 455, 463 (6th Cir. 2012); *Sova*, 142 F.3d 903.

III. CONCLUSION

For all these reasons, the Motion (ECF DKT #61) of Defendant Bailey Gannon for Summary Judgment is denied.

IT IS SO ORDERED.

DATE: 2/13/2025 s/Christopher A. Boyko
CHRISTOPHER A. BOYKO
United States District Judge

APPENDIX C

NOT RECOMMENDED FOR PUBLICATION

File Name: 23a0334n.06

No. 22-4059

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

[FILED JULY 21, 2023
DEBORAH S. HUNT, CLERK]

JENNIFER KILNAPP,	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM
v.	)	THE UNITED STATES
	)	DISTRICT COURT FOR
CITY OF CLEVELAND,	)	NORTHERN DISTRICT
OHIO, et al.,	)	OF OHIO
Defendants,	)	
	)	OPINION
BAILEY GANNON, in his)	)	
official and personal	)	
capacity,	)	
Defendant - Appellant.	)	

Before: COLE, CLAY, and KETHLEDGE, Circuit Judges.

CLAY, Circuit Judge. Plaintiff Jennifer Kilnapp commenced this action under 42 U.S.C. § 1983 and alleges that Defendants violated her rights under the Fourth and Fourteenth Amendments to be free from the use of excessive

force in the absence of a suspect posing an immediate threat to police officers or others. Defendant Bailey Gannon appeals the district court's denial of his motion for judgment on the pleadings filed under Federal Rule of Civil Procedure 12(c). For the reasons set forth below, we **AFFIRM**.

I. BACKGROUND

A. Factual History

The following factual summary is based upon the allegations in Kilnapp's complaint. *See See Hudak v. Elmcroft of Sagamore Hills*, 58 F.4th 845, 850 (6th Cir. 2023) (providing factual summary "[a]s alleged in the complaint"); *see also S. Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478, 480 (6th Cir. 1973) ("For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment.").

On July 20, 2020, Kilnapp and Gannon, both Cleveland police officers, responded to a call reporting that there was an emotionally disturbed man with a gun in a boarding home. Gannon was a rookie, and Kilnapp was his field training officer. Upon arrival on the scene, Kilnapp and Gannon learned that the disturbed man, Darryl Borden, was in the second-floor bathroom, and they proceeded up the stairs to the hallway to confront him. Gannon stood by the bathroom door while Kilnapp stood a few feet behind him. Gannon opened the bathroom

door and Borden was allegedly “holding a firearm but it was down at his side in one hand, pointed towards the ground. It was not raised or pointed at Gannon.”¹ (Compl., R. 1, Page ID # 5).

According to the complaint, despite the fact that Borden did not threaten or step toward either officer, Gannon “panicked” and “spun back out of the doorway, where he was no longer in the line of sight or fire between himself and Borden.” (*Id.* at Page ID # 6). Gannon did not make any commands for Borden to get on the floor, proceed out of the bathroom, or drop his weapon, and Borden remained in the bathroom while Gannon retreated. During this time, Kilnapp was standing “near the top of the staircase.” (*Id.*). “As [Gannon] ran, [he] pointed his gun over his head behind him—in the opposite direction he was running—and began shooting.” (*Id.*). Gannon was purportedly “not looking where he was shooting.” (*Id.*). After Gannon’s shots, Borden fired his gun.

Kilnapp supports her allegation that Gannon fired first by pointing to the trajectory tracing and audio testing of Gannon’s body camera. Kilnapp was hit in the right forearm by one of Gannon’s fired bullets, and the bullet fragmented and punctured her bicep; Kilnapp was also struck with a bullet in

¹ Gannon later told investigators that “when he opened the door, Borden was holding a gun in two hands and pointing it at the door.” (Compl., R. 1, Page ID # 9). Kilnapp avers that Gannon’s version of events is neither possible or supported by the subsequent investigation nor the body camera footage.

her armpit which traveled through her chest to near her spine. Kilnapp was able to exit the home on her own, and was taken to the hospital where surgeons were able to remove the bullet fragment near her spine.

The Ohio Bureau of Criminal Investigations (“BCI”) conducted a forensic examination of the scene, which included laser scans and 3D modeling to determine the bullet trajectories. Based on BCI’s model, the investigators determined that the bullet entered “the wall near the top of the staircase on a slight downward angle” and “[b]ecause Gannon was running down the stairs when he fired ... Gannon must have been holding his gun above his head when he fired.” (*Id.* at Page ID # 8). BCI modeling also provided Kilnapp’s approximate vantage point when Gannon began shooting and the path of Borden’s bullets. “The forensic examination at the scene show[ed] no bullets from Borden fired even remotely in Kilnapp’s direction. ... Borden fired from inside the bathroom into the bathroom door before the bullets landed in the wall opposite him. Kilnapp was never in Borden’s line of fire.” (*Id.* at Page ID # 9). No body camera footage suggests that Borden shot at Kilnapp. (*Id.*). Gannon “admits that a bullet from his service weapon inadvertently struck [Kilnapp.]” (Answer, R. 14, Page ID # 70).

The City of Cleveland charged Borden with attempted murder, based on its belief that Borden shot Kilnapp. Kilnapp alleges that the Cleveland division of police and the prosecutor’s office falsely reported that Borden intended to ambush the

officers from the bathroom, and that they continued to claim that Borden shot Kilnapp, despite BCI modeling, ballistic testing, and body camera footage that established that this narrative was not true. Borden's attempted murder charges were dropped in June of 2021, nearly a year after the shooting.

In March of 2021, the Cleveland chief of police suspended Kilnapp for neglecting to turn on her body camera before entering the house on the day of the shooting. According to Kilnapp this type of infraction typically results in counseling, not suspension. Meanwhile, Gannon faced no consequences for providing a misleading description of the events that occurred on the day Kilnapp was shot, nor for mishandling his firearm. Kilnapp was unable to return to work for two years and is no longer a full-time patrol officer. Kilnapp's injury caused nerve damage in her right arm, and she continues to experience "physical pain, weakness, numbness, and tingling in her arm, wrist, and hand;" she also suffers from post-traumatic stress disorder. (Compl, R. 1, Page ID # 12). It took a year for Kilnapp to regain her full range of motion.

B. Procedural History

Kilnapp filed her complaint on July 13, 2022, against Defendants City of Cleveland ("the City"); Dornat Drummond, the City of Cleveland's chief of police, in his official capacity; and Gannon in his official and personal capacity. Kilnapp brought her complaint under 42 U.S.C. § 1983 and alleged Gannon used excessive force in violation of the

Fourth and Fourteenth Amendments. Defendants filed separate motions. On September 16, 2022, the City, Drummond in his official capacity, and Gannon in his official capacity, filed a motion to dismiss Kilnapp's claims pursuant to Federal Rule of Civil Procedure 12(b)(6). On September 22, 2022, Gannon, in his individual capacity, filed an answer and a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). On December 9, 2022, the district court denied both motions; but dismissed claims against Drummond and Gannon in their official capacities as duplicative of claims against the City. The City did not appeal the denial of its motion to dismiss. This appeal concerns only the district court's denial of the motion for judgment on the pleadings that Gannon filed in his individual capacity.

Gannon argued in the court below that he "is shielded from suit by qualified immunity[.]" (Order, R. 29, Page ID # 403). Gannon also asserted immunity under the common-law Fireman's Rule and the Fellow Servant Doctrine under Ohio's Worker's Compensation System. The district court determined that factual disputes may exist as to whether Gannon opened fire first and "whether Defendant's actions were intentional or inadvertent;" however, at this early stage of litigation, the district court held that Kilnapp met her burden in plausibly alleging a Fourth and Fourteenth Amendment violation. (*Id.* at Page ID # 404–05). The district court found that because federal qualified immunity did not apply, the state and common-law immunities are necessarily denied as well. *See Felder v. Casey*,

487 U.S. 131, 138 (1988) (“[W]e have held that a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy[.]”).² In sum, the district court held that the complaint plausibly alleged that “Defendant Gannon used excessive and unreasonable deadly force under the circumstances, and that Defendant Gannon could not have reasonably believed the use of deadly force was lawful.” (Order, R. 29, Page ID # 405–06). Gannon timely appealed.

II. DISCUSSION

A. Standard of Review

Pursuant to Federal Rule of Civil Procedure 12(c), “[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.” Fed. R. Civ. P. 12(c). “We review de novo a judgment on the pleadings granted pursuant to Rule 12(c) ... using the same standard that applies to a review of a motion to dismiss under Rule 12(b)(6).” *Moore, Successor Tr. of Clarence M. Moore & Laura P. Moore Tr. v. Hiram Twp.*, 988 F.3d 353, 357 (6th Cir. 2021) (citing *Roger Miller Music, Inc. v. Sony/ATV Publ’g, LLC*, 477 F.3d 383, 389 (6th Cir. 2007)).

² Gannon does not contest the court’s denial of his state and common law immunities on appeal.

A motion to dismiss is properly granted if the plaintiff “fail[ed] to state a claim upon which relief can be granted[.]” Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the plaintiff must allege facts that are sufficient “to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* The reviewing court must accept the factual allegations in the complaint “as true and construe the complaint in the light most favorable to the [p]laintiff[.]” *Hill v. Blue Cross & Blue Shield of Mich.*, 409 F.3d 710, 716 (6th Cir. 2005). “A Rule 12(c) motion ‘is granted when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law.’” *Jackson v. Prof'l Radiology Inc.*, 864 F.3d 463, 466 (6th Cir. 2017) (quoting *Paskvan v. City of Cleveland Civil Serv. Comm'n*, 946 F.2d 1233, 1235 (6th Cir. 1991)).

B. Qualified Immunity

Qualified immunity protects governmental officials from suit as long “as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A two-step inquiry applies. The first question is “whether the facts, when taken in the light most

favorable to the party asserting the injury, show the officer's conduct violated a constitutional right[.]” *Mullins v. Cyranek*, 805 F.3d 760, 765 (6th Cir. 2015). The court then asks whether the right was “clearly established” such “that a reasonable official would understand that what he is doing violates that right.” *Saucier v. Katz*, 533 U.S. 194, 201–02 (2001) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). District courts are “permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)

Although a defendant's “entitle[ment] to qualified immunity is a threshold question to be resolved at the earliest possible point, that point is usually summary judgment and not dismissal under Rule 12.” *Wesley v. Campbell*, 779 F.3d 421, 433–34 (6th Cir. 2015) (alteration in original) (quotation marks and citations omitted). “The reasoning for our general preference is straightforward: ‘Absent any factual development beyond the allegations in a complaint, a court cannot fairly tell whether a case is “obvious” or “squarely governed” by precedent, which prevents us from determining whether the facts of this case parallel a prior decision or not’ for purposes of determining whether a right is clearly established.” *Guertin v. State*, 912 F.3d 907, 917 (6th Cir. 2019) (quoting *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 428 F.3d 223, 235 (6th Cir. 2005) (Sutton, J., concurring)). Therefore, it is generally inappropriate for a district

court to grant a 12(c) motion based on qualified immunity. *Wesley*, 779 F.3d at 433; *see also Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016).

Although the factual record is currently undeveloped, Gannon nonetheless argues that he is entitled to qualified immunity because he did not violate a clearly established constitutional right under the Fourth or Fourteenth Amendments. We find his argument unpersuasive, especially at this stage of the litigation.

1. Constitutional Violation

With respect to the first qualified immunity prong, the question is whether “the plaintiff[s] version of the events, relied upon by the district court, supports a holding that defendants violated [the plaintiff’s] Fourth Amendment right to be free from excessive force.”³ *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008). The Fourth Amendment prohibits police from using excessive force while making an arrest or seizure. *Graham v. Connor*, 490 U.S. 386, 394–95 (1989). The use of deadly force is excessive and unreasonable unless there is probable cause to believe that the suspect poses an immediate threat to the officer or to others. *Tennessee v.*

³ Kilnapp pleads in the alternative, that if she fails to establish a constitutional violation under the Fourth Amendment, then a violation can be established under the Fourteenth Amendment. Because we find that Kilnapp meets the standards set forth by the Fourth Amendment, we need not evaluate her claim under the Fourteenth Amendment.

Garner, 471 U.S. 1, 11 (1985); *Graham*, 490 U.S. at 396. To determine whether such probable cause exists, we consider “the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Graham*, 490 U.S. at 396. Our precedent establishes that the question of whether a suspect posed an immediate danger is dispositive: where the suspect poses no immediate threat to the safety of an officer or others, the use of deadly force is unreasonable and violates the Fourth Amendment. *Foster v. Patrick*, 806 F.3d 883, 887 (6th Cir. 2015).

Kilnapp alleges that Gannon violated the Fourth Amendment when he shot his gun without looking, and “shot Kilnapp incorrectly believing she was Borden following him.” (Compl., R. 1, Page ID # 16). Gannon avers that qualified immunity bars Kilnapp’s claim because: (1) he did not seize Kilnapp as defined by the Fourth Amendment; and (2) his actions were reasonable given the circumstances. We find that Kilnapp has sufficiently alleged a Fourth Amendment violation.

i. Seizure

Gannon argues that because the firing of his gun was not intended to hit Kilnapp, and because Kilnapp was not subject to his intended seizure, a Fourth Amendment seizure of Kilnapp is not

established. This is an incorrect interpretation of the law.

“While it is not always clear just when minimal police interference becomes a seizure ... there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.” *Garner*, 471 U.S. at 7 (citing *United States v. Mendenhall*, 446 U.S. 544 (1980)). However, the force must be applied with an “intent to restrain, as opposed to force applied by accident or for some other purpose.” *Torres v. Madrid*, 141 S. Ct. 989, 991 (2021). Thus, “[t]he appropriate inquiry is whether the challenged conduct objectively manifests an intent to restrain.” *Id.* Importantly, and relevant in this case, “[a] seizure occurs even when an unintended person or thing is the object of the detention or taking, ... but the detention or taking itself must be willful.” *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596 (1989) (citations omitted). In *Brendlin v. California*, 551 U.S. 249 (2007), the Supreme Court reaffirmed this *Brower* finding that an unintended person may be seized so long as the seizure is not the result of “an unknowing act.” *Id.* at 254 (quoting *Brower*, 489 U.S. at 596); *see also Fisher v. City of Memphis*, 234 F.3d 312, 318 (6th Cir. 2000) (holding that a “violation of the Fourth Amendment requires an intentional acquisition of physical control [A] seizure occurs even when an unintended person or thing is the object of the detention or taking, so long as the detention or taking itself is willful.”); *Campbell v. Cheatham Cnty. Sheriff’s Dep’t*, 47 F.4th 468, 478 (6th Cir. 2022) (reasoning, through example, that

unintended targets are protected under the Fourth Amendment: “[w]e have explained that when an officer seizes one person by shooting at a car, ... the officer seizes everyone in the car, even if the officer is unaware of the presence of passengers.”).⁴

Kilnapp’s status as a police officer does not remove her from the protections of the Fourth Amendment; she qualifies as an unintended target. In this case, Gannon fired his gun intentionally to seize Borden. However, as a result of his actions, Gannon shot Kilnapp who was an unintended target. (*Id.*). If Kilnapp alleged that Gannon’s gun had fired by accident, then our analysis would differ. *Brower* holds that an unintentional action of an officer cannot be construed to be an intentional attempt to seize an individual. 498 U.S. at 597 (explaining that “[t]he pursuing police [stopping a car based on] his loss of control of his vehicle and the subsequent crash [does not establish intent to seize the individual in the car],” however, “[i]f, instead of that, the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the

⁴ Gannon quotes *Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000), which states that the “Fourth Amendment ‘reasonableness’ standard does not apply to section 1983 claims which seek remuneration for physical injuries inadvertently inflicted upon an innocent third party by police officers’ use of force while attempting to seize a perpetrator, because the authorities could not ‘seize’ any person other than one who was a deliberate object of their exertion of force.” We need not spend time distinguishing with *Claybrook*, as *Claybrook* precedes *Brendlin*. Supreme Court authority controls. See *Salmi v. Sec’y of Health & Hum. Servs.*, 774 F.2d 685, 689 (6th Cir. 1985).

termination of the suspect's freedom of movement would have been a seizure."). In this case, Kilnapp does not allege that Gannon accidentally shot his gun; based upon the allegations in Kilnapp's complaint, the shooting of the gun was intentional, the individual that fell into contact with the bullet was unintentional. As discussed above, an unintentional victim is protected under the Fourth Amendment. Accordingly, Kilnapp properly alleged seizure under the Fourth Amendment. To hold otherwise would ignore binding Supreme Court precedent.

ii. Reasonableness

Kilnapp alleges sufficient facts to establish that Gannon's behavior was objectively unreasonable.

When a plaintiff is "seized" by means of excessive force, the plaintiff must prove that, under the pertinent circumstances, the means used to detain her were objectively unreasonable. *Graham*, 490 U.S. at 395. Whether a seizure is objectively reasonable depends on the totality of the circumstances, including the severity of the crime, 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. *Ciminillo v. Streicher*, 434 F.3d 461, 467 (6th Cir. 2006). Particularly as it relates to a qualified immunity defense, "reasonableness must be judged from the perspective of a reasonable officer on the scene, not with the 20/20 vision of hindsight." *Id.*

Viewed in that light most favorable to Kilnapp, Gannon acted unreasonably by blindly deploying a firearm over his head when no suspect was in pursuit of him. Based on Kilnapp's allegations, Borden remained in the bathroom, while Gannon ran downstairs and deployed the first shots from his firearm. A factual dispute may exist as to the timing of when the weapons were used, as Borden also deployed his weapon during the incident; however, at this stage of litigation, the Court takes the facts as alleged in the complaint as true. Further, Kilnapp can be construed to serve as a proxy for a reasonable officer; she stood beside Gannon during the same incident, without firing her weapon or fleeing. Based on the record before us, at this early stage of litigation, and without the benefit of discovery, we conclude any reasonable officer would know it to be unacceptable to fire a gun blindly when no imminent threat is present. Moreover, a district court should not grant dispositive motions in excessive force cases where there are questions of fact whether someone objectively posed a serious threat of immediate harm. *See Jacobs v. Alam*, 915 F.3d 1028, 1041 (6th Cir. 2019) ("[B]ecause [the parties' disputes], do not raise a purely legal question about whether [the plaintiff's] version of the events supports a claim of violation of clearly established law, so too do we lack jurisdiction here). Accordingly, Kilnapp has sufficiently alleged facts to establish a Fourth Amendment violation.

2. Clearly Established Law

“A Government official’s conduct violates clearly established law when, at the time of the challenged conduct, ‘the contours of a right are sufficiently clear’ that every ‘reasonable official would have understood that what he is doing violates that right.’” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (cleaned up). “To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent.” *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). There does not need to be “a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.” *al-Kidd*, 563 U.S. at 741 (citing *Anderson*, 483 U.S. 635 at 640). But “there can be the rare ‘obvious case,’ where the unlawfulness of the officer’s conduct is sufficiently clear even though existing precedent does not address similar circumstances.” *Wesby*, 138 S. Ct. at 590 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam)).

In this case, there is no doubt that the law is clearly established. “[D]eadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment,” *Garner*, 471 U.S. at 7, and the individual injured need not be the intended target of the force to be seized, *Brendlin*, 551 U.S. at 254 (2007). Gannon applied deadly force with the intent to seize Borden. Kilnapp was shot instead. Although Kilnapp was not the intended target, she was still seized under the Fourth Amendment. Further,

viewed in that light most favorable to Kilnapp, Gannon acted unreasonably by blindly deploying a firearm over his head when no suspect posed a threat to him. The law is sufficiently clear, that in this case, based on the facts alleged in the complaint, “every reasonable official would have understood” that Gannon’s actions violated Kilnapp’s Fourth Amendment rights. *See al-Kidd*, 563 U.S. at 741 (quotation marks and citation omitted). Therefore, Gannon is not entitled to a judgment as a matter of law. Accordingly, this Court affirms the district court’s decision to allow Kilnapp’s excessive force claims against Gannon to proceed to discovery.

III. CONCLUSION

For the aforementioned reasons, the judgment of the district court is **AFFIRMED**.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-4059

JENNIFER KILNAPP, [Filed Jul 21, 2023]

Plaintiff v. Appellee,

CITY OF CLEVELAND, et al.,

Defendants,

BAILEY GANNON, in his official and personal
capacity, Defendant - Appellant.

Before: COLE, CLAY, and KETHLEDGE, Circuit
Judges.

JUDGMENT

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

THIS CAUSE was heard on the record from the
district court and was submitted on the briefs
without oral argument.

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

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**ENTERED BY ORDER OF
THE COURT**

[h/w signature]
Deborah S. Hunt, Clerk

APPENDIX D

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO EASTERN
DIVISION**

[FILED DEC. 9, 2022]

JENNIFER KILNAPP,	) CASE
	) NO. 1 22CV1225
	)
Plaintiff,	) SENIOR JUDGE
	) CHRISTOPHER A.
	) BOYKO
vs.	)
	)
	) OPINION AND
	) ORDER
	)
CITY OF	)
CLEVELAND, et al.,	)
	)
Defendants.)	)

CHRISTOPHER A. BOYKO, SR. J.:

This matter comes before the Court upon the Motion (ECF DKT #12) of Defendants City of Cleveland, Dornat Drummond and Bailey Gannon (in their official capacities) to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6) and the Motion (ECF DKT #15) of Defendant Bailey Gannon for Judgment on the Pleadings. For the following reasons, the City Defendants' Motion is granted in part and denied in part; Defendant Gannon's Motion is denied.

I. FACTUAL BACKGROUND

On July 20, 2020, Plaintiff Cleveland Police Officer Jennifer Kilnapp and her rookie partner, Defendant Bailey Gannon, responded to a call on the east side of Cleveland of an emotionally disturbed man with a gun on the second floor of a boarding house. When they arrived on the scene, Gannon went ahead to the second floor bathroom and Plaintiff took her position a few feet behind. Plaintiff alleges that Gannon did not knock and announce that they were police officers; did not try to de-escalate the situation; and did not call for backup. Instead, Gannon opened the door and saw a man with a gun. Plaintiff alleges that Gannon panicked and ran past her down the stairs. Further, Plaintiff alleges that Gannon pointed his gun over his head behind him and began shooting. A bullet struck Plaintiff. Plaintiff was rushed to the hospital by EMS and she underwent surgery. Nearly two years later, Plaintiff still has nerve damage, PTSD and is unable to return to duty.

According to the within Complaint (ECF DKT #1) filed on July 13, 2022, the Bureau of Criminal Investigations (“BCI”) and the Cleveland Police Department investigated and charged the man in the house, Daryl Borden, with Attempted Murder. Plaintiff alleges that Gannon told homicide detectives that when he opened the door, Borden was holding the gun with two hands pointing at the door. Plaintiff alleges that trajectory tracing and audio testing of Gannon’s body camera prove that Gannon shot first, not Borden. Subsequent ballistics,

Plaintiff says, show that Gannon shot her. Allegedly, the Cleveland Division of Police did not inform Plaintiff that Gannon shot her until the Spring of 2021. The Attempted Murder charges against Borden were dropped in June of 2021; but Borden was sentenced after a plea of guilty to Attempted Felonious Assault on a Peace Officer on July 1, 2021.

Plaintiff was suspended in March of 2021 for not turning on her body camera before entering the house. On the other hand, Gannon was not disciplined for his allegedly misleading description of the event nor for shooting his partner in flagrant violation of basic gun safety rules.

Plaintiff alleges that the force Gannon used was unreasonable and excessive, in violation of the Fourth Amendment. By shooting Plaintiff, Gannon seized her within the meaning of the Fourth Amendment. (*Id.* at ¶ 100). Plaintiff further alleges that Gannon intended to fire his weapon; he did not fire it accidentally. (*Id.* at ¶ 104).

Alternatively, Plaintiff alleges that Gannon used force against her maliciously and sadistically, in violation of the Fourteenth Amendment. By firing blindly at Plaintiff, Gannon's use of force was an arbitrary exercise of governmental power. (*Id.* at ¶ 115). Gannon's conduct shocks the conscience and reflects deliberate indifference towards Plaintiff's federally protected rights. (*Id.* at ¶ 120).

Moreover, Plaintiff alleges that Defendants' conduct reflects a policy or custom of the City of Cleveland and the Division of Police ("CDP"). CDP

and the City of Cleveland have a policy or custom of tolerating, permitting, encouraging, or engaging in excessive force in violation of the Constitution. This policy or custom is evidenced in part by: the failure to train officers; the lack of appropriate training for new recruits; and the failure to implement effective use-of-force policies, de-escalation guidelines and methods for intervention with individuals suffering from behavioral health crises. Such failures amount to deliberate indifference to the rights of persons with whom the police come into contact and to the rights of fellow officers. These policies or customs were closely related to, or actually caused Plaintiff's injuries. (*Id.* at ¶¶ 88-89). Plaintiff alleges that the Chief of Police ratified Gannon's shooting of Kilnapp by failing to discipline him for it or to further investigate. (*Id.* at ¶ 98).

Therefore, Plaintiff alleges that all Defendants are liable for violating her constitutional rights pursuant to 42 U.S.C. § 1983.

On September 16, 2022, Defendants City of Cleveland, Chief Drummond and Officer Gannon filed a Motion to Dismiss the Complaint in its entirety.

On September 22, 2022, Defendant Gannon filed a Motion for Judgment on the Pleadings based upon qualified and common law immunity.

II. LAW AND ANALYSIS

Fed.R.Civ.P. 12(b)(6) Standard of Review

“In reviewing a motion to dismiss, we construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.” *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). Factual allegations contained in a complaint must “raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). *Twombly* does not “require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. Dismissal is warranted if the complaint lacks an allegation as to a necessary element of the claim raised. *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485 (6th Cir. 1990).

The United States Supreme Court, in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), discussed *Twombly* and provided additional analysis of the motion to dismiss standard:

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-plead factual allegations a court should assume their veracity and then determine

whether they plausibly give rise to an entitlement to relief. *Id.* at 679.

When a court is presented with a Rule 12(b)(6) motion, it may consider the complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the complaint and are central to the claims contained therein. *See Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001).

Fed.R.Civ.P. 12(c) Standard of Review

After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. Fed.R.Civ.P. 12(c). In this jurisdiction, "[t]he standard of review for a judgment on the pleadings is the same as that for a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) ... We 'construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief.'" *Roger Miller Music, Inc. v. Sony/ATV Publishing, LLC*, 477 F.3d 383, 389 (6th Cir. 2007) (citations omitted). The pleading does not have to demonstrate probability; rather, "just enough factual information to create an expectation that discovery will uncover evidence supporting the claim." *Haber v. Rabin*, No. 1:16CV546, 2016 WL 3217869, at *3 (N.D. Ohio Jun.10, 2016), citing *Twombly*, 550 U.S. at 556.

The court's decision "rests primarily upon the allegations of the complaint;" however, "exhibits attached to the complaint [] also may be taken into account." *Barany-Snyder v Weiner*, 539 F.3d 327, 332 (6th Cir. 2008) (citation omitted) (brackets in the original).

The court need not accept as true legal conclusions or unwarranted factual inferences. *Lewis v. ACB Bus. Servs.*, 135 F.3d 389, 405 (6th Cir. 1998). The complaint must state a plausible claim for relief. "Plausibility is a context-specific inquiry, and the allegations in the complaint must 'permit the court to infer more than the mere possibility of misconduct,' namely, that the pleader has 'show[n]' entitlement to relief." *Center for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011). Dismissal is warranted if the complaint lacks an allegation as to a necessary element of the claim raised. *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485 (6th Cir. 1990).

Lastly, a Rule 12(c) motion "is granted when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *Paskvan v. City of Cleveland Civil Serv. Comm'n*, 946 F.2d 1233, 1235 (6th Cir. 1991).

42 U.S.C. § 1983

To sustain an action under 42 U.S.C. § 1983, a plaintiff must show that the conduct complained of was committed by a person acting under color of state law; and that the conduct deprived the plaintiff of a federal constitutional or statutory right. *See*

Haines v. Saginaw Police Dept., 35 F.3d 565 (6th Cir. 1994) (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978)). Deprivation of a plaintiff's rights, privileges, or immunities secured by the Constitution and federal laws is the threshold requirement of a Section 1983 action.

Plaintiff alleges a violation of her Fourth Amendment right to be free from unreasonable seizure and her Fourteenth Amendment right to substantive due process.

Fourth Amendment Violation

To establish a claim for unreasonable seizure, a plaintiff must show that a seizure actually occurred and that the seizure was unreasonable under the circumstances. *Brower v. County of Inyo*, 489 U.S. 593 (1989). “[V]iolation of the Fourth Amendment requires an intentional acquisition of physical control. As a result, a seizure occurs even when an unintended person or thing is the object of the detention or taking, so long as the detention or taking itself is willful.” *Id.* at 596. “[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). The act of firing a gun is intentional, even if the result is not the one anticipated. See, *Rodriguez v. Passinault*, 637 F.3d 675 (6th Cir. 2011). “Seizure” cannot be applied to an unknowing act. *Brower*, 489 U.S. at 596.

Fourteenth Amendment Violation

“Fundamentally, the substantive component of the due process clause insulates citizens against the arbitrary exercise of governmental power.” *Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000), citing *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). Conduct of a law enforcement officer towards a citizen which “shocks the conscience” denies the victim fundamental substantive due process. *Id.* at 847.

A. OFFICER BAILEY GANNON

Defendant Gannon moves for dismissal of Plaintiff’s claims as a matter of law pursuant to Fed.R.Civ.P. 12(c). (ECF DKT #15). He argues that he is shielded from suit by qualified immunity because Plaintiff fails to demonstrate a violation of her rights under the Fourth or Fourteenth Amendments for an unintentional injury that he may have caused. Moreover, any alleged constitutional violation was not clearly established. In addition, Defendant Gannon asserts immunity under the common-law Fireman’s Rule and the Fellow Servant Doctrine under Ohio’s Worker’s Compensation System.

To reiterate, Plaintiff alleges that Gannon did not announce that they were police officers; rather, he opened the bathroom door in the boarding house and saw a man with a gun. Plaintiff further alleges that Gannon panicked and ran past her down the stairs. Then, Gannon pointed his gun over his head behind him and began shooting. One of his bullets

struck Plaintiff. Gannon intended to fire his weapon; he fired first; and by shooting Plaintiff, he seized her within the meaning of the Fourth Amendment. Based upon those facts, Defendant Gannon's use of deadly force was unreasonable and excessive. Also, in violation of the Fourteenth Amendment, Gannon's conduct shocks the conscience and shows deliberate indifference towards Plaintiff's federally protected rights.

In his Answer (ECF DKT #14), Defendant Gannon admits that a bullet from his service weapon inadvertently struck his partner on or about July 20, 2020, but denies the remaining allegations of Paragraph 1 of the Complaint. (ECF DKT #14 at ¶ 1). In ¶ 2 of his Answer, Defendant admits that detectives and investigators conducted an examination of the scene; and that on July 1, 2021, the State dismissed five counts of the indictment in *State v. Borden*, Cuyahoga County Case No. CR-20-651870-A, after Darryl Borden pleaded guilty to attempted felonious assault (peace officer) 2923.02/2903.11 A(1) F2 with firearm specification(s). Defendant admits that he did not announce that he was a police officer outside of the bathroom door, and admits that Darryl Borden was standing in the bathroom holding a firearm when he opened the door. (ECF DKT #14 at ¶¶ 9-10).

The Court finds that Plaintiff has plausibly alleged violations by Defendant Gannon of her rights under the Fourth and Fourteenth Amendments. The Court also notes that the pleadings pose questions of fact as to whether Defendant fired first or in reaction

to shots coming from the armed man in the boarding house bathroom, and whether Defendant's actions were intentional or inadvertent.

Qualified immunity

The doctrine of qualified immunity is “available to government officials performing discretionary functions.” *Painter v. Robertson*, 185 F.3d 557, 566 (6th Cir. 1999). The doctrine provides “immunity from suit rather than a mere defense to liability.” *Saucier v. Katz*, 533 U.S.194, 200-201. A government official will be entitled to immunity from suit as long as his conduct does not violate “clearly established [federal] statutory or constitutional rights of which a reasonable person would have known.” *Painter*, 185 F.3d at 567.

“The test is whether, reading the complaint in the light most favorable to the plaintiff, it is plausible that an official's acts violated the plaintiff's clearly established constitutional right.” *Heyne v. Metro Nashville Pub. Sch.*, 655 F.3d 556, 562-63 (6th Cir. 2011).

The Sixth Circuit has recognized that while “insubstantial claims against government officials should be resolved as early in the litigation as possible, ... it is generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity.” *Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016). Moreover, the Sixth Circuit has held that although “an officer's entitlement to qualified immunity is a threshold question to be resolved at the earliest

possible point, that point is usually summary judgment and not dismissal under Rule 12.” *Wesley v. Campbell*, 779 F.3d 421, 433-434 (6th Cir. 2015).

Reading Plaintiff’s Complaint against Defendant Gannon most favorably, the Court holds that Plaintiff makes plausible claims that Defendant Gannon used excessive and unreasonable deadly force under the circumstances, and that Defendant Gannon could not have reasonably believed the use of deadly force was lawful.

Clearly, material issues of fact remain to be determined and foreclose resolution on a Fed.R.Civ.P. 12(c) motion, which the Court analyzes in the same manner as a Fed.R.Civ.P. 12(b)(6) motion. Defendant Gannon is not entitled to qualified immunity at this stage of the proceedings.

State-law immunities

Defendant Gannon argues that Plaintiff’s claims against him are barred by the common-law Fireman’s Rule and the Fellow Servant Doctrine under Ohio’s Worker Compensation statutes. This argument fails.

At the outset, the Court recognizes that like all individual police officers, Plaintiff retains her constitutional rights, which if violated by a state actor, can result in liability under § 1983. Police officers do not forfeit constitutional rights when they join the municipal police force. *See, e.g., Jensen v. City of Oxnard*, 145 F.3d 1078 (9th Cir.), *cert. denied*, 525 U.S. 1016 (1998).

Moreover, “any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.” *Felder v. Casey*, 487 U.S. 131, 138 (1988), quoting *Free v. Bland*, 369 U.S. 663, 666 (1962). “Accordingly, we have held that a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy, see *Martinez v. California*, 444 U.S. 277, 284, 100 S.Ct. 553, 558, 62 L.Ed.2d 481 (1980).” *Felder*, 487 U.S. at 139.

Defendant’s request for dismissal of the Complaint on the basis of common-law and state statutory immunities is denied.

The Court finds that material issues of fact exist; that qualified immunity and state law immunities do not foreclose the Complaint; and that Defendant Gannon is not entitled to judgment as a matter of law under Fed.R.Civ.P. 12(c).

B. CITY OF CLEVELAND DEFENDANTS

Official capacity claims

Defendants contend that Plaintiff’s claims against the individual Defendants, Dornat Drummond and Bailey Gannon, in their official capacities should be dismissed. The Court agrees.

Official capacity suits “represent only another way of pleading an action against an entity of which

an officer is an agent.” *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985), quoting *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55 (1978). “As long as the government entity receives notice and an opportunity to respond, an official capacity suit is, in all respects other than name, to be treated as a suit against the entity.” *Graham*, 473 U.S. at 166, citing *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985).

Thus, for example, a suit against a municipal employee in his official capacity is the equivalent of a suit against the public entity itself. *Shamaeizadeh v. Cunigan*, 338 F.3d 535, 556 (6th Cir. 2003).

Therefore, since Defendants Drummond and Gannon are employees of the City of Cleveland, and since the City has been named and served with notice of the suit, Plaintiff’s claims against the individual Defendants in their official capacity are dismissed as duplicative of claims against Defendant City of Cleveland.

Municipal liability

The City Defendants move for dismissal of Plaintiff’s Complaint in its entirety for failure to state a claim under Fed.R.Civ.P. 12(b)(6). (ECF DKT #12).

The cause of action created by § 1983 may be exercised only against a “person who ... causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws.” 42 U.S.C. § 1983. The Supreme Court has interpreted the word “person” broadly; and municipalities, are considered “persons” for purposes of § 1983 liability. *Monell*, 436 U.S. at 690.

Although “person” has been given a broad interpretation under § 1983, when the person is a municipality, liability attaches only under a narrow set of circumstances: “A municipality may not be held liable under § 1983 on a *respondeat superior* theory—in other words, ‘solely because it employs a tortfeasor.’” *D’Ambrosio v. Marino*, 747 F.3d 378, 388–89 (6th Cir. 2014) (quoting *Monell*, 436 U.S. at 691). Instead, a plaintiff must show that “through its deliberate conduct, the municipality was the ‘moving force’ behind the injury alleged.” *Alman v. Reed*, 703 F.3d 887, 903 (6th Cir. 2013) (quoting *Bd. of Cty. Comm’rs v. Brown*, 520 U.S. 397, 404 (1997)). A plaintiff may accomplish this by showing that the municipality had a “policy or custom” that caused the violation of his rights. *Monell*, 436 U.S. at 694.

There are four methods of showing the municipality had such a 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 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.” *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013) (citation omitted). (Emphasis added).

Defendants argue that Plaintiff's allegations are nothing more than "formulaic" and "conclusory." They contend that the Complaint does not discuss particular shortcomings of the City or the CDP nor how those shortcomings caused Gannon's "split second decision."

Plaintiff is not required to demonstrate every one of the four avenues to municipal liability under § 1983. In fact, Plaintiff need ultimately only prove one.

A reading of the Complaint shows that Plaintiff relies most heavily upon the City's policy of inadequate training and its custom of tolerance for federal rights violations.

As for tolerating and acquiescing in civil rights violations: "CDP took no disciplinary action against Gannon for misleading investigators, despite their determination that his version of events could not possibly be true." (ECF DKT #1 at ¶ 70). "CDP also chose not to discipline Gannon for shooting his partner by firing blindly over his head while running in the other direction, even though his actions flagrantly violated the most basic gun-safety rules." (*Id.* at ¶ 71). "In December 2014, the U.S. Department of Justice found that the Cleveland Division of Police had engaged in an ongoing pattern and practice of excessive force, as well a litany of other failures regarding training and implementation of constitutionally appropriate use-of-force and de-escalation policies and procedures." (*Id.* at ¶ 81). Moreover, Plaintiff alleges that these

deficiencies continued through July of 2020 when this incident occurred; and that the policies of the City were “closely related to or actually caused the injury.” (*Id.* at 89).

With regard to failure to train: “CDP and the City of Cleveland have a policy or custom of failing to adequately train officers—particularly new officers and recruits—in various relevant areas, including: the use of force; intervention with individuals suffering from behavioral health crises; de-escalation; and other officer-safety tactics. Such failures amount to deliberate indifference to the rights of persons with whom the police come into contact and the rights of fellow officers themselves.” (*Id.* at ¶ 96).

To repeat the 12(b)(6) standard: “In reviewing a motion to dismiss, we construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.” *Directv, Inc. v. Treesh*, 487 F.3d at 476. Specific facts are not necessary at this juncture; rather, Plaintiff is required to “give the defendant fair notice of what the ... claim is and the grounds upon which it rests.” See *Gunasekara v. Irwin*, 551 F.3d 461, 466 (6th Cir. 2009) (quoting in part, *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007)).

With the benefit of discovery, Plaintiff may be able to show that a custom or policy of tolerance exists, what its scope might be or how it resulted in a violation of her constitutional rights. Plaintiff may

“demonstrate that the inadequate training was the result of deliberate indifference by providing prior instances of unconstitutional conduct reflecting that the municipality ignored a history of abuse, and was on notice that the training in this particular area was deficient and likely to cause injury.” *Fisher v. Harden*, 398 F.3d 837, 849 (6th Cir. 2005). Plaintiff may additionally be able to “show that such a training failure has the “‘highly predictable consequence’ of constitutional violations of the sort Plaintiff suffered.” *Gregory v. City of Louisville*, 444 F.3d 725, 753 (6th Cir. 2006) (citation omitted).

However, Plaintiff does not bear this evidentiary burden now. Instead, Plaintiff’s Complaint must offer “just enough factual information to create an expectation that discovery will uncover evidence supporting the claim.” *Haber v. Rabin*, No. 1:16CV546, 2016 WL 3217869, at *3 (N.D. Ohio Jun.10, 2016), citing *Twombly*, 550 U.S. at 556.

The Court finds that Plaintiff’s Complaint alleges a plausible claim of municipal liability under 42 U.S.C. § 1983. The Motion of the City of Cleveland Defendants to Dismiss is denied in this regard.

III. CONCLUSION

For these reasons, the Motion (ECF DKT #12) of Defendants City of Cleveland, Dornat Drummond and Bailey Gannon (in their official capacities) to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6) is granted in part and denied in part; and the Motion (ECF

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DKT #15) of Defendant Bailey Gannon for Judgment on the Pleadings is denied.

IT IS SO ORDERED.

DATE: December 9, 2022

s/Christopher A. Boyko
CHRISTOPHER A. BOYKO
Senior United States District
Judge

APPENDIX E

Case No. 25-3149

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

ORDER

JENNIFER KILNAPP

Plaintiff — Appellee

v.

CITY OF CLEVELAND, OH

Defendant

and

BAILEY GANNON, in his official and personal
capacity

Defendant — Appellant

BEFORE: MOORE, BUSH and DAVIS, Circuit
Judges.

Upon consideration of the petition for rehearing
filed by the Appellee,

It is **ORDERED** that the petition for rehearing
is **DENIED**. Judge Bush adheres to original
disposition and his partial dissent.

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ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

Issued: March 09, 2026 [h/w signature]