Selected docket entries for case 13−5199

Generated: 12/04/2015 06:53:32

Filed	Document Description	Page	Docket Text
02/15/2013	1 Case Opening Letter	4	Civil Case Docketed. Notice filed by Appellant Mr. Chad Estes. Transcript needed: y. (RLJ)
02/15/2013			The case manager for this case is: Robin L. Johnson. (RLJ)
02/19/2013			Qualified immunity case − expedited for calendaring. (PM)
02/19/2013			Mediation Office is involved in this appeal. (CAW)
02/19/2013	6 mediation conference set	7	Mediation telephone conference has been scheduled for 03/18/2013 at 2:00 pm ET with Paul Calico. [Please open notice for important details and deadlines.] (CAW)
02/28/2013	7 appearance form	9	APPEARANCE filed for Appellee Terry Wynn by John W. Roberts. Certificate of Service: 02/28/2013. (JWR)
02/28/2013	8 appearance form of Ricks	10	APPEARANCE filed for Appellant Mr. Chad Estes by Teresa Reall Ricks. Certificate of Service: 02/28/2013. (TRR)
02/28/2013	9 civil appeal statement of parties and issues	11	CIVIL APPEAL STATEMENT OF PARTIES AND ISSUES filed by Attorney Mr. Teresa Reall Ricks for Appellant Mr. Chad Estes. Certificate of Service:02/28/2013. (TRR)
02/28/2013	10 corporate disclosure	12	CORPORATE DISCLOSURE STATEMENT filed by Attorney Mr. Teresa Reall Ricks for Appellant Mr. Chad Estes Certificate of Service: 02/28/2013. (TRR)
02/28/2013	11 transcript order	13	TRANSCRIPT ORDER FORM filed by Mr. Teresa Reall Ricks for Mr. Chad Estes; No hearings held in District Court. Certificate of Service: 02/28/2013. (TRR)
02/28/2013	14 Briefing Letter	14	BRIEFING LETTER SENT setting briefing schedule: appellant brief due 04/12/2013; appellee brief due 05/15/2013. (RLJ)
02/28/2013	15 appearance form	19	APPEARANCE filed for Appellee Terry Wynn by Michael B. Schwegler. Certificate of Service: 02/28/2013. (MBS)
02/28/2013	16 corporate disclosure	20	CORPORATE DISCLOSURE STATEMENT filed by Attorney Mr. Michael Byrne Schwegler for Appellee Terry Wynn Certificate of Service: 02/28/2013. (MBS)
03/19/2013	18 mediation conference set	22	A follow−up mediation telephone conference has been scheduled for 04/01/2013 at 9:30 am ET with Paul Calico. [Please open notice for important details and deadlines.] (CAW)
03/19/2013	19 mediator briefing letter sent	23	BRIEFING LETTER SENT by Mediation Office, resetting briefing schedule: appellant brief now due 04/19/2013. appellee brief now due 05/22/2013. (CAW)
04/02/2013			Mediation Office is no longer involved in this appeal. (LMR)
04/19/2013	21		APPELLANT BRIEF filed by Ms. Teresa Reall Ricks for Mr. Chad Estes. Certificate of Service:04/19/2013. Argument Request: requested. (TRR)

	21 Appellant brief	24	
	21 AntiCancer v. Berthold	92	
	21 Bozung v. Rawson	98	
	21 Cockrell v. Cincinnati	107	
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	21 Verge v. Murfreesboro	132	
	21 Wright v. Chattanooga	139	
	21 Wysong v. Heath	149	
05/22/2013	22 appellee brief	158	APPELLEE BRIEF filed by Mr. Michael Byrne Schwegler for Terry Wynn. Certificate of Service:05/22/2013. Argument Request: requested. (MBS)
06/07/2013	25 reply brief	213	REPLY BRIEF filed by Attorney Ms. Teresa Reall Ricks for Appellant Mr. Chad Estes. Certificate of Service:06/07/2013. (TRR)
06/12/2013			Update fee status change to paid − 02/19/2013 RE 175 RECEIPT #34675025294 in the amount of $455.00 (RLJ)
08/14/2013	31 Oral Argument Notice	237	Oral argument date set for 9:00 AM Friday, October 4, 2013. Notice of argument sent to counsel on 08/14/2013. (DTS)
08/20/2013	32 argument acknowledgement	239	Oral argument acknowledgement filed by Attorney Ms. Teresa Reall Ricks for Appellant Mr. Chad Estes. Certificate of Service: 08/20/2013. (TRR)
08/28/2013	34 argument acknowledgement	240	Oral argument acknowledgement filed by Attorney Mr. Michael Byrne Schwegler for Appellee Terry Wynn. Certificate of Service: 08/28/2013. (MBS)
08/28/2013	35 argument acknowledgement	241	Oral argument acknowledgement filed by Attorney Mr. John William Roberts for Appellee Terry Wynn. Certificate of Service: 08/28/2013. (JWR)
09/24/2013	40 appearance form	242	APPEARANCE filed for Appellant Mr. Chad Estes by John E. Carter. Certificate of Service: 09/24/2013. (JEC)
09/25/2013	42 argument acknowledgement	243	Oral argument acknowledgement filed by Attorney Mr. John Engelhardt Carter for Appellant Mr. Chad Estes. Certificate of Service: 09/25/2013. (JEC)
10/04/2013			CAUSE ARGUED by Mr. John Engelhardt Carter for Appellant Mr. Chad Estes and Mr. Michael Byrne Schwegler for Appellee Terry Wynn before Rogers,Circuit Judge; Griffin,Circuit Judge and Donald,Circuit Judge. (LAG)
11/04/2013	51		OPINION filed : AFFIRMED, decision not for publication. John M. Rogers (Authoring), Richard Allen Griffin, and Bernice Bouie Donald, Circuit Judges. (RLJ)
	51 Cover Letter	244	
	51 corrected opinion	245	
11/05/2013	52		OPINION CORRECTION LETTER sent indicating revisions to unpublished opinion filed November 4, 2013. Word on page 3 paragraph 3 first sentence second word was changed from "undisputed" to "alleged". (RLJ)
	52 Opinion Correction Letter	249	

	52 opinion correction letter sent	250	
11/27/2013	57 Mandate Letter	254	MANDATE ISSUED with no costs taxed. (RLJ)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: February 15, 2013

Mr. Teresa Reall Ricks
Farrar & Bates
211 Seventh Avenue, N., Suite 500
Nashville, TN 37219

Mr. John William Roberts
Roberts & Werner
1105 Sixteenth Avenue, S., Suite D
Nashville, TN 37212

Mr. Michael Byrne Schwegler
Law Office
P.O. Box 159264
Nashville, TN 37215

Re: Case No. 13-5199, *Terry Wynn v. Chad Estes*
Originating Case No. : 1:11-cv-00025

Dear Counsel:

This appeal has been docketed as case number **13-5199** with the caption that is enclosed on a separate page. The appellate case number and caption must appear on all filings submitted to the Court. **The filing fee must also be paid to the district court immediately** if it was not paid when the notice of appeal was filed.

Before preparing any documents to be filed, counsel are strongly encouraged to read the Sixth Circuit Rules at www.ca6.uscourts.gov. If you have not established a PACER account and registered with this court as an ECF filer, you should do so immediately. Your password for district court filings will not work in the appellate ECF system.

At this stage of the appeal, the following forms should be downloaded from the web site and filed with the Clerk's office by **March 1, 2013**.

Appellant: Appearance of Counsel
Civil Appeal Statement of Parties & Issues
Transcript Order
Disclosure of Corporate Affiliations
Application for Admission to 6th Circuit Bar (if applicable)

Appellee: Appearance of Counsel
Disclosure of Corporate Affiliations
Application for Admission to 6th Circuit Bar (if applicable)

More specific instructions are printed on each form. If appellant's initial forms are not timely filed, the appeal will be dismissed for want of prosecution. If you have questions after reviewing the forms and the rules, please contact the Clerk's office for assistance.

Sincerely yours,

s/Robin L. Johnson
Case Manager
Direct Dial No. 513-564-7039

Enclosure

OFFICIAL COURT OF APPEALS CAPTION FOR 13-5199

TERRY WYNN

Plaintiff - Appellee

v.

CHAD ESTES, Officer,
in his individual and official capacities

Defendant - Appellant

OFFICE OF THE CIRCUIT MEDIATORS
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
331 POTTER STEWART U.S. COURTHOUSE
100 EAST FIFTH STREET
CINCINNATI, OHIO 45202-3988
CA06-MEDIATION@CA6.USCOURTS.GOV

PAUL B. CALICO
Chief Circuit Mediator
DEBORAH N. GINOCCHIO
RODERICK M. MCFAULL
MARIANN YEVIN

TELEPHONE (513) 564-7330
FAX (513) 564-7349

February 19, 2013

John William Roberts, Esq.
Michael Byrne Schwegler, Esq.
Teresa Reall Ricks, Esq.

Re: *Terry Wynn v. Chad Estes*, CA No. 13-5199

MEDICATION CONFERENCE NOTICE

Dear Counsel:

DATE AND TIME

Pursuant to Federal Rule of Appellate Procedure 33 and Sixth Circuit Rule 33, a **TELEPHONE** mediation conference has been scheduled in this case for **MARCH 18, 2013** at **2:00** p.m. **EASTERN TIME**. The Court will place the calls to the number provided in the Mediation Background Information Form, which you are required to submit by March 11, 2013 (see additional information regarding Mediation Background Information Forms below.) **Please note that the use of cell phones is not permitted**. You should allow at least ninety minutes for the conference.

PURPOSES

There are several purposes for mediation conferences. One is to prevent unnecessary motions or delay by addressing any **procedural issues** relating to the appeal. A second is to identify and clarify the main **substantive issues** presented on appeal. The third and primary purpose is to explore possibilities for **settlement**. We will discuss in considerable detail the parties' interests and possible bases for resolving the case. You should be prepared to address all of these matters. Your attention is also directed to the document entitled *About Mediation Conferences*, which is available on the Court's website at www.ca6.uscourts.gov under the heading Mediation Office. It provides more detailed information about mediation conferences in the Sixth Circuit.

PARTICIPATION BY COUNSEL

The attorneys identified above have been tentatively identified as those having primary authority on behalf of their respective clients in this case. Our goal, however, is to secure the participation of the lawyers on whose advice the clients will most directly rely in making decisions about settlement. **If more than one attorney is involved, the attorney with the most direct relationship with the client is required to participate in the conference and should be listed as Lead Mediation Counsel on the Mediation Background Form**. All attorneys who will participate in the conference must be listed on the Form, along with their contact information.

CLIENT PARTICIPATION

Attendance/participation by clients in the initial mediation conference is not mandatory but is welcome. The decision regarding client participation in the initial conference is left up to counsel, but the

best practice is to involve clients unless 1) their participation will not enhance the chances of settlement, and/or 2) counsel are fully authorized to exercise judgment on the client's behalf with respect to any and all settlement proposals generated. Even if clients do not participate directly in the conference, it may be advisable to have them available by telephone.

If your client will participate in the conference from a separate telephone, please list their contact number on the Mediation Background Information Form.

CONVERSION TO IN-PERSON CONFERENCES

Initial conferences typically are conducted by telephone (unless all counsel reside within 50 miles of Cincinnati) for the convenience of litigants and counsel. Our experience, however, is that in-person conferences can be more productive. **If you think an in-person mediation would enhance the likelihood of settlement** and you are willing to travel to Cincinnati for the conference, **please call the undersigned mediator**. If the other parties agree, the mediation will be changed to an in-person conference. The date of the mediation can be changed if necessary.

RESCHEDULING

If the date and time of the mediation conference present an unavoidable conflict with a previously scheduled court appearance or commitment, you are required to contact the Mediation Administrator, Teresa Mack, by **FEBRUARY 22, 2013** to advise of the conflict and to request that the mediation conference be rescheduled. When we are notified of such conflicts in a timely manner, we will provide you with alternative dates and times. You are then responsible for contacting opposing counsel to confirm his or her availability and advising this office of the agreed date and time. We will then send a revised notice.

If you do not contact this office by February 22, 2013, we may be unable to accommodate requests for rescheduling. While we make every reasonable effort to accommodate timely requests for rescheduling, untimely requests can adversely affect this office and the Court, and alternative dates and times are usually quite limited. If alternative dates and times are still available, you are responsible for contacting opposing counsel to confirm his or her availability and advising this office of the agreed date and time. Until a new date is confirmed, however, the mediation will go forward as originally scheduled.

MEDIATION BACKGROUND INFORMATION FORM

All parties are required to submit a Mediation Background Information Form by **MARCH 11, 2013**, which can be downloaded from the Court's website. **Please submit the Form directly to the Mediation Office electronically, by fax or by mail. Do NOT file or otherwise disclose it to the Court.** Providing all of the requested information and submitting the Form in a timely manner is essential to maximizing the likelihood of success in mediation. Except to the extent authorized by counsel, information in the Form will be held confidential and will not be shared with other parties or their counsel.

Thank you for your careful attention to these matters.

Sincerely,
/s/
Paul B. Calico

caw
cc: Robin L. Johnson, Case Manager

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Appearance of Counsel

Sixth Circuit
Case No.: 13-5199

Case Name: Terry Wynn vs. Chad Estes

Client's or
Clients' Name(s): (List all clients on this form, do not file a separate appearance form for each client.)

Terry Wynn

☐ Appellant ☐ Petitioner ☐ Amicus Curiae ☐ Criminal Justice Act (Appointed)
☑ Appellee ☐ Respondent ☐ Intervenor

Lead counsel must be designated if a party is represented by more than one attorney or law firm. Check if you are lead counsel. ☑

Name: John W. Roberts Admitted: 2010
(Sixth Circuit admission date only)

Signature: John W. Roberts

Firm Name: Roberts Law Group

Business Address: 1720 West End Avenue

Suite: 402 City/State/Zip: Nashville, TN 37203

Telephone Number (Area Code): 615-242-1001

Email Address: jroberts@robertswicker.com

CERTIFICATE OF SERVICE

I certify that on Feb. 28, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ John W. Roberts

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Appearance of Counsel

Sixth Circuit
Case No.: 13-5199

Case Name: Terry Wynn vs. Chad Estes

Client's or
Clients' Name(s): (List all clients on this form, do not file a separate appearance form for each client.)

Chad Estes

☑ Appellant ☐ Petitioner ☐ Amicus Curiae ☐ Criminal Justice Act (Appointed)
☐ Appellee ☐ Respondent ☐ Intervenor

Lead counsel must be designated if a party is represented by more than one attorney or law firm. Check if you are lead counsel. ☑

Name: Teresa Reall Ricks Admitted: January 31, 1994
(Sixth Circuit admission date only)

Signature:

Firm Name: Farrar & Bates, LLP

Business Address: 211 7th Ave. North

Suite: 500 City/State/Zip: Nashville, TN 37219

Telephone Number (Area Code): (615) 254-3060

Email Address: terri.ricks@farrar-bates.com

CERTIFICATE OF SERVICE

I certify that on February 28, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Teresa Reall Ricks

6ca-68
6/12

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CIVIL APPEAL STATEMENT OF PARTIES AND ISSUES

Case No: 13-5199

Case Name: Terry Wynn v. Chad Estes

Is this case a cross appeal? ☐ Yes ☑ No
Has this case or a related one been before this court previously? ☐ Yes ☑ No
If yes, state:
Case Name: _____ Citation: _____
Was that case mediated through the court's program? ☑ Yes ☐ No

Please Identify the Parties Against Whom this Appeal is Being Taken and the Specific Issues You Propose to Raise:

Appellee: Terry Wynn

Statement of Issues:

Whether the Trial Court erred in determining that Chad Estes was not entitled to qualified immunity for plaintiff's 42 U.S.C. §1983 claims of false arrest and excessive force under the Fourth Amendment to the United States Constitution.

This is to certify that a copy of this statement was served on opposing counsel of record this 28th day of February, 2013.

Teresa Reall Ricks
Name of Counsel for Appellant

6CA-53
Rev. 6/08

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-5199 Case Name: Wynn v. Estes

Name of counsel: Teresa Reall Ricks

Pursuant to 6th Cir. R. 26.1, Chad Estes
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on February 28, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Teresa Reall Ricks
Farrar & Bates 211 7th Ave N Ste. 500
Nashville, TN 37219 (615) 254-3060

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

READ INSTRUCTIONS ON THE NEXT PAGE

TRANSCRIPT ORDER

List on this form all transcript you are ordering from one court reporter.
Use a separate form for each reporter and docket each form separately in the Sixth Circuit ECF database.

District Court Middle District for TN at Nashville District Court Docket Number 1:11-cv-00025

Short Case Title Wynn v. Estes

Date Notice of Appeal Filed by Clerk of District Court 02/13/2013 COA# 13-5199

PART 1 (TO BE COMPLETED BY PARTY ORDERING TRANSCRIPT, THE FORM MUST BE SIGNED WHETHER OR NOT TRANSCRIPT IS ORDERED).

A. Complete one of the following:

- [x] No Hearings
- [ ] Transcript is unnecessary for appeal purposes
- [ ] Transcript is already on the file in District Court Clerk's Office
- [ ] This is to order a transcript of the following proceedings: (*specify exact dates of proceedings*)

	JUDGE MAGISTRATE	HEARING DATE(S)	COURT REPORTER
Pre-trial proceedings			
Testimony (specify witnesses)			
Other (specify)			

TRANSCRIPT OF THE FOLLOWING PROCEEDINGS WILL BE PROVIDED ONLY IF SPECIALLY AUTHORIZED. SEE ITEM 13 CJA FORM 24

- [ ] Voir Dire
- [ ] Jury Instructions
- [ ] Opening statement of plaintiff
- [ ] Closing argument of plaintiff
- [ ] Opening statement of defendant
- [ ] Closing argument of defendant

FAILURE TO SPECIFY IN ADEQUATE DETAIL THOSE PROCEEDINGS TO BE TRANSCRIBED, OR FAILURE TO MAKE PROMPT SATISFACTORY FINANCIAL ARRANGEMENTS FOR TRANSCRIPT, ARE GROUNDS FOR DISMISSAL OF THE APPEAL.

B. This is to certify that satisfactory financial arrangements have been completed with the court reporter for payment of the cost of the transcript.
This method of payment will be:

- [ ] Criminal Justice Act (Attach copy of CJA Form 24)
- [ ] Private Funds

Date: 2/28/13

Signature [signature] Print Name Teresa Reall Ricks Counsel for Chad Estes

Address Farrar & Bates, LLP 211 7th Ave. N., #500, Nashville TN 37219 Telephone (615) 254-3060

ALLOWANCE BY THE COURT OF LEAVE TO PROCEED IN FORMA PAUPERIS IN A CIVIL APPEAL DOES NOT ENTITLE THE LITIGANT TO HAVE TRANSCRIPT AT GOVERNMENT EXPENSE.

PART II. COURT REPORTER ACKNOWLEDGMENT (To be completed by the Court Reporter and forwarded to the Court of Appeals within 10 days after receipt).

Date transcript order received	Estimated completion date; if not within 45 days of the date financial arrangements made, motion for extension to be made to Court of Appeals	Estimated number of pages

Arrangements for payment were made on
Arrangements for payment have not been made pursuant to FRAP (10(b))

Date _____ Signature of Court Reporter _____ Telephone _____

PART III. NOTIFICATION THAT TRANSCRIPT HAS BEEN FILED IN THE DISTRICT COURT (To be completed by Court Reporter on date of filing transcript in District Court and notification must be forwarded to Court of Appeals on the same date).

This is to certify that the transcript has been completed and filed with the District Court today.

Actual Number of Pages Actual Number of Volumes

Date Signature of Court Reporter

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: February 28, 2013

Ms. Teresa Reall Ricks
Farrar & Bates
211 Seventh Avenue, N., Suite 500
Nashville, TN 37219

Mr. John William Roberts
Roberts & Werner
1105 Sixteenth Avenue, S., Suite D
Nashville, TN 37212

Re: Case No. 13-5199, *Terry Wynn v. Chad Estes*
Originating Case No. : 1:11-cv-00025

Dear Counsel:

The briefing schedule for this case is listed below. The briefs must be filed electronically with the Clerk's office no later than these dates. If the appellant's principal brief is filed late, the case is at risk of being dismissed for want of prosecution.

Citations in your brief to the lower court record must include (i) a **brief** description of the document, (ii) the record entry number and (iii) the "**Page ID** #" for the relevant pages. Consult 6 Cir. R. 28(a)(1) for additional information.

Appellant's Principal Brief Appendix (if required by 6th Cir. R. 30(a) and (c))	Filed electronically by **April 12, 2013**
Appellee's Principal Brief Appendix (if required by 6th Cir. R. 30(a) and (c))	Filed electronically by **May 15, 2013**
Appellant's Reply Brief (Optional Brief)	Filed electronically **17** days after the appellee's brief is filed. See Fed. R. App. P. 26(c)

For most appeals, the Court will access directly the electronic record in the district court. However, to determine if this appeal requires an appendix and how to prepare it, read the latest version of the Sixth Circuit Rules at www.ca6.uscourts.gov, in particular Rules 28 and 30.

A party desiring oral argument must include a statement in the brief setting forth the reason(s) why oral argument should be heard. *See* 6 Cir. R. 34(a). If the docket entry for your brief indicates that you have requested oral argument but the statement itself is missing, you will be directed to file a corrected brief.

In scheduling appeals for oral argument, the court will do what it can to avoid any dates which counsel have called to its attention as presenting a conflict. If you have any such dates, you should address a letter to the Clerk advising of the conflicted dates.

Sincerely yours,

s/Robin L. Johnson
Case Manager
Direct Dial No. 513-564-7039

Enclosure

CHECKLIST FOR BRIEFS

ECF FUNDAMENTALS:

___ Briefs filed ECF unless filer is pro se or attorney with a waiver for ECF filings

___ PDF format required

___ Native PDF format strongly preferred

___ In consolidated cases (excluding cross-appeals), appellants should **un-check** the case number(s) that is/are not their case. The appellant's brief should appear only on the docket of his/her specific appeal.

___ Parties who have joined in a notice of appeal shall file a single brief. Fed. R. App. P. 3(b)(1)

COVER OF BRIEF (Fed. R. App. P. 32(a)(2)):

___ Sixth Circuit case number

___ Heading: "United States Court of Appeals for the Sixth Circuit"

___ Title of case

___ Nature of proceeding and name of court, agency or board below

___ Title of brief (example "Appellant's Brief")

___ Name(s) and address(es) of counsel filing the brief

CONTENTS (Fed. R. App. P. 28, 6 Cir. R. 28):

___ Corporate Disclosure Form

___ Table of Contents

___ Table of Authorities with page references (with cases alphabetically arranged, statutes and other authorities)

___ **Statement in support of oral argument** (if there is no statement, argument is waived)

***Page limitation, word or line count begins here. See Fed. R. App. P. 32(a)(7)

___ Jurisdictional statement

___ Statement of issues

___ Statement of the case

___ Statement of facts **with references to record** (and appendix for any relevant pleadings not available ECF)

In an appeal from district court, briefs must cite to Page ID # range from header or footer of pages from original record being referenced, with short title and record entry number. Keep references **succinct**. For other appeals, see 6 Cir. R. 28 for information on how to reference appendices or administrative records. Examples:

Motion for Summary Judgment, RE 24, Page ID # 120-145
Transcript, RE 53, Page ID # 675-682
Plea Agreement, R. 44, Page ID # 220-225
A.R., RE 5, Page ID # 190-191, pp. 69-70

___ Summary of argument

___ Argument **with references to record and citations to case law, statutes and other authorities**

___ Standard of review (for each issue which may appear in discussion of each issue or under separate heading placed before discussion of issues)

___ Signed conclusion
Signature format is: s/(attorney's name)
Graphic or other electronic signatures discouraged
***Page limitation, word or line count ends here.

___ A Certificate of Compliance as required by Fed. R. App. P. 32(a)(7)(C)

___ Dated Certificate of Service

___ **Designation of Relevant District Court Documents with Page ID # range**

___ Other Addendum contents allowed by Fed. R. App. P. 28(f) or 6 Cir. R. 28(b). Addendum may **not** contain any items from lower court record or appendix

TYPEFACE AND LENGTH (See Fed. R. App. 32(a)(5) and (a)(7):

___ Typeface either proportionally-spaced font at 14 point (such as CG Times or Times New Roman) or monospaced font at 12 point (such as Courier New).

Times New Roman at 14 point `Courier New at 12 point`

___ Length for principal briefs: 30 pages OR up to 14,000 words (proportional fonts) OR up to 1300 lines (monospaced font)

___ Length for reply brief: 15 pages OR up to 7,000 words (proportional fonts) OR up to 650 lines (monospaced font)

___ Briefs using the 14,000 word or 1300 line limits must include word or line count in certificate of compliance (see Fed. R. App. P. 32(a)(7)(C))

___ Headings, footnote and quotations count toward word or line limitations

___ For Death Penalty briefs, see 6 Cir. R. 32(b)(2)

___ For Cross-Appeals, see Fed. R. App. P. 28.1

___ For Amicus briefs, see Fed. R. App. P. 29 and 32

MISCELLANEOUS:

___ Personal information must be redacted from the brief - see Fed. R. App. P. 25(a)(5) for specifics. When filing a brief, the ECF system will require attorneys to verify that personal information has been redacted.

___ Footnotes must be same sized text as body of brief

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Appearance of Counsel

Sixth Circuit Case No.: 13-5199

Case Name: Terry Wynn vs. Chad Estes

Client's or Clients' Name(s): (List all clients on this form, do not file a separate appearance form for each client.)

Terry Wynn, M.D.

☐ Appellant ☒ Appellee ☐ Petitioner ☐ Respondent ☐ Amicus Curiae ☐ Intervenor ☐ Criminal Justice Act (Appointed)

Lead counsel must be designated if a party is represented by more than one attorney or law firm. Check if you are lead counsel. ☐

Name: Michael B. Schwegler Admitted: 07/24/2006
(Sixth Circuit admission date only)

Signature:

Firm Name: Ernest B. Willians III, PLLC

Business Address: P.O. Box 159264

Suite: _____ City/State/Zip: Nashville, TN 37215

Telephone Number (Area Code): 615-372-0993

Email Address: mikeschwegler@ewivlaw.com

CERTIFICATE OF SERVICE

I certify that on MBS February 28 March 1, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/

6ca-68
6/12

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit Case Number: 13-5199 Case Name: Wynn v. Estes

Name of counsel: Michael B. Schwegler

Pursuant to 6th Cir. R. 26.1, Terry Wynn, M.D.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on ~~March 1, 2013~~ MBS February 28, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6CA-1
8/08

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

OFFICE OF THE CIRCUIT MEDIATORS
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
331 POTTER STEWART U.S. COURTHOUSE
100 EAST FIFTH STREET
CINCINNATI, OHIO 45202-3988
CA06-MEDIATION@CA6.USCOURTS.GOV

PAUL B. CALICO
Chief Circuit Mediator
DEBORAH N. GINOCCHIO
RODERICK M. MCFAULL
MARIANN YEVIN

TELEPHONE (513) 564-7330
FAX (513) 564-7349

March 19, 2013

John William Roberts, Esq.
Michael Byrne Schwegler, Esq.
Teresa Reall Ricks, Esq.

Re: *Terry Wynn v. Chad Estes*, CA No. 13-5199

MEDIATION CONFERENCE NOTICE
FOLLOW-UP

Dear Counsel:

Pursuant to Rule 33 of the local Rules of the Sixth Circuit, this will confirm that a follow-up **TELEPHONE** mediation conference has been scheduled for **APRIL 1, 2013** at **9:30 AM** **EASTERN TIME**.

Sincerely,

Paul B. Calico

/s/

by: Teresa R. Mack
Mediation Administrator

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Re: *Terry Wynn v. Chad Estes*, CA No. 13-5199

Dear Counsel:

Pursuant to Rule 33, Rules of the Sixth Circuit, the briefing schedule for this/these appeal(s) has been extended by **Seven (7)** days. The briefs must be filed electronically with the Clerk's Office no later than these dates. The modified schedule is as follows:

Appellant's Brief Appendix (if required by 6th Cir. R. 30(a))	Filed electronically by **APRIL 19, 2013**
Appellee's Brief Appendix (if required by 6th Cir. R. 30(a) and (c)(2))	Filed electronically by **MAY 22, 2013**
Appellant's Reply Brief (Optional Brief)	Filed electronically **seventeen** days after the Appellee brief

For more detailed information concerning the filing of electronic briefs, please refer to your initial briefing letter sent to you from the Clerk's Office.

The Federal Rules of Appellate Procedure, Sixth Circuit Rules, and relevant checklists are available at www.ca6.uscourts.gov. If you still have questions after reviewing the information on the web site, please contact the Clerk's Office before you file your briefs.

Sincerely,

/s/

Paul B. Calico

caw
cc: Robin L. Johnson, Case Manager

CASE NO. 13-5199

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TERRY WYNN

Plaintiff — Appellee

v.

CHAD ESTES

Defendant — Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

BRIEF OF APPELLANT

Teresa Reall Ricks
FARRAR & BATES, L.L.P.
211 Seventh Avenue, N., Suite 500
Nashville, TN 37219
(615) 254-3060
Attorney for Appellant Chad Estes

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Basis for district court's subject-matter jurisdiction:

As this is an action by Plaintiff for damages under 42 U.S.C. §1983, the district court had jurisdiction under 28 U.S.C. §§1331 and 1343.

Basis for court of appeals' jurisdiction:

This Court has jurisdiction under 28 U.S.C. §1291.

Filing dates establishing the timeliness of appeal:

The district court entered its order denying Defendant Estes qualified immunity on February 11, 2013. (Order, RE 171, PageID# 1849–1850.) The notice of appeal was filed February 13, 2013. (Notice of appeal, RE 173, PageID# 1854.)

Assertion regarding finality of order or judgment:

The district court's order denying qualified immunity for Defendant is an immediately appealable "final decision" under Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985).

STATEMENT OF THE ISSUE

1. Whether the trial court erred in determining that Chad Estes was not entitled to qualified immunity for Plaintiff's 42 U.S.C. §1983 claims of false arrest and excessive force under the Fourth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Plaintiff Terry Wynn filed suit on April 21, 2011, against the City of Pulaski, Tennessee, the police chief, and various named and unnamed officers of the City police department. She alleges causes of action under 42 U.S.C. §1983 and the Tennessee Governmental Tort Liability Act arising from an incident on May 5, 2010, when Wynn was pulled over for a speeding offense. She drove off from the traffic stop before it was concluded, resulting in her pursuit and arrest by Defendant Chad Estes, an officer of the City police department.

In his memorandum opinion ruling on the various Defendants' dispositive motions, the district court dismissed the majority of Plaintiff's claims. The only remaining Defendant is Officer Estes. The only remaining causes of action are (i) §1983 claims for arrest without probable cause and for excessive use of force in forcing the Plaintiff against a car to apply handcuffs and (ii) the related state law claims of battery and false imprisonment.

As the uncontested facts in this case make clear, however, Officer Estes is entitled to qualified immunity for the claims brought under 42 U.S.C. §1983 and to "good faith" immunity for the corresponding state law claims. Accordingly, the part of the district court's ruling denying Officer Estes immunity should be reversed, and all claims against Estes should be dismissed.

STATEMENT OF THE FACTS

Plaintiff Terry Wynn is a medical doctor whose specialty is obstetrics/gynecology and who at all times relevant to this action worked as an on-call physician for Hillside Hospital in Pulaski, Tennessee, and maintained a private practice known as Wynn Gynecology and Obstetrics in a separate building next to the hospital. (Wynn Dep., RE 63-1, PageID# 736–737, pp. 37:5–13, 39:11–25.) At the time of this incident, Wynn had lived in the area for approximately nine months, having recently moved from Detroit, Michigan, in July/August 2009. (Id., PageID# 738, p. 32:13–23.)

In Wynn's capacity as the on-call OB/GYN, she received a call at her home on May 5, 2010, from a nurse at Hillside Hospital "just prior to 9:00 p.m." advising her a patient admitted to the hospital the previous day and examined by Wynn several times earlier that same day was ready to deliver. Wynn then left her home, got into her car, and began driving to the hospital, about a 15-minute drive away. (Wynn Dep. Ex. 3, RE 63-2, PageID# 819, p. 6:13–23.) Wynn's car lacked any decal, tag, or other indicator that Wynn was a physician or was affiliated with Hillside Hospital; the car still had a Michigan license plate; and though Wynn had been residing in Tennessee for longer than 30 days, she had not yet obtained a Tennessee driver's license or Tennessee tags. (Wynn Dep., RE 63-1, PageID# 749, 753, 813, 816, pp. 153:2–19, 160:8–12, 376:20–23, 473:5–13.)

Defendant Estes, who was on-duty at the time, was driving in the opposite direction on a street in downtown Pulaski. He clocked Wynn's vehicle with his radar gun, which runs continuously, at 16 mph over the speed limit—specifically, 46 mph in a 30–mph zone. (Estes Dep., RE 64-1, PageID# 836, p. 25:2–19.) Wynn admits she cannot dispute this, stating, "I never looked at my speedometer, to be honest with you." (Wynn Dep., RE 63-1, Page # 750–51, pp. 157:8–9, 158:18–19.) Officer Estes turned his vehicle around and initiated a traffic stop, first activating his blue lights, and then when Wynn did not pull over, his siren. (Estes Dep., RE 64-1, PageID# 837–38, 878, pp. 28:22–23, 30:3–8; 167:7–18.) Officer Estes notified dispatch he was stopping a vehicle with a Michigan tag; the time was 9:21 pm. (Estes Dep. Ex. 16, RE 64-2, PageID# 885, p. 1.)

As Estes walked towards Wynn's vehicle once she pulled over, he noticed from the rear tail lights that she had not placed the vehicle in park and that the driver (he did not know who she was) was very agitated and was waving her hand out the window, so he approached somewhat cautiously, in keeping with his training. (Wynn Dep. Ex. 3, RE 63-2, PageID# 819, p. 7:19–21; Allen Expert Report, RE 71-1, PageID# 951, p. 6.) When he reached the driver's side door, he requested to see the driver's license and proof of insurance. (Wynn Dep., RE 63-1, 182:3–11, 18–19.)

Wynn stated she couldn't find her driver's license and offered him "a Michigan medical I.D." which he looked at as she was holding it but did not take into his hand. But he said, "No, I need your license." (Wynn Dep. Ex. 3, RE 63-2, PageID# 819–20, pp. 8:25–9:2; Wynn Dep., RE 63-1, PageID# 756–57, 765–66, pp. 182:25–183:3, 194:25–195:15.) Estes did not see anything he recognized as medical credentials. (Estes Dep., RE 64-1, PageID# 839, p. 35.) Estes heard Wynn say she was in a hurry and on her way to the hospital, so he asked if she needed medical attention. She said, no, she was going for a delivery." (Estes Dep., RE 64-1, PageID# 840, p. 36:1–9.)

Wynn was asked repeatedly during her deposition to recall the exact words she used during this encounter, but she was able to offer few specifics, as exemplified in the following deposition excerpts:

> [Wynn was providing here a general narrative of events:]
>
> And then he said I need your—those other two things [registration and insurance].
>
> And I said, Look, I'm really in a hurry. I need to get to the hospital. My patient's—I don't remember if I said my patient is going to deliver or I have a delivery to do. My patient's going to deliver. Something about, My patient is going to deliver. My exact words at this time, I don't remember.
>
> Q. So you may have said—said to him something along the lines of, I have to go to the hospital for a delivery?
>
> A. I said, My patient's—I don't know if I said my patient's going to deliver or if my patient is going to have a baby. Something—my

patient something, I don't remember the exact words. I think the word was deliver, my patient is going to—getting ready to deliver.

. . .

Q. After Officer Estes asked you for registration and proof of insurance, did you—did you give those things to him?

A. No, I did not.

Q. Why?

A. Because I couldn't locate them and I was—told him—I said to him, Look, I'm in a—I really need to get to the hospital right away. I'm in a hurry. If you don't—that's when I said, If you don't believe me, you can follow me to the hospital and if necessary arrest me there.

Q. What did you mean when you said "if you don't believe me"?

A. Because I got the impression—he was holding me up when I already told him there was an emergency, I got the impression that something's—maybe he doesn't believe me.

Q. Do you recall specifically using the word "emergency" with Officer Estes?

A. I specifically recall saying I need to get to the hospital right away. Emergency, I'm not really sure about.

Q. Okay. So all you can say today that you specifically told Officer Estes was you need to get to the hospital right away?

A. Yes. That's all I can say today.

(Wynn Dep., RE 63-1, PageID# 758, 761–62, pp. 184:2–20, 187:18–188:19; see also Wynn Dep. 475:16–20 ("Again, I don't remember the exact words. I said to him that my patient was getting ready to deliver. The exact wording I—I don't

remember. And that I was sort of in a hurry; that I needed to get there."); Wynn Dep. 476:19–20 ("I know what fact I got across. The exact wording I do not remember.").)

Officer Estes testified he never heard the word "baby," and he certainly never subjectively understood Wynn was a medical doctor or that she was talking about a birth or delivering a baby. (Estes Dep., RE 64-1, PageID# 841, 883, pp. 37:11–12, 207:17–20.)

Wynn later explained she never bothered to explicitly tell Officer Estes she was a doctor because she *assumed* he understood this because she was wearing scrubs and had informed him she was going to the hospital. (Wynn Dep., RE 82-1, PageID# 1136, p. 443:3–9.) Likewise, she saw no need to specify exactly what she was going to the hospital to deliver because "What else do you deliver? Pizza?" (Wynn Dep., RE 63-1, PageID# 815, p. 446:19–21.) Wynn stated that someone who did not understand "delivery" referred to delivering a baby would have to be "naïve" (she did not want to use the word "stupid") to think delivery could refer to anything else. (Wynn Dep., RE 82-1, PageID# 1135, p. 442:13–14.)[1]

[1] Though addressed more fully below, it bears noting here, as it seems to have contributed to the unfolding misunderstanding between Wynn and Estes, that while this may have been dispositive information as far as Wynn was concerned that she should be permitted to proceed to the hospital unimpeded, this was completely irrelevant as to any law enforcement determination, as there was no legal exception to any of the charges at issue in this case for a doctor driving to the hospital, and is similarly irrelevant to any determination of whether an constitutional violation

Wynn then provided her Michigan driver's license to the officer but never provided the requested proof of insurance. (Wynn Dep., RE 63-1, PageID# 761, 767–68, pp. 187:18–21, 196:25–197:2.) At this point, Officer Estes believed the Plaintiff's car began to roll forward, so he advised her "that she wasn't free to go and . . . told her that she would be arrested if she did pull off." (Estes Dep., RE 64-1, PageID# 841-42, pp. 37:15–38:4.) *Wynn does not contest this statement*, stating at her deposition:

> *I don't remember what he said*, but at some point I said, "Look, if you don't believe me, why don't you follow me to the hospital, and if necessary you can arrest me there." He said, "Okay, I will."

(Wynn Dep., RE 63-1, PageID# 758–59, pp. 184:22–185:2 (emphasis added).) There was no other conversation, and based solely on the three words Wynn says she heard Estes say, "Okay, I will"—which, by the way, Estes denies saying (Estes Dep., RE 64-1, PageID# 842–42, pp. 37:19–38:16)—Wynn sped off, despite the fact that Wynn admits that at the time she pulled off, the officer was still holding her driver's license in his hand and never told her she was free to go. (Wynn Dep., RE 63-1, PageID# 770, p. 199:6–20.) According to Estes, the emergency lights on Officer Estes' vehicle were still activated (Estes Dep., RE 64-1, PageID# 844, 847, pp. 40:17–19, 43:9–11); Wynn does not remember whether they were or not (Wynn Dep., RE 63-1, PageID# 754, p. 180:15–17.) From Estes' perspective, this

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occurred.

meant the traffic stop was still ongoing; from Wynn's perspective, she has stated she thought he was providing "an escort." (Wynn Dep., RE 82-1, PageID# 1147, p. 479:5–9.)

According to a person who lived across the street from the location of the initial traffic stop and witnessed it, when the Plaintiff pulled out onto the road, the rear wheels of Plaintiff's car "peppered" the officer's vehicle with rocks. The witness then saw the officer "[take] off running to his car. . . . [The officer then] jumped in his car and took off after her." (Harwell Dep., RE 68-1, PageID# 924–25, pp. 9:21–10:8, 12.) As the officer took off in his car, he activated his siren and Harwell testified it appeared he was pursuing her. (Id., PageID# 926–27, pp. 13:8–13, 14:13–16.)

According to Estes, he then "advised dispatch that the vehicle was running from [him]" (Estes Dep., RE 64-1, PageID# 843, p. 39:12–14). In response, three additional police cars soon passed by going the same direction towards the hospital, with their emergency lights and sirens activated. (Harwell Dep., RE 68-1, PageID# 926–27, pp. 13:21–14:12.) At least one of those officers noticed there was something unusual about Estes' voice when he called for back-up, consistent with the highly unusual event of a person driving off at high speed from an ongoing traffic stop. (Bue Dep., RE 100-1, PageID# 1493, p. 14:7-25.)

During the pursuit after the traffic stop, the Plaintiff began following (somewhat ironically) a pizza delivery car that was headed to the hospital emergency room to deliver a pizza. (Wynn Dep., RE 63-1, PageID# 761, p. 187:7–11; Donnelly Dep., RE 70-1, PageID# 939, p. 7:16–23.) The delivery person, Kelsey Donnelly, believed the Plaintiff was tailgating her car in an reckless, unsafe manner, and stated that if she had needed to hit her brakes, she would have been rear-ended. After Donnelly turned into the hospital, she pulled over and the Plaintiff's car sped past, followed by the police car. (Donnelly Dep., RE 70-1, PageID# 940–43, pp. 10:15–11:13, 12:11–18, 16:9–25.)

As soon as Wynn, followed by Estes, arrived at the hospital, at approximately 9:24 pm, Officer Estes pulled his car behind Plaintiff's parked car with his emergency lights on. (Estes Dep., RE 64-1, PageID# 845-46, 878–79, pp. 41:1–11, 42:4–6, 167:22–168:5; Estes Dep. Ex. 16, RE 64-2, PageID# 885, p. 1 Wynn Dep., RE 63-1, PageID# 775, p. 207:6–19.)

However, notwithstanding her statement at the traffic stop that "he could arrest her at the hospital" or that she would explain things further at the hospital and the fact that Estes exited his vehicle with the blue lights engaged, as soon as Wynn arrived at the hospital she immediately "jumped out of the car" and, without noticing or acknowledging Officer Estes, began "rushing" in the opposite direction towards the hospital. Officer Estes then rapidly approached her and grabbed her

left wrist and "slung" a handcuff on it, allegedly cutting it. (Wynn Dep. Ex. 3, RE 63-2, PageID# 820, pp. 10:23–24, 12:9; Wynn Dep., RE 63-1, PageID# 776, p. 209:17–24).

Estes testified that at this point he was instructing her to place her right arm behind her back, (Estes Dep., RE 64-1, PageID# 850, p. 52:14–17), while *Wynn does not recall* whether he said "Give me your hand" (Wynn Dep., RE 63-1, PageID# 782–83, pp. 221:24–222:1) and further admits the only way Estes would have gotten cuffs on her right wrist was to grab it, *as she certainly did not hold it out* (id., PageID# 779–80, pp. 216:18–217:1). When later asked specifically, "Were you at any point attempting to keep your right hand away from Officer Estes?," Wynn admitted, "*You know, I may have. I may have. I don't remember. I don't recall*." (Id., PageID# 783, p. 222:6–9 (italics added).)

Accordingly, Officer Estes placed both his hands on Plaintiff's cuffed left arm, and using an escort technique known as the "straight arm bar" technique—meaning Estes was walking slightly behind her and to her left, his left hand on her left wrist and his right hand on her upper left arm, effectively holding her left arm in a locked position—Estes forcibly guided her to the front of his vehicle (Estes Dep., RE 64-1, PageID# 851–857, pp. 53:1–59:19) and pressed her down so that she was leaning against the front side of his car so that he could place the other handcuff on her right wrist behind her back (Wynn Dep., RE 63-1, PageID# 777–

78, pp. 212:5–213:2; Estes Dep., RE 64-1, PageID# 855, 858–59, pp. 57:19–21, 60:1–8, 61:14–16).

Wynn describes the experience of being led by this technique as being "slung," (Wynn Dep. Ex. 3, RE 63-2, PageID# 820, p. 11:2), though when asked during her deposition to describe the motions Estes used to move her to the front of the police car after placing the first wrist in handcuffs, she did not contradict Estes' version, saying she does not remember any specifics: "This all happened so fast and I—it was totally un—inconceivable. *I have no idea*." (Wynn Dep., RE 63-1, PageID# 774, p. 206:6–7 (italics added); see also id., PageID# 772, 780, pp. 203:18–20, 217:5–21.) When asked whether her chest and face were actually being pressed into the police vehicle, Plaintiff said, "I think the initial sling did not take me all the way down. No, it did not. He sort of pressed me down." (Wynn Dep., RE 63-1, PageID# 778, p. 213:7-9.)

Wynn does remember, however, seeing a hospital security guard who was witnessing this part of the incident. (Wynn Dep., RE 63-1, PageID# 773, p. 204:9–23.) The guard, Isaac Braden, testified that when he first walked into the area, Officer Estes had already placed one cuff on Plaintiff's left wrist and was attempting to cuff the right, but despite Estes' verbal commands to the Plaintiff to place her free right arm behind her back, she was not complying and "was pulling and jerking away." (Braden Dep., RE 67-1, PageID# 913–14, pp. 7:14–8:4.)

Braden never saw Estes do anything improper during his attempts to handcuff Plaintiff. (Id., PageID# 918–19, pp. 16:12–17:13.) After she was handcuffed, Wynn called out to Braden asking him to advise the obstetrics department of what had happened, using words to the effect of, "Can you get somebody to deliver a baby?" (Id., PageID# 915, p. 9:18–24; Wynn Dep. Ex. 3, RE 63-2, PageID# 820, 822, p. 12:11–23, 19:22–20:6.) So Braden, who recognized Wynn but did not verbally advise Estes of this at the time, radioed the hospital, advising them of the situation. (Braden Dep., RE 67-1, PageID# 916, 917, pp. 10:11–17, 12:2–9.) Word quickly made its way to the hospital supervisor on duty, Jennifer Waybright. (Waybright Dep., RE 66-1, PageID# 903 p. 11:4–10.)

Officer Estes then requested Wynn get into the rear of his vehicle, but she refused. "There was no struggle," Wynn later stated, admitting, "[b]ut no, I did not get in willingly." (Wynn Dep., RE 63-1, PageID# 784, p. 223:6–7.) Meanwhile, Sergeant Young of the Pulaski Police Department, along with several other patrolmen, arrived on the scene in response to the call for assistance from Officer Estes. When Young arrived, Estes had already placed the handcuffs on both of Plaintiff's wrists behind her back and was walking her to his patrol car. (Young Dep., RE 65-1, PageID# 890, p. 21:16–18.) Young heard Estes ask the Plaintiff to get into the back of the car, to which she replied she would not, and saw Estes apply pressure to Plaintiff's shoulder to guide her into the back of the car. (Id.,

PageID# 891, p. 26:8–21.) As the Plaintiff later stated, "I just remember he—he did something to encourage me getting into the police car." (Wynn Dep., RE 63-1, PageID# 784, p. 223:17–19.) The time was approximately 9:26 pm, only 5 minutes after Estes had notified dispatch he was initiating the first traffic stop. (Estes Dep. Ex. 16, RE 64-2, PageID# 885, p. 1; Estes Dep., RE 64-1, PageID# 880, p. 169:1–17.)

After the Plaintiff was in the back of the car, Estes advised Young of what had occurred, including what happened at the initial traffic stop. After hearing this report, Young spoke with several individuals present at the scene, including the security guard Isaac Braden, the hospital supervisor Jennifer Waybright, and the Plaintiff herself. It was only then that Braden informed Young that Wynn was a physician, the first time either Sgt. Young or Officer Estes understood that to be the case. (Young Dep., RE 65-1, PageID# 893-94, pp. 32:-33:3; Estes Dep., RE 64-1, PageID# 864-65, pp. 80:17-20, 82:1-2.) Waybright advised Sgt. Young other doctors were available to perform the delivery, were trained to do so, and would constitute "adequate medical care." (Waybright Dep. RE 66-1, PageID# 906-07, p. 30:5–31:3.) And finally Young asked Wynn why she had not informed Estes she was a physician, but she said she had. (Young Dep. RE65-1, PageID# 892, 29:19–21.)

Then, Estes proceeded to transport the Plaintiff to the Giles County Sheriff's Office. According to the police dispatch time log, the transport of Wynn to the sheriff's office lasted 10 minutes, from 9:31 pm when Officer Estes departed the hospital parking lot until 9:41 pm when they arrived at the sheriff's office. (Estes Dep. Ex. 16, RE 64-2, PageID# 885, p. 1; Estes Dep. RE 64-1, PageID# 881, p. 170.)

At the sheriff's office, the handcuffs were removed, and when someone asked if she needed medical care for where the handcuffs had been, Wynn declined and "said [she] was okay" because it was not "emergent" and "could wait" (Wynn Dep., RE 63-1, PageID# 786, 793-94, pp. 233:11-13, 252:23–253:11.) Tina Derryberry, the sheriff's deputy who was assigned to process Wynn for intake and "was with her the whole time" testified Wynn did not mention any injury to her wrists, nor did Derryberry notice any such injury when the cuffs were removed. (Derryberry Dep., RE 69-1, PageID# 932-34, pp. 12:16–14:6, 14:15–17.) Officer Estes noticed Wynn had abrasions on her wrist. (Estes Dep., RE 64-1, PageID# 866, p. 84:13–16.)

Officer Estes began preparing a criminal summons against the Plaintiff for speeding, felony evading arrest, resisting arrest, no insurance, registration violation, and driver's license violation. (Id., PageID# 867, 872-74, pp. 92:11–14, 114:7–14, 115:3–116:6.) Normally, Officer Estes would provide this paperwork to

the magistrate, whose desk is nearby, as he completed it. (Id. at 107:16–19.) As Estes was in process, however, he received a phone call from the Pulaski police chief instructing that the Plaintiff be released from custody immediately so she could return to the hospital to perform the delivery. (Id., PageID# 875-76, pp. 122:24–123:9.)

According to the Plaintiff, she observed Officer Estes react angrily during the conversation with the chief by complaining that the chief was "let[ting] her do anything just because she's a doctor." (Wynn Dep. Ex. 3, RE 63-2, PageID# 823, 825, pp. 24:9–11, 29:8–13; see also Wynn Dep., RE 63-1, PageID# 760, p.186:1–4.) Estes denies making this statement but admits he was angry the Plaintiff was being released without any charges and further admits he insubordinately questioned the chief's decision. (Estes Dep., RE 64-1, PageID# 868-70, pp. 100:24–102:11.)

Thus, after the Plaintiff had been at the jail for "[a]t least 30 minutes, maybe an hour, she was released on her own recognizance." (Wynn Dep. Ex. 3, RE 63-2, PageID# 824, p. 26:20–22; Wynn Dep., RE 63-1,PageID# 787-88, pp. 236:22–24, 237:14–19). She was offered transport back to the hospital by a patrol officer, which she initially accepted but then changed her mind and rode back to the hospital with a family member of the waiting patient when that was offered her. (Wynn Dep. Ex. 3, RE 63-2, PageID# 826, p. 33:3–11; Estes Dep., RE 64-1,

PageID# 876, p.123:18–23.) The speeding charge, the only charge filed, was later dismissed. (Id. PageID# 862, p. 69:1–25.)

Upon returning to the hospital, the Plaintiff cleaned her wrists and had a nurse apply a simple Band-aid, which was removed during the delivery of the baby but reapplied afterwards and which stayed on about a day. (Wynn Dep., RE 63-1, PageID# 794-96, pp. 253:12–255:3; Wynn Dep. Ex. 3, RE 63-2, PageID# 826, p. 34:4–7.) The Plaintiff never received any additional medical care for her alleged wrist injuries, which present no continuing problem for the Plaintiff (Wynn Dep., RE 63-1, PageID# 795, 810, pp. 254:21-23, 270:2-4) and which have apparently completely healed, since when asked at her deposition, "Do you even have a scar?," Plaintiff responded, "I thought I did. Maybe it healed completely. Maybe it healed completely. I don't remember." (Id., PageID# 809, p. 278:20-23.)

Regarding Plaintiff's other alleged injuries, she stated at her deposition that when she was forced against the car by the officer during the handcuffing, she experienced "pain in her lower back" and that her lower back and hip hurt for several days but then got better (Wynn Dep., RE 63-1, PageID# 801, p. 260:7-8, 260:14–16)—though during her transportation in the police car to the jail immediately after feeling this back pain, the Plaintiff enjoyed the music on the radio, moving her head to it (id. at 227:8–23). And this pain did not prevent the

Plaintiff from performing a surgical procedure, the caesarian section, immediately after this incident. (Wynn Dep. Ex. 3, RE 63-2, PageID# 828, p. 42:11–15.)

After the delivery was completed, the Plaintiff had the hospital emergency room doctor look at her back, but she inferred from his body language he did not want to be involved, so she decided to forego an actual examination. She had the person living as her spouse, also a physician, informally examine her back at home, but has received no other medical attention for her back. She treated the pain that night and the next day with the prescription-only painkiller Reprexain that was "available in my office" and with over-the-counter pain relievers regularly for the next three or four days and only occasionally thereafter and now describes the pain as "very minimal." (Wynn Dep., RE 63-1 PageID# 735, 797-806, pp. 17:6-15, 256:7-25, 258:6-259:9, 260:18–261:4, 262:16–264:5, 264:6-265:13.)

Approximately five or six weeks later, the Plaintiff began feeling numbness in her leg which she relates to this incident. The Plaintiff has not, however, sought medical treatment for this numbness other than her own self-diagnosis. She testified she has also suffered self-diagnosed emotional problems such as exhaustion and inability to concentrate as a result of this incident but has not sought outside medical or psychological treatment. (Id., PageID# 738, 800-03, 807-08, pp. 114:6-8, 259:13-260:3, 261:21-262:6, 267:9-268:17.)

The City of Pulaski ordered separate internal and external investigations regarding the events surrounding the arrest of Plaintiff, and many of the individuals and witnesses involved in this action were interviewed, including Plaintiff Terry Wynn. (Wynn Dep., RE 63-1, PageID# 762-63, pp. 188:22–189:7.) After these investigations were concluded, on May 30, 2010, the Pulaski police chief wrote letters placing both Officer Estes and Sergeant Young on suspension due to the events of May 5, 2010. Officer Estes was suspended without pay for thirty days. Sgt. Young was initially suspended without pay for fourteen days, but he appealed this action and the period was reduced to seven days. Significantly, the police chief did not question whether Estes had the right to arrest the Plaintiff; he merely concluded that under the circumstances, it was inappropriate to do so. (Memo., RE 61-2, PageID# 720–21; Memo., RE 62-2, PageID# 726–27; Memo., RE 62-3, PageID# 728–29.)

Additionally, outside experts retained by Officer Estes have concluded that he complied with accepted police training in: (i) initiating the traffic stop; (ii) determining he had probable cause to arrest Wynn based on her departure from the traffic stop; (iii) his decision to arrest Wynn at the hospital; and (iv) the force he used in applying the handcuffs and effecting the arrest. (Mays Expert Rep., RE 72-1, PageID# 972-78, pp. 7-13; Allen Expert Rep., RE 71-1, PageID# 951-57, pp. 5-11.)

Alleging this event was tortious under state law and violated her federal constitutional rights, Wynn filed the instant action on April 21, 2011.

SUMMARY OF ARGUMENT

In cases brought under 42 U.S.C. §1983, government officials performing discretionary acts are presumptively entitled to qualified immunity from suit. This immunity "applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." Pearson v. Callahan, 555 U.S. 223, 231, 129 S.Ct. 808, 815, 172 L.Ed. 2d 565 (2009) (citations omitted).

The lower court found Defendant Estes is not entitled to qualified immunity. This finding is incorrect and should be reversed on appeal, however, as the relevant case law does not remotely meet the applicable standard—that is, the case law does not "dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*." Clemente v. Vaslo, 679 F.3d 482, 490 (6th Cir. 2012) (citation omitted; emphasis in original).

Furthermore, while Plaintiff is entitled to have *material* factual disputes resolved in her favor at this stage of pleading, she is not entitled to have her subjective beliefs or conclusory statements given precedence over other parties'

specific recollections of events. Accordingly, when categorical statements of the Plaintiff which lack any support in the record (and are even contradicted by her own testimony) are excluded from consideration, it becomes evident Defendant Estes is entitled to qualified immunity, and therefore this action should be dismissed.

ARGUMENT

I. Standard of Review

As stated by this Court in Key v. Grayson, 179 F.3d 996 (6th Cir. 1999), cert. denied, 528 U.S. 1120, 120 S.Ct. 94, 145 L.Ed.2d 821 (2000), "Because the doctrine of qualified immunity is a legal issue, this court's review is de novo. Moreover, this court is required to examine de novo all appeals from motions for summary judgment which a district court has denied." Id. at 999).(citation omitted).

II. Doctrine of Qualified Immunity—Generally

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 555 U.S. 223, 231, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009)) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). "The protection of qualified immunity applies

regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." Pearson v. Callahan, 555 U.S. at 231, 129 S.Ct. at 815) (quotation marks, citations omitted).

Significantly, qualified immunity is "an *immunity from suit* rather than a mere defense to liability." Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985) (emphasis in original), quoted by Pearson v. Callahan, 555 U.S. at 237, 129 S.Ct. at 818.)Accordingly, it is not a defendant's burden to prove that he is entitled to qualified immunity, but rather, once the defendant has asserted this as a defense, *it is the plaintiff's burden to prove that the defendant is not*. See Clemente v. Vaslo, 679 F.3d 482, 490 (6th Cir. 2012).

The appropriate analysis for qualified immunity was recently summarized by the Sixth Circuit in Clemente v. Vaslo) as follows:

> The Supreme Court has laid out a two-step inquiry to determine if qualified immunity protects an official's actions: (1) whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right[]," and (2) whether that right was clearly established. Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), overruled on other grounds by Pearson, 555 U.S. at 236, 129 S.Ct. 808).

Clemente v. Vaslo, 679 F.3d 482, 489 (6th Cir. 2012))(ellipsis, brackets in original). Under Pearson v. Callahan,a court may, "in its discretion, . . . consider the second question first if it believes such a path 'will best facilitate the fair and efficient disposition' of the case before it." Kinzer v. Schuckmann, 850 F. Supp. 2d

785, 790 (S.D. Ohio 2012) (quoting Pearson v. Callahan, 555 U.S. at 242, 129 S.Ct. at 821)..

Additionally,

> Because qualified immunity shields reasonable conduct, even when it is mistaken, the Sixth Circuit has at times added a third line of inquiry to the traditional two-part test: "whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." Peete, 486 F.3d at 219; cf. Everson v. Leis, 556 F.3d 484, 494 n. 4 (6th Cir. 2009) (stating regardless of whether the two-prong or the three-prong test is applied, "the essential factors considered are [] the same"). "[I]f officers of reasonable competence could disagree [on the legality of the action], immunity should be recognized." Malley, 475 U.S. at 341.

Wright v. City of Chattanooga, Case No. 1:10-CV-291, 2012 WL 28744 (E.D. Tenn. Jan. 5, 2012) (slip copy) (brackets in original; quoting Peete v. Metro. Gov't of Nashville & Davidson Cnty., 486 F.3d 217 (6th Cir. 2007), and Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)).

As to what constitutes a "clearly established right" for purposes of this analysis—an issue of central importance in most qualified immunity cases—the Clemente v. Vaslo court explained:

> For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "It is important to emphasize that this inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." Brosseau v. Haugen, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). "The general proposition, for example, that an

> unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." Ashcroft v. al-Kidd, —— U.S. ——, 131 S.Ct. 2074, 2084, 179 L.Ed.2d 1149 (2011). Thus, "[t]he relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 202, 121 S.Ct. 2151.
>
> "We look first to the decisions of the Supreme Court, and then to the case law of this circuit in determining whether the right claimed was clearly established when the action complained of occurred." Gragg v. Ky. Cabinet for Workforce Dev., 289 F.3d 958, 964 (6th Cir. 2002). "[T]he case law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances.*" Id. Plaintiffs bear the burden of showing the claimed right was clearly established. Everson v. Leis, 556 F.3d 484, 494 (6th Cir. 2009).

Clemente v. Vaslo, 679 F.3d at 490) (internal citations, ellipsis, quotation marks omitted; emphasis in original).

More recently, the Sixth Circuit criticized a district court for "summarily conclud[ing] that the law [was] clearly established . . . [for purposes of a qualified immunity analysis]," stating, "[T]he court's bare-bones analysis is far too general, failing to recognize that the right violated must be clear *in a particularized context* so that a reasonable official would be on notice that his actions were unconstitutional." Sutton v. Metro. Gov't of Nashville & Davidson County, 700 F.3d 865, 877 (6th Cir. 2012) (citation omitted; emphasis added) (criticizing lower court opinion by same presiding district court judge who issued opinion in instant action).

III. Officer Estes is entitled to qualified immunity from Wynn's claim for wrongful arrest.

A. Legal framework

According to Sixth Circuit precedent, "A false arrest claim under federal law requires a plaintiff to prove that the arresting officer lacked probable cause to arrest the plaintiff." Sykes v. Anderson, 625 F.3d 294, 305 (6th Cir. 2010) (quoting Voyticky v. Village of Timberlake, Ohio, 412 F.3d 669, 677 (6th Cir. 2005)).

> "Probable cause is defined as reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion." United States v. McClain, 444 F.3d 556, 562 (6th Cir. 2005)). To determine whether [the defendant officer] had probable cause to arrest [the plaintiff], we consider the totality of the circumstances and whether the "facts and circumstances" of which [the officer] had knowledge at the moment of the arrest were "sufficient to warrant a prudent person . . . in believing . . . that" the seized individual "ha[d] committed . . . an offense." Hinchman [v. Moore], 312 F.3d [198,] 204 [(6th Cir. 2002)].

Sykes v. Anderson, 625 F.3d at 306 (ellipsis in original). "[P]robable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction." E.g., Crockett v. Cumberland Coll., 316 F.3d 571, 582 (6th Cir. 2003) (quoting Adams v. Williams, 407 U.S. 143, 149 (1972)). And "[a]n arrest based on probable cause does not become invalid simply because the charges are subsequently dismissed." Stone v. City of Grand Junction, Tenn., 765 F. Supp. 2d 1060, 1075 (W.D. Tenn. 2011) (citing Manley v. Paramount's Kings Island, 299 F. App'x 524, 530 (6th Cir. 2008)).

Furthermore,

> [o]nce probable cause is established, . . . an officer is under no duty to investigate further or to look for additional evidence which may exculpate the accused. In fact, law enforcement is under no obligation to give any credence to a suspect's story or alibi nor should a plausible explanation in any sense require the officer to forego arrest pending further investigation if the facts as initially discovered provide probable cause.

Williams ex rel. Allen v. Cambridge Bd. of Educ., 370 F.3d 630, 637 (6th Cir. 2004) (quoting Ahlers v. Schebil, 188 F.3d 365, 371 (6th Cir. 1999) (internal quotation marks omitted).

A last point on the law regarding probable cause determinations: *it is from the officer's perspective*:

> Probable cause is assessed "*from the perspective of a reasonable officer on the scene*, rather than with the 20/20 vision of hindsight," Kostrzewa v. City of Troy, 247 F.3d 633, 639 (6th Cir. 2001) (quoting Graham v. Connor, 490 U.S. 386, 394 (1989)), and thus "[p]robable cause determinations involve an examination of all facts and circumstances *within an officer's knowledge at the time of an arrest*." Gardenhire v. Schubert, 205 F.3d 303, 315 (6th Cir. 2000).

Klein v. Long, 275 F.3d 544, 550 (6th Cir. 2001) (emphasis added; internal citation omitted). Thus, for the purposes of this action, the question is not what the Plaintiff believed or whether she was reasonable in *her* beliefs and actions, but rather, whether the officer was reasonable in *his* based on the facts known to him. That is, it may be the case that both Wynn and Estes behaved reasonably based on all of

the respective facts and circumstances known to each at the time, and if that is the case, then this cause of action must be dismissed.

B. The district court's opinion and the appropriate factual inferences

In the section of its opinion explaining its removal of Estes' qualified immunity on this claim, the lower court stated:

> "'When no material dispute of fact exists, probable cause determinations are legal determinations that should be made' by the court." Alman v. Reed, 2013 WL 64370 at *6 (6th Cir. Jan. 7, 2013) (quoting Hale v. Kart, 396 F.3d 721, 728 (6th Cir. 2005)). "But '[i]f disputed factual issues underlying probable cause exist, those issues must be submitted to a jury for the jury to determine the appropriate facts.'" Id.
>
> Here, there unquestionably are factual disputes as to whether Dr. Wynn was arrested based upon probable cause.

(Memo. Op., RE 170, PageID# 1835–36, pp. 14–15.) While the law as stated is correct, it was not correctly applied in the instant action, as the court should not have credited Wynn's subjective beliefs and categorical statements in determining probable cause or qualified immunity. Furthermore, the "factual disputes" referred to by the judge are not actual disputes of material fact. Instead, the lower court credited portions of Wynn's testimony but failed to consider other more specific testimony concerning the same part of the incident. The lower court also failed to consider testimony of Estes and third parties on matters that Wynn admitted she could not remember.

While this Court is required to view the facts and all inferences in the light

most favorable to the nonmoving party, it "may reject evidence that is unspecific or immaterial." Edwards v. Sanders, 129 F.3d 1263 (6th Cir. 1997) (unpublished) (citing Street v. J.C. Bradford & Co., 886 F.2d 1472, 1480 n. 21 (6th Cir. 1989). "Conclusory allegations and unsubstantiated assertions are not evidence and are not adequate to oppose a motion for summary judgment." AntiCancer, Inc. v. Berthold Technologies, U.S.A., LLC, — F. Supp. 2d —, Case No. 3:11-CV-457, 2013 WL 625363, at *5 (E.D. Tenn. Feb. 20, 2013) (citing inter alia Miller v. Aladdin–Temp–Rite, LLC, 72 F. App'x 378, 380 (6th Cir. 2003).

As the Sixth Circuit stated in Chappell v. City Of Cleveland, 585 F.3d 901 (6th Cir. 2009):

> [T]he district court's determination that there is a factual dispute does not necessarily preclude appellate review where, as defendants here contend, the ruling also hinges on legal errors as to whether the factual disputes (a) are *genuine* and (b) concern *material* facts. See Scott v. Harris, 550 U.S. 372, 378–80, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (reversing denial of qualified immunity where lower court erred in finding genuine issue of material fact).
>
> . . .
>
> . . . The district court thus purports to have viewed the facts in the light most favorable to plaintiff's claim. In our opinion, however, the court also gave plaintiff the benefit of inferences and suppositions that are not only not supported by the record facts, but are directly contradicted by the record facts. The district court's reasoning is explicit and deserves careful scrutiny.

Id. at 906, 911 (emphasis in original). See also Arendale v. City of Memphis, 519 F.3d 587, 605 (6th Cir. 2008) ("[C]onclusory assertions, supported only by

Plaintiff's own opinions, cannot withstand a motion for summary judgment"); Lewis v. Philip Morris Inc., 355 F.3d 515, 533 (6th Cir.), cert. denied, 543 U.S. 821, 125 S.Ct. 61, 160 L.Ed.2d 31 (2004) ("In order to survive a motion for summary judgment, the non-moving party must be able to show sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy").

In determining factual disputes in the instant action, the district court stated:

> [W]hether Dr. Wynn fled is a question for the jury because she claims that she made it unmistakably clear to the officer that she was going to the hospital to deliver a baby, she understood that the officer was following her to the hospital and providing her an escort, she was wearing scrubs and had her lab coat next to her in the car, and she was not arrested until she was at the hospital headed towards the entrance.

(Memo. Op., RE 170, PageID# 1835, p. 14.) This, however, reverses the proper order of the analysis. Instead, as the Sixth Circuit has stated, "At the summary judgment stage, once the relevant set of facts is determined and all reasonable inferences are drawn in favor of the plaintiff, to the extent supported by the record, the question whether the detectives' actions were objectively unreasonable is 'a pure question of law.'" Chappell v. City Of Cleveland, 585 F.3d at 909) (quoting inter alia Scott v. Harris, 550 U.S. 372, 381 n.8, 127 S.Ct. 1769, 1776, 167 L.Ed.2d 686 (2007) (rejecting objections raised by the dissent that this constituted a "usurp[ation] of the jury's factfinding function")). Proper application of this analysis in the specific context of qualified immunity thus requires the district

court to determine the relevant facts in the light most favorable to the Plaintiff, *view the facts from the officer's perspective*, and then apply law to those facts.

The district court did not correctly make the required determination of relevant facts. First, Wynn may claim, as the district court stated, "that she made it unmistakably clear to the officer that she was going to the hospital to deliver a baby," but this is a conclusory assertion, not a disputed fact, and it is an assertion not supported by the record. Wynn cannot recall the specifics of her communications to Estes during the traffic stop, and Estes testified that the only words used by Wynn were "hospital" and "delivery." Wynn did not say she is a "doctor," she was going to deliver a "baby," or the situation was an "emergency." Because Wynn does not recall the specific communications, she cannot dispute Estes' testimony.

Second, Wynn may have subjectively "understood that the officer was following her to the hospital and providing her an escort," but her subjective understanding is irrelevant to a determination of whether the officer had probable cause to arrest her. Furthermore, Wynn's subjective understanding cannot be reasonably inferred from the facts known to Estes. It is undisputed that the word "escort" or words indicating an escort were never mentioned, Estes did not return Wynn's driver's license, and Estes never authorized her to leave. The undisputed facts also establish that Wynn sped away and peppered Estes' car with rocks and

that Estes pursued her from behind with blue lights engaged. None of these facts support Wynn's alleged belief that she was being escorted to the hospital.

Third, Wynn did not have "her lab coat next to her," as the lower court stated; instead her lab coat was in her lap, under her purse as she was digging through it to find her license, and it was night. (Wynn Dep. Ex. 3, RE 63-2, PageID# 829, p. 48:6–20.) And even though she may have been "wearing scrubs and had her lab coat" in her lap, under her purse, at night, she never actually uttered the words, "I'm a doctor," (Wynn Dep., RE 82-1, PageID# 1136, p. 443:3 ("I didn't say I'm a doctor.")), and even if she had, again, that would be legally irrelevant to a determination of whether she left an ongoing traffic stop or, more to the point, whether the officer was objectively reasonable in his understanding that she had left an ongoing traffic stop without his permission.

C. Probable cause for the arrest

The district court determined that the officer did have reasonable suspicion to initiate the initial traffic stop (Memo. Op., RE 170, PageID# 1834–35, pp. 13–14), and the Plaintiff has not appealed this determination. Thus, the only seizure at issue is the subsequent arrest that occurred at the hospital.

The district court focused on whether probable cause existed for the charge of evading arrest under T.C.A. §39-16-603(b)(1). (Memo. Op., RE 170, PageID# 1836, p. 15.) However, "probable cause need only exist as to *any* offense that

could be charged under the circumstances." Verge v. City of Murfreesboro, Case No. 3:08-1230, 2009 WL 2983027 (M.D. Tenn. Sept. 14, 2009) (unpublished) (emphasis added) (quoting Blankenhorn v. City of Orange, 485 F.3d 463, 473 (9th Cir. 2008); see also Lyons v. City of Xenia, 417 F.3d 565, 573 (6th Cir. 2005).

In the words of the U.S. Supreme Court, "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." Atwater v. City of Lago Vista, 532 U.S. 318, 354, 121 S.Ct. 1536, 1557, 149 L.Ed.2d 549 (2001). See also Virginia v. Moore, 553 U.S. 164, 175, 128 S.Ct. 1598, 1606, 170 L.Ed.2d 559 (2008) ("The [Atwater] rule extends even to minor misdemeanors . . . because of the need for a bright-line constitutional standard. If the constitutionality of arrest for minor offenses turned in part on inquiries as to risk of flight and danger of repetition, officers might be deterred from making legitimate arrests.").

It is uncontested that the Plaintiff exceeded the posted speed limit (T.C.A. §55-8-152), did not have a valid Tennessee driver's license though she had resided in Tennessee longer than thirty days (T.C.A. §§55-50-301(a)(1), 55-50-304(5)(A), and failed to provide proof of insurance (T.C.A. §55-12-139). Generally, in cases involving the violation of any of these three statutes, "the arresting officer shall issue a traffic citation to the person in lieu of arrest, continued custody and the

taking of the arrested person before a magistrate," T.C.A. §55-10-207(a)(1) *provided* that "[t]he person cited shall signify the acceptance of the citation and the agreement to appear in court as directed by signing the citation," T.C.A. §55-10-207(b)

If the person refuses to sign the citation, on the other hand, then under T.C.A. §55-10-207(a)(1) and §55-10-203(a)(5), "the arrested person shall be taken without unnecessary delay before a magistrate or judge within the county." T.C.A. §55-10-203(a). Alternatively, a person may be taken into custody in lieu of a citation under T.C.A. §40-7-118(c)(2) if "[t]here is a reasonable likelihood that the offense would continue or resume," which in this case the Plaintiff proceeded to do by speeding away from the traffic stop. See State v. Jackson, 313 S.W.3d 270, 273 (Tenn. Crim. App. 2008) (upholding an arrest in lieu of citation where the suspect "would have continued to commit the offense of driving without a license").

Thus, first, given the facts as Estes knew them at the time—an agitated, speeding motorist, a Michigan license plate and Michigan driver's license (when presumably a hospital employee would have been in-state), failure to provide proof of insurance, an unspecified reference to needing to go to the hospital "for a delivery," and the fact that the officer's emergency lights were still on—it was objectively reasonable for the officer to interpret her driving away in the middle of

a traffic stop *while he was still holding her out-of-state driver's license* as a refusal to sign the citation, thereby justifying her arrest and presentation to a magistrate.

Second, the statute regarding evading arrest, a class E felony which is an arrestable offense, states:

> It is unlawful for any person, while operating a motor vehicle on any street, road, alley or highway in this state, to intentionally flee or attempt to elude any law enforcement officer, after having received any signal from the officer to bring the vehicle to a stop.

T.C.A. §39-16-603(b)(1). After Wynn drove off from the traffic stop, it was also objectively reasonable for Officer Estes to believe that he had probable cause to arrest Wynn for evading arrest. The fact that Wynn says she understood Officer Estes was "following her to the hospital and providing her an escort," as observed by the lower court, is irrelevant, as Wynn's subjective belief or understanding was not a fact known to the officer. The facts known to Estes were: (1) he told Wynn she would be arrested if she drove off; (2) he continued to maintain possession of her driver's license; (3) he never told Wynn she was free to leave; (4) the blue lights on the police vehicle were still on when she left; (5) the word "escort" was never mentioned by either Wynn or Estes; (6) a police escort would have been given from the front, not from behind; (7) when Wynn pulled off she peppered the police vehicle with gravel, tailgated the vehicle in front of her, and turned on her emergency flashers so that the vehicle would get out of her way; and (8) when Wynn arrived at the hospital, she ignored Estes and attempted to rush into the

hospital. When these undisputed facts are considered, it is clear that Officer Estes reasonably believed the Plaintiff violated T.C.A.§39-16-603(b)(1)

And third, the statute regarding resisting arrest, a class B misdemeanor, states:

> (a) It is an offense for a person to intentionally prevent or obstruct anyone known to the person to be a law enforcement officer, or anyone acting in a law enforcement officer's presence and at the officer's direction, from effecting a stop, frisk, halt, arrest or search of any person, including the defendant, by using force against the law enforcement officer or another.
>
> (b) Except as provided in §39-11-611 [pertaining to self-defense], it is no defense to prosecution under this section that the stop, frisk, halt, arrest or search was unlawful.

T.C.A. §39-16-602. Significantly, at least one federal district court has held that fleeing a traffic stop violates this statute. See United States v. Holifield, Case No. 1:12-CR-21, 2012 WL 6101999, at *3 (E.D. Tenn. Dec. 7, 2012) (slip opinion) ("[O]nce Defendant fled during the traffic stop, he committed a second crime, and one for which he could be arrested. See T.C.A. §39–16–602. (footnote quoting Tennessee resisting arrest statute omitted)). Thus, the act of fleeing the traffic stop by car, in addition to her physical resistance to being placed in handcuffs, (discussed fully in Section IV), also constituted the offense of resisting arrest, and it was objectively reasonable for the officer to believe he had probable cause to arrest her for it.

D. Whether it was clearly established

Additionally, even if Estes did not have probable cause for the arrest, he is still entitled to qualified immunity, as, quite simply, the Plaintiff has not satisfied her burden of showing that it was *clearly established* that the officer did not have probable cause to arrest her or "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Clemente v. Vaslo, 679 F.3d 482, 490 (6th Cir. 2012)) (citations omitted).

In removing the qualified immunity of Defendant Estes to the wrongful arrest claim, the district court made only two summary statements to support its finding that all relevant law is clearly established. First, the court stated:

> "The Fourth Amendment's guarantee that people shall 'be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures' has been part of our Constitution since 1791," and "[a]s a general proposition, the law that a search or seizure must be objectively 'reasonable' under all the circumstances has been 'clearly established' for a long time." Holland ex rel. Overdorff v. Harrington, 268 F.3d 1179, 1195-96 (10th Cir. 2001).

(Memo. Op., RE 170, PageID# 1834, p. 13.) Later, the court stated, "[T]he federal right to be subject only to arrest upon probable cause [i]s clearly established." (Memo. Op., RE 170, PageID# 1835, p. 14 (quoting Everson v. Leis, 556 F.3d 484, 500 (6th Cir. 2009)) (brackets in original)).

These two summary statements do not, however, comply with the rule that the inquiry into whether the relevant law was clearly established for purposes of

qualified immunity must, according to the Sixth Circuit, be a *particularized* one, as summarized in Clemente v. Vaslo:

> "It is important to emphasize that this inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." Brosseau v. Haugen, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). "The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." Ashcroft v. al-Kidd, —— U.S. ——, 131 S.Ct. 2074, 2084, 179 L.Ed.2d 1149 (2011). Thus, "[t]he relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 202, 121 S.Ct. 2151.

Clemente, 679 F.3d at 490). Specifically, the district court's analysis failed to take into account two areas where the law relevant to a probable cause determination in the instant action is most definitely not "clearly established."

First, there is no "clearly established" exception to any of the relevant offenses for a doctor traveling to a hospital in her own private vehicle. Or stated more precisely, there is an exception under Tennessee law from the generally applicable traffic laws for certain "authorized emergency vehicles," but it is not clearly established that this exception applies to Dr. Wynn. In fact, it is clearly established that it does not.

The relevant statute here is T.C.A. §55-8-108, which exempts certain "authorized emergency vehicles" from the generally applicable traffic laws. However, a physician's private vehicle does not come within the definition of an

"authorized emergency vehicle" as defined in T.C.A. §55-8-101(3) See Bonds v. Emerson, 94 S.W.3d 491, 493–94 (Tenn. Ct. App. 2002) (holding that police officer who did not have both his lights and siren continuously on in his unmarked cruiser during high-speed emergency response was not eligible for provisions of T.C.A. §55-8-108; Nash-Wilson Funeral Home, Inc. v. Greer, 417 S.W.2d 562, 565 (Tenn. Ct. App. 1966) (ambulance not designated or authorized as an emergency vehicle was not entitled to the privileges and exemptions from requirements of traffic regulations and was required to obey all generally applicable statutes regarding operation of motor vehicles).

To slightly confuse matters, trauma physicians, trauma nurses, and on-call surgical personnel are eligible for special Tennessee "emergency" license plates. T.C.A. §55-4-202(c)(1)(H)–(J). The Plaintiff, however, did not have one of these, nor is it clear she was eligible for one. What is clear is that even if Plaintiff had had one of the special plates, *she still would not have been exempted from the generally applicable traffic laws*, as an attorney general's opinion from 2003 explicitly states:

> The Tennessee Code does not list the purpose of the special purpose emergency plates. However, the plates *do not* turn a vehicle into an emergency vehicle, which is defined in T.C.A. §55-8-101(2)(A)–(C).

Tenn. Op. Att'y Gen. No. 03-163 n.1 (Dec. 23, 2003) (emphasis added).[2]

[2] At the time this attorney general's opinion was written, "emergency" license

While such an emergency plate would not have exempted the Plaintiff from traffic laws, its presence, though, may have put any officer on notice that the driver was potentially responding to a medical emergency (and verifiably authorized to do so), and thus its *absence* is of some bearing to this action as to what a reasonable officer seeing such a special Tennessee car tag—as opposed to an out-of-state Michigan tag—might reasonably have done under the circumstances.

Moreover, aside from the relevant statutes, there does not seem to be any relevant case law which would support the proposition that an officer violates the constitutional rights of a doctor or a patient on their way to the hospital when he arrests that person for fleeing from an ongoing traffic stop. See Wright v. City of Chattanooga, Case No. 1:10-CV-291, 2012 WL 28744 (E.D. Tenn. Jan. 5, 2012) (slip copy) (summary judgment granted to officers on 42 U.S.C. §1983 claims arising from plaintiff's arrest for driving-related charges allegedly committed during plaintiff's "emergency" transport of his wife to the hospital in their private vehicle). So even if such a right could be said to exist, it is not clearly established.

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plates were only available for emergency responders such as EMTs. Trauma physicians (2004 Tenn. Pub. Ch. 937), trauma nurses (2007 Tenn. Pub. Ch. 63), and on-call surgical personnel (2008 Tenn. Pub. Ch. 1165) were all added as explicit categories eligible for the special "emergency" plates later. The content of the definition of "authorized emergency vehicle," however, has not been altered since the issuance of the attorney general's opinion, though it has been moved to §55-8-101(3)(A)–(C), and thus the above-quoted language from the AG's opinion is still very much on point.

The second area of law relevant to this claim which is not "clearly established"—where there is no clear guidance from the courts at all— is when an officer may reasonably understand a traffic stop to be continuing and when the officer must reasonably understand it has concluded. Wynn says that when she became aware that the officer was not understanding what she thought she was making clear, she said to him, "Look, if you don't believe me you can follow me to the hospital and arrest me there." (Wynn Dep., RE 82-1, PageID# 1135, p. 442:6–8; see also Wynn Dep. Ex. 3, RE 63-2, PageID# 820, p. 9:14–16 ("And I said if you don't believe me, you can arrest me at the hospital."); Wynn Dep. at 477:17–19 ("I said, If you don't believe me you can follow me and arrest me there.").) To which Estes responded, "Okay, I will." But this only begs the question, "Okay, I will…" do what? Given the context of the conversation, even assuming he said these words, they may have only been a reiteration of what he had *clearly* just stated to her (and which she does not contest because she admits she does not remember)—that is, that he would arrest her if she fled from the traffic stop—and thus it would not be clearly established that he violated her constitutional rights by following through and actually arresting her.

More broadly, while there is a considerable body of case law examining Terry-style investigatory traffic stops from the perspective of a *suspect* and at what point the *suspect* feels free to leave, there does not seem to be *any* case law

examining the issue from the *officer's* perspective as to when it is objectively reasonable for the *officer* to expect the suspect not to flee.

For example, in State v. McCrary, 45 S.W.3d 36, 42 (Tenn. Crim. App. 2000), the court stated that it is not until "a police officer issues a traffic citation or warning and returns a driver's license and registration [that] a traffic stop ceases to be a seizure for purposes of the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Tennessee Constitution. . . ." State v. McCrary, 45 S.W.3d 36, 42 (Tenn. Crim. App. 2000)) (citing numerous federal and state court opinions). While McCrary) deals with the delimitations of a traffic stop in a different context (when a mandatory stop turns into a consensual encounter for purposes of determining whether consent for a search was freely given) and views the encounters from a different perspective (whether a reasonable citizen would feel free to leave versus whether a reasonable officer would expect the citizen to feel compelled to stay), it offers some of the only guidance available in this situation.

Furthermore, as the expert reports make clear, Officer Estes' belief that the traffic stop had not yet concluded was consistent with accepted standards of police training (Mays Expert Rep., RE 72-1, PageID# 973–74, pp. 8–9; Allen Expert Rep., RE 71-1, PageID# 953, p. 7), and as the Sixth Circuit recently stated,

"guidance from experts in a field" can be relevant in determining qualified immunity. Cockrell v. City of Cincinnati, 468 F. App'x 491, 494 (6th Cir. 2012).

And thus it was not clearly established that Officer Estes—*who was still holding Wynn's driver's license and had not even had the opportunity to radio a request to dispatch to verify Wynn's identity and credentials*—was objectively unreasonable in believing she was still compelled to stay at the time that she fled.

It bears repeating: qualified immunity "applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." Pearson v. Callahan, 555 U.S. 223, 231, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009) (citations omitted). Even if Estes made a mistake of fact and law in his belief that Wynn was still the subject of an ongoing traffic stop at the time she fled the scene, the very most that Plaintiff has come forward with, even viewing the evidence in the light most favorable to her, is of a regrettable miscommunication during the traffic stop around three words, namely, "Okay, I will," and if that is all there is, that is precisely the circumstance that qualified immunity is meant to address.

IV. Officer Estes is entitled to qualified immunity from Wynn's claim for excessive use of force.

If this Court finds that Estes was objectively reasonable is his belief that he had probable cause to arrest the Plaintiff, then he necessarily was objectively reasonable in the amount of force that he used to place Plaintiff under arrest, due to

seriousness of the charge and the risk of flight. However, even if this Court does not find that probable cause existed, Estes was still objectively reasonable in the amount of force that he used, or at the very least, it was not clearly established that he was not.

A. Legal framework

As in the above inquiry regarding probable cause, the standard in a Fourth Amendment excessive force case is one of objective reasonableness *from the officer's perspective*. As explained in Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)

> As in other Fourth Amendment contexts, . . . the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. . . . An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

Id. at 397, 1872 (citations omitted).

Courts have further described several non-exhaustive factors to be considered in evaluating allegations of excessive force: "(1) the severity of the crime at issue; (2) the threat of immediate danger to the officers or bystanders; and (3) the suspect's attempts to resist arrest or flee." Wysong v. City of Heath, 260 F.

App'x 848, 854 (6th Cir. 2008) (citing Graham, 490 U.S. at 396, 109 S.Ct. at 1865).

Significantly, the Graham Court built in to this analysis a safeguard against biases in perception which often affect after-the-fact oversight:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chamber," violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

Graham v. Connor, 490 U.S. at 396–97, 109 S.Ct. at 1872 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)). In the words of the Sixth Circuit, this constitutes "a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case." Dorsey v. Barber, 517 F.3d 389, 401 (6th Cir. 2008) (quoting Smoak v. Hall, 460 F.3d 768, 783 (6th Cir. 2006)).

Lastly, "excessive force claims [must be decided] based on *the nature of the force* rather than the extent of the injury," Wilkins v. Gaddy, 130 S.Ct. 1175, 1177 (2010) (emphasis added) (citing Hudson v. McMillian, 503 U.S. 1, 4 (1992),) and effecting an arrest has long been understood to require *some* degree of physical force or coercion. See Graham v. Connor,) 490 U.S. 386, 396 (1989). It is only

when the force may be described as "gratuitous" that it is impermissible under the Fourth Amendment. See Miller v. Sanilac Cnty., 606 F.3d 240, 252 (6th Cir. 2010).

B. The district court's opinion and the appropriate factual inferences

Similar to its analysis on probable cause, the district court's analysis of the use of force claim gave credit to several of Plaintiff's categorical statements and conclusions which were not supported by the record and were contradicted by her own statements. For example, the court stated, "Fleeing in a motor vehicle can be considered as a relatively serious crime, particularly since it could put pursing officers and others at risk. But this assumes as a given that Dr. Wynn was actually fleeing, something she disputes." (Memo. Op., RE 170, PageID# 1837, p. 16.) However, this case (especially at this juncture) does not turn on a *factual* dispute about whether or not Wynn fled the traffic stop. Instead, it turns on the *question of law* of whether it was objectively reasonable, in light of the facts and circumstances known to Estes, for Estes to *believe* Wynn had fled, something the district court failed to adequately address.

Similarly, the district court stated, "If a jury believes Dr. Wynn, it might be inclined to also believe that she did not pose an immediate threat to the officers at the time she was arrested." But again, the district court framed what is properly a question of law—namely, whether Estes was objectively reasonable in his belief

that she posed a threat given the events as they occurred *from his perspective*—into a question of fact to be resolved by the jury.

And when the district court said it would credit Wynn's statement that "she claims that she was not actively resisting arrest," the court was actually crediting a claim which is contradicted by her own statements, as Wynn admits that without even momentarily pausing to acknowledge the officer's presence at the hospital, she "rushed" in the opposite direction. (Wynn Dep. Ex. 3, RE 63-2, PageID# 820, p. 12:9.) And after one of her arms was placed in a handcuff, she specifically admits she may even have intentionally tried to keep her free hand away from the officer (Wynn Dep., RE 63-1, PageID# 783, p. 222:6-9), which was exactly what the hospital security guard observed her doing—in the guard's words, she "was pulling and jerking away." Furthermore, Wynn's resistance to efforts to gain control of her right arm occurred while Officer Estes was verbally directing her to give him her arm. (Braden Dep., RE 67-1, PageID# 913–14, pp. 7:14–8:4.)

C. The use of force in effecting an arrest

Once this Court correctly determines the relevant set of facts and draws all reasonable inferences in favor of the Plaintiff to the extent supported by the record, it must as a matter of law conclude that Officer Estes was reasonable in his use of force, and this claim must be dismissed.

As noted above, at least since Graham v. Connor was decided in 1989, effecting an arrest has been understood by the courts to require *some* degree of physical force or coercion. See Graham v. Connor,490 U.S. at 396; see also United States v. Heath, 259 F.3d 522, 530 (6th Cir. 2001) ("This Circuit permits the use of force, such as handcuffs and guns, to effect a stop when such a show of force is reasonable under the circumstances of the stop.") and Houston v. Clark County Sheriff Deputy John Does 1–5, 174 F.3d 809, 814–15 (6th Cir. 1999) ("such force may include both drawing a weapon and handcuffing the suspect").

Regarding "the circumstances of the stop" to be considered in this analysis, also as noted above, among the primary factors to consider are (i) the severity of the crime at issue and (ii) the possibility of flight. On the first point, Officer Estes reasonably believed that the suspect had committed the offense of evading arrest, under the circumstances a felony. And on the second point, the suspect had demonstrated a propensity for flight and was, in fact, in the act of fleeing on foot (from the perspective of the officer) at the time she was apprehended.

And lastly, there was nothing "gratuitous" about the force used by Officer Estes in effecting the arrest. The only force used was the minimum amount of force necessary to place the suspect in handcuffs as quickly as possible—both to minimize potential physical harm to the officer and to the suspect herself—and all of the force used was a part of the officer's continuous efforts to secure Plaintiff

and none took place after—a vital distinction in the analysis under Vance v. Wade, 546 F.3d 774 (6th Cir. 2008), in determining if force was gratuitous.

The facts in Vance are instructive. The plaintiff alleged that an officer had used excessive force by "pulling up on [plaintiff's] handcuffs while his hands were cuffed behind his back" and "shoving [his] head and shoulder downward and essentially throwing [him] into the floorboard," and then "closing the car door to force [his] legs into the car." Id. at 783-784. The Vance court compared these allegations with the facts in Saucier v. Katz, where the U.S. Supreme Court held that the officer was entitled to qualified immunity "despite the plaintiff's allegations of a "'gratuitously violent shove' . . . when he was placed into the [military] van[,]" because "[a] reasonable officer in petitioner's position could have believed that hurrying [the plaintiff] away from the scene . . . was within the bounds of appropriate police responses." Vance, 546 F.3d at 784-85 (quoting Saucier), 533 U.S. at 208; alterations in original).

For the Vance court, what made the the force gratutitious was "the delay between when [the officer] escorted [the suspect] to the police car and when he shoved [the suspect] into the back seat." Id. at 786 n. 8. at 786 n.8. The court stated:

> Had [the officer], in a decisive effort to minimize risks and calm a potentially volatile situation, simply escorted [the suspect] to the car and proceeded immediately to shove [the suspect] into the car and cram him into the floorboard, this case would more likely fall in "the

> sometimes hazy border between excessive and acceptable force" in which qualified immunity would properly operate to protect an officer from suit. Saucier, 533 U.S. at 206. The delay between initially placing [the suspect] in the car and then returning after several minutes to cram him into the vehicle renders irrelevant . . . [the officer's] belief, upon initially arriving at the restaurant, that [the suspect] had been uncooperative.

Vance v. Wade, 546 F.3d 774, 785 (6th Cir. 2008) (internal citation, quotation marks omitted).

In the instant action, the lower court determined that factual disputes prevent qualified immunity because the Plaintiff "claims that she was not actively resisting arrest, notwithstanding that she did not put out her hands to be cuffed or willingly get into the car. Further, while she suffered relatively minor injuries during her arrest, there is a question of fact as to whether there was the need for the force applied that (according to Dr. Wynn) included being slammed up against the cruiser and being pinned there for up to several minutes." (Memo. Op., RE 170, PageID# 1837, p. 16.)

But, as explained in detail above, these findings by the district court fail to take into account the Plaintiff's own testimony, as well as the testimony of Isaac Braden which does not contradict and is consistent with Plaintiff's testimony. The Plaintiff admitted that the only way Estes would have gotten cuffs on her right wrist was to grab it, *as she certainly did not hold it out*. (Wynn Dep. RE 63-1, PageID# 779–80, pp. 216:18–217:1.) She was specifically asked, "Were you at any

point attempting to keep your right hand away from Officer Estes?" She replied, "*You know, I may have. I may have. I don't remember. I don't recall*." (Id., PageID# 783, p. 222:6–9 (italics added).)

However, while *she* may not recall, security guard Isaac Braden *does*. According to him, when he first saw them, Officer Estes had already placed one cuff on Plaintiff's left wrist and was attempting to cuff the right, but despite Estes' verbal commands to the Plaintiff to place her free right arm behind her back, she was not complying and "was pulling and jerking away." (Braden Dep., RE 67-1, PageID# 913–14, pp. 7:14–8:4.) He also testified that he never observed Estes jerk the Plaintiff in any manner or slam her against the vehicle. (Id., PageID# 918, p. 16:12–24.)

Second, the court was incorrect in discounting the Plaintiff's failure to comply with commands from an officer as justification for the force used to place her in handcuffs. See, e.g., Stricker v. Twp. of Cambridge, 710 F.3d 350, 364 (6th Cir. 2013) ("The Strickers admit that they repeatedly disobeyed lawful officer commands. . . . Since [plaintiff] was headed away from the point of the officers' entry, it was objectively reasonable for her to believe that he was attempting to flee from the police.")

Lastly, according to two defense experts, Estes' use of force in effecting the arrest of Plaintiff was consistent with accepted standards of police training (Mays

Expert Rep., RE 72-1, PageID# 975–78, pp. 10–13; Allen Expert Rep., RE 71-1, PageID# 954-57, pp. 8–11), further indicating that every similarly situated law enforcement officer would not reasonably understand Estes' actions to be unconstitutional. And significantly, *these expert statements are uncontested*, as the Plaintiff did not file any expert reports.

D. Whether it was clearly established

As an examination of the applicable case law makes clear, it was not "clearly established" that the amount of force used by Officer Estes was objectively unreasonable, and the Plaintiff has most certainly not met her burden of establishing that it was so.

For example, in Dunn v. Matatall, 549 F.3d 348, 354–355 (6th Cir. 2008), the Sixth Circuit held that it was objectively reasonable for an officer to assume that a fleeing suspect on an expired license charge would continue to be resistant while the officer was effecting the arrest, even though the suspect verbally expressed his willingness to cooperate and the officer broke the suspect's hip in removing him from the car.

In McColman v. St. Clair County, 479 F. App'x 1 (6th Cir. 2012),[3] the Sixth Circuit held that an officer, in effecting the arrest of a double amputee who had not

[3] The Sixth Circuit has noted that it is problematic for a plaintiff attempting to establish what was clearly established to rely on unpublished cases. See Hays v. Bolton, 488 F. App'x 971, 978 (6th Cir. 2012) ("An unpublished case not yet in

actively resisted, was justified in leaving her handcuffed and, while pulling her into the car, "yank[ing] [her] . . . across the seat" in a manner that causedd her prosthetic leg to fall off, bruised her arms, and "caused excruciating pain." Id.at *3. The court reiterated the maxim that not every push or shove, even if later deemed unnecessary, violates the Fourth Amendment and held that not only was any constitutional violation not clearly established, but that there was no constitutional violation in the first place, and "[the officer] did not use excessive force." Id.) at *7.

In Bozung v. Rawson, 439 F. App'x 513 (6th Cir. 2011), during a traffic stop initiated due to a rosary hanging from the rear-view mirror which the officer believed to constitute a vision obstruction, the plaintiff alleged that he was "thrown to the ground almost immediately after advising the officer of his handicap." He further alleged that the officer "failed to advise him as to why he was being arrested . . . [and] did not ask him to place his hands or arms behind his back before he was thrown to the ground." When he asked the officer "to loosen the handcuffs because they were too tight . . . [the officer] refused to do so." Id. at 515.

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existence cannot possibly supply the 'clearly established' constitutional right an officer must violate to disqualify himself of governmental immunity"; citation omitted). It is not, however, problematic for a *defendant* attempting to show what was *not* clearly established. See McCloud v. Testa, 97 F.3d 1536, 1555 n.28 (6th Cir. 1996) ("[U]npublished opinions, because they show how our court dealt with concrete disputes, are more persuasive than the purely hypothetical examples we have invented and so merit consideration.")

This account was corroborated by one witness but contradicted by the officer and a separate independent witness. And the plaintiff alleged resulting injuries that included "lacerations to the face which required stitches," a broken thumb, "permanent marks" where the handcuffs cut his hand, loss of the use of his arms, trouble walking, "numbness from the back of his neck, between the shoulders . . . down both arms, then down his legs," and that "[a]n MRI revealed cervical cord contusion."

Nonetheless, the Sixth Circuit found the officer was entitled to qualified immunity. The court stated that though the suspect was "cooperative and was not boisterous, combative, or disrespectful," the suspect's refusal to comply with the officer's "orders to place his hands behind his back prior to the takedown," though given sufficient time to do so—*orders the suspect denied hearing*—constituted sufficient cause for the takedown. Id. at 520.

And lastly, in Wright v. City of Chattanooga, Case No. 1:10-CV-291, 2012 WL 28744 (E.D. Tenn. Jan. 5, 2012)), a case highly similar to the instant action which involved traffic violations allegedly committed during the suspect's trip to a hospital for an emergency and the use of force by police when he was subsequently apprehended, the Sixth Circuit stated:

> . . . Mr. Wright ran through two red lights and failed to stop for a police car that had signaled him to stop. In the midst of having to discern Mr. Wright's true motives upon arriving at the hospital, it was not completely unreasonable for Defendant to have grabbed Mr.

> Wright's arm as he reached into the passenger side of the car. In retrospect, it was probably an unnecessary act given the totality of the circumstances. However, this assessment by the Court is made in hindsight, a perspective Defendant could not avail himself of at the time of the incident. Finally, even if the Court was to conclude Defendant's conduct—either the grabbing of Mr. Wright's arm or his temporarily blocking the couple from entering the hospital—was unreasonable, nothing Plaintiffs have alleged would support a claim that such force would have been "excessive."

Id. at *9.

Thus, based on these four cases, either Plaintiff's fleeing or her resistance was sufficient to justify Estes forcibly walking her to a car and holding her against it as he placed her in handcuffs, and so even if this Court were to decide, because of the standard for considering summary judgment, that this force might constitute unconstitutional behavior, it cannot be said to have been *clearly established* as such, and therefore this claim must necessarily be dismissed.

V. CONCLUSION

Based on all the foregoing, Defendant Estes respectfully requests that this Court reverse the district court's denial of his claim of qualified immunity and thus dismiss all remaining federal claims against him. Furthermore, as the state law claims are analyzed as their federal law counterparts, if the court dismisses the federal claims, it must necessarily dismiss the state law claims as well. See Griffin v. Hardrick, 604 F.3d 949, 956 (6th Cir. 2010) (battery); Roberts v. Essex Microtel Assoc., II, L.P., 46 S.W.3d 205, 213 (Tenn. Ct. App. 2000) (false imprisonment).

Respectfully submitted,
FARRAR & BATES, L.L.P.

/s/ *Teresa Reall Ricks*
Teresa Reall Ricks (BPR #014459)
211 Seventh Avenue North, Suite 500
Nashville, TN 37219
(615) 254-3060
Attorney for Chad Estes

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Fed. R. App. P. 32(a)(7)(C)(I) and 6th Cir. R. 32(a), I hereby certify that:

I. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

II. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in Times New Roman at 14 point.

Respectfully submitted,
FARRAR & BATES, L.L.P.

/s/ *Teresa Reall Ricks*
Teresa Reall Ricks (BPR #014459)
211 Seventh Avenue North, Suite 500
Nashville, TN 37219
(615) 254-3060
Attorney for Chad Estes

Certificate of Service

The undersigned hereby certifies that on this the 19th day of April, 2013 a true and correct copy of the foregoing has been forwarded via the Court's electronic filing system to:

W. Joseph Werner, Esquire
John W. Roberts, Esquire
ROBERTS & WERNER, PLLC
1720 West End Avenue, Suite 402
Nashville 37203

Michael B. Schwegler, Esquire
Law Office of Ernest B. Williams, IV
P.O. Box 159264
Nashville, TN 37215
Attorneys for Wynn

/s/ Teresa Reall Ricks
Teresa Reall Ricks

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to 6th Cir. R. 30(b) and 30(f), Defendant-Appellant, designates the following entries from the docket of the district court below as relevant to this appeal.

Record Entry No.	PageID#	Description of Document
1	1–25	Complaint
61-2	720–21	Exhibit 1 to Estes Affidavit
62-2	726–27	Exhibit 1 to Young Affidavit
62-3	728–29	Exhibit 2 to Young Affidavit
63-1	732–817	Portions of Wynn Deposition
63-2	818–32	Wynn Deposition Exhibit 3
64-1	835– 884	Portions of Estes Deposition
64-2	885	Estes Deposition Exhibit 16
65-1	889–99	Portions of Young Deposition
66-1	902– 09	Portions of Waybright Deposition
67-1	912–20	Portions of Braden Deposition
68-1	923–28	Portions of Harwell Deposition
69-1	931–35	Portions of Derryberry Deposition
70-1	938–44	Portions of Donnelly Deposition
71-1	947–63	Allen Expert Report

72-1	966–86	Mays Expert Report
82-1	1090–149	Portions of Wynn Deposition
100-1	1492– 94	Portions of Bue Deposition
170	1822–48	Memorandum
171	1849–50	Order
173	1854	Notice of Appeal

APPENDIX OF UNREPORTED CASE LAW

AntiCancer, Inc. v. Berthold Technologies, U.S.A., LLC, — F. Supp. 2d —, Case No. 3:11-CV-457, 2013 WL 625363, at *5 (E.D. Tenn. Feb. 20, 2013)

Bozung v. Rawson, 439 F. App'x 513 (6th Cir. 2011)

Cockrell v. City of Cincinnati, 468 F. App'x 491, 494 (6th Cir. 2012)

Hays v. Bolton, 488 F. App'x 971, 978 (6th Cir. 2012)

McColman v. St. Clair County, 479 F. App'x 1 (6th Cir. 2012)

United States v. Holifield, Case No. 1:12-CR-21, 2012 WL 6101999, at *3 (E.D. Tenn. Dec. 7, 2012)

Verge v. City of Murfreesboro, Case No. 3:08-1230, 2009 WL 2983027 (M.D. Tenn. Sept. 14, 2009)

Wright v. City of Chattanooga, Case No. 1:10-CV-291, 2012 WL 28744 (E.D. Tenn. Jan. 5, 2012)

Wysong v. City of Heath, 260 F. App'x 848, 854 (6th Cir. 2008)

2013 WL 625363
Only the Westlaw citation is currently available.
United States District Court, E.D. Tennessee.

ANTICANCER, INC., Plaintiff,
v.
BERTHOLD TECHNOLOGIES, U.S.A., LLC, et al., Defendants.

No. 3:11–CV–457. | Feb. 20, 2013.

Synopsis

Background: Assignee of two method patents in procedures enabling medical researchers to track the growth and spread of cancerous cells in animals by using tumor cells containing fluorescent proteins brought action against defendants that designed, manufactured, and sold imaging systems for use by researchers and other medical scientists, alleging direct and indirect infringement of both patents. Defendants moved for summary judgment.

Holdings: The District Court, Thomas A. Varlan, J., held that:

[1] assignee did not demonstrate that defendants performed all of the steps under the first patent after that patent had issued, and

[2] assignee failed to establish a genuine issue of material fact on its claim that defendants induced infringement of second patent.

Motion granted.

West Headnotes (6)

[1] Patents
Identity in General

Under patent law, the concept of “use” of a patented method or process is fundamentally different from the use of a patented system or device. 35 U.S.C.A. § 271(a).

[2] Patents
Identity in General

A method or process consists of one or more operative steps, and accordingly a patent for a method or process is not infringed unless all steps or stages of the claimed process are utilized; additionally, all steps to the method must be performed when the patent is in force, i.e. after the patent has issued, for an act of infringement to occur. 35 U.S.C.A. § 271(a).

[3] Patents
Identity in General

Alleged infringers' brochure discussing use of an imaging system for the type of imaging gene expression claimed by method patent pertaining to the use of fluorescent proteins was produced prior to the issuance of the claimed patent, and therefore did not demonstrate that alleged infringers performed all of the steps under the patent after the patent had issued, as required to support patent assignee's infringement claim.

[4] Patents
Contributory Infringement; Inducement

A plaintiff must satisfy four requirements to establish a claim for inducement infringement: (1) specific acts of direct patent infringement by a third-party; (2) the defendant took active steps that induced the third-party's infringement; (3) the defendant intended the third-party to take the infringing acts; and (4) the defendant knew or willfully disregarded the risk that those actions by the third-party would constitute direct infringement. 35 U.S.C.A. § 271(b).

[5] Patents
Affidavits or Other Evidence

General statement of assignee of method patent pertaining to the use of fluorescent proteins, that it was standard procedure for instrumentation manufacturers such as defendants to send information to current and past customers about applications for their products, was insufficient to

satisfy assignee's burden on summary judgment of creating a genuine issue of material fact on its induced infringement claim against defendants, as to whether defendants sent a product brochure and a computer presentation discussing the use of an imaging system for the type of imaging gene expression claimed by the patent to researchers who allegedly practiced the claimed patent methods without a license.

[6] Patents

Original Utility

6,649,159, 6,759,038. Not Infringed.

Attorneys and Law Firms

Matthew D Valenti, Anticancer, Inc., San Diego, CA, for Plaintiff.

Andrew S. Neely, Michael J. Bradford, Luedeka, Neely & Graham, P.C., Knoxville, TN, Matthew D. Valenti, Anticancer, Inc., San Diego, CA, for Defendants.

Opinion

MEMORANDUM OPINION

THOMAS A. VARLAN, District Judge.

***1** This civil matter is before the Court on defendants' Motion for Summary Judgment of Noninfringement [Doc. 35], in which defendants move the Court to dismiss plaintiff's claims of patent infringement. Plaintiff submitted a response [Doc. 37], to which defendants submitted a reply [Doc. 38]. The Court has considered the pending motion, the responsive pleadings, and supporting exhibits in light of the relevant case law. For the reasons discussed herein, defendants' motion [Doc. 35] will be granted, plaintiff's claims against defendants will be dismissed, and this case will be closed.

I. Facts

The dispute in this action arises from plaintiff's method patents in procedures which enable medical researchers to track the growth and spread of cancerous cells in animals by using tumor cells which contain fluorescent proteins [Doc. 1 ¶ 4]. The fluorescent proteins glow so that researchers may track the growth in real time using fluorescence imaging, which allows researchers to learn what effect a given drug or treatment has on the examined tumor cells [*Id.* ¶ 6].

The first of the two patents at issue in this case pertaining to the use of fluorescent proteins is U.S. Patent No. 6,649,159 B2 (the #159 patent), which claims "methods for whole-body external optical imaging of gene expression and methods for evaluating a candidate protocol or drug for treating diseases or disorders using a fluorophore ..." [Doc. 1–1, Ex. B at 2]. The # 159 patent was issued on November 18, 2003.

The second patent at issue is U.S. Patent No. 6,759,038 B2 (the #038 patent). The #038 patent claims the procedure for following "the progression of metastasis of a primary tumor, which method comprises removing fresh organ tissues from a vertebrate subject which has been modified to contain tumor cells that express [fluorescence] and observing the excised tissues for the presence of fluorescence ..." [Doc. 1–1, Ex. A at 2]. The #038 patent was issued on July 6, 2004 *[Id.]*. Plaintiff licenses the use of both patents to commercial users, including pharmaceutical companies, as well as non-commercial users, including educational institutions [Doc. 1 ¶ 18].

Defendants design, manufacture, and sell imaging systems for use by researchers and other medical scientists, including the NightOWL LB 981 NC 100 (the "NightOWL") and the NightOWL II LB 983 (the "NightOWL II") *[Id.* ¶ 20]. Both of these imaging systems, when used with the appropriate filter settings, are capable of utilizing the methods covered by the #159 and #038 patents in order to capture images of fluorescent protein *[Id.* ¶ 21]. In or around November 2002, defendants sold a NightOWL system and various accessories for the device to Indiana University School of Medicine [Doc. 36–3 at 4]. The shipment included a filter for the use of fluorescent protein imaging [*Id.*]. Defendants later sold a NightOWL system to the Massachusetts Institute of Technology ("MIT") in August 2003, which also included filter accessories for the use of fluorescent protein imaging [*Id.* at 7]. In between the sale of the two systems, defendants published a marketing brochure in June 2003 entitled *Ultra Sensitive Whole Sample Imaging [:] NightOWL LB 981* (the *"Whole Sample Imaging* brochure"), which highlighted the capabilities of the NightOWL [Doc. 36 at 4].

***2** In or around 2009 and again in or around 2010, researchers at the Koch Institute for Integrative Cancer Research at MIT used a NightOWL device to practice the

methods claimed by the #038 patent without a license from plaintiff [Doc. 37–1 ¶ 6]. Plaintiff discovered the unlicensed uses based on at least two articles published by researchers at the Koch Institute, detailing the activities surrounding use of the NightOWL and plaintiff's patented methods [*Id.* (citing Hai Jiang, et al., *The Combined Status of ATM* and p53 Link Tumor Development with Therapeutic Response, 23 Genes and Develop. 1895 (June 2009) (the "Jiang article"); Kun Xie, et al., *Error-prone Translesion Synthesis Mediates Acquired Chemoresistance*, 107 Proceedings of the Nat'l Acads. of Sci. 20792 (Nov.2010) (the "Xie article")]. Plaintiff also alleged that researchers at Indiana University similarly infringed the #038 patent using the NightOWL sold to them by defendants [Doc. 36 at 5].

Plaintiff filed suit against defendants in the Southern District of California on November 12, 2010, alleging direct infringement and indirect infringement of both the #159 and #038 patents, specifically alleging that defendants induced individuals at Indiana University and MIT to infringe plaintiff's patent using the NightOWL [Doc. 1 ¶¶ 41–43]. Upon defendants' motion, the case was transferred to this Court on September 19, 2011.

II. Standard of Review

Summary judgment under Rule 56 of the Federal Rules of Civil Procedure is proper "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." Fed.R.Civ.P. 56(a). The moving party bears the burden of establishing that no genuine issues of material fact exist. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 n. 2, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Moore v. Phillip Morris Cos.*, 8 F.3d 335, 339 (6th Cir.1993). All facts and all inferences to be drawn therefrom must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Burchett v. Kiefer*, 301 F.3d 937, 942 (6th Cir.2002). "Once the moving party presents evidence sufficient to support a motion under Rule 56, the non-moving party is not entitled to a trial merely on the basis of allegations." *Curtis Through Curtis v. Universal Match Corp., Inc.*, 778 F.Supp. 1421, 1423 (E.D.Tenn.1991) (citing *Catrett*, 477 U.S. at 317). To establish a genuine issue as to the existence of a particular element, the non-moving party must point to evidence in the record upon which a reasonable finder of fact could find in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The genuine issue must also be material; that is, it must involve facts that might affect the outcome of the suit under the governing law. *Id.*

The Court's function at the point of summary judgment is limited to determining whether sufficient evidence has been presented to make the issue of fact a proper question for the factfinder. *Anderson*, 477 U.S. at 250. The Court does not weigh the evidence or determine the truth of the matter. *Id.* at 249. Nor does the Court search the record "to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479–80 (6th Cir.1989). Thus, "the inquiry performed is the threshold inquiry of determining whether there is a need for a trial-whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250.

III. Analysis

A. The #159 Patent

***3** Plaintiff alleges that defendants directly infringed the #159 patent by discussing use of the NightOWL for monitoring gene expression and by using an image of a mouse imaged for "report gene expression" in the *Whole Sample Imaging* brochure [Doc. 37–3 at 23]. [1] In support of their motion for summary judgment, defendants argue that plaintiff cannot show that defendants practiced all of the steps of the method claimed by the #159 patent. Defendants further argue that the marketing brochure plaintiffs rely upon as evidence of infringement was released for public distribution prior to the issuance of the #159 patent. Defendants also contend that the marketing brochure was created in Germany, and that all activity described in the brochure also took place in Germany, so that no there can be no infringement. [2]

[1] **[2]** 35 U.S.C. § 271(a) provides that:

> Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.

Under section 271(a), "the concept of 'use' of a patented method or process is fundamentally different from the use

of a patented system or device." *NTP, Inc. v. Research in Motion, Ltd.*, 418 F.3d 1282, 1317 (Fed.Cir.2005). "A method or process consists of one or more operative steps, and accordingly '[i]t is well established that a patent for a method or process is not infringed unless all steps or stages of the claimed process are utilized.' " *Id.* (quoting *Roberts Dairy Co. v. United States*, 208 Ct.Cl. 830, 530 F.2d 1342, 1354 (Ct.Cl.1976)); *see also EMI Group N. Am., Inc. v. Intel. Corp.*, 157 F.3d 887, 896 (Fed.Cir.1998) ("For infringement of a process invention, all of the steps of the process must be performed, either as claimed or by an equivalent step.").

In addition to the requirement that all steps to the method must be performed, all steps to the method must be performed when the patent is in force, *i.e.* after the patent has issued, for an act of infringement to occur. *See Monsanto Co. v. Syngenta Seeds, Inc.* ., 503 F.3d 1352, 1360 (Fed.Cir.2007) (noting that "infringement of a multi-step method claim cannot lie by the performance of a single step after issuance of the patent when the initial steps were performed prior to issuance"); *see, e.g. Mycogen Plant Sci. Co. v. Monsanto Co.*, 252 F.3d 1306, 1318 (Fed.Cir.2001) (noting that § 271(g) of statute "requires that the patent be issued and in force at the time that the process is practiced and the product is made"), *vacated on other grounds*, 535 U.S. 1109, 122 S.Ct. 2324, 153 L.Ed.2d 153 (2002).

[3] Plaintiff's sole claim of patent infringement of the #159 patent stems from the *Whole Sample Imaging* brochure. That brochure discusses use of the Night OWL for the type of imaging gene expression claimed by the #159 patent [Doc. 36–2 at 9]. The brochure also displays images that depict gene expression in living mice [*Id.*]. Plaintiff alleges that defendants had to follow the methods covered by the #159 patent in order to produce the brochure.

***4** In support of its motion, defendants submitted the affidavit of Bernd Hutter, an employee in defendants' Marketing & Product Management, Bioanalytical Instruments division [Doc. 36–2 ¶ 1]. Mr. Hutter testified that the *Whole Sample Imaging* brochure was released for public distribution on or about June 20, 2003 and that the all of the activity described in and connected to the brochure occurred prior to June 20, 2003 [*Id.* ¶¶ 3–4]. Mr. Hutter further stated that the date of the brochure can be observed by the "notation in the bottom right corner of the page" in vertical text which appears on the last page of the brochure: 062003 *[Id.* ¶ 3]. [3] Plaintiff has not offered any evidence to rebut Mr. Hutter's testimony that the *Whole Sample Imaging* brochure was produced prior to the November 18, 2003 issuance of the # 159 patent. Plaintiff has not created a genuine issue of material fact as to whether defendants performed all of the steps under the #159 patent after the #159 patent had issued. Accordingly, defendants are entitled to summary judgment on plaintiff's claim of patent infringement of the #159 patent. [4]

B. The #038 Patent

In its response to defendants' motion [Doc. 37], plaintiff claims that researchers at the Koch Institute for Integrative Cancer Research at MIT practiced the methods of the #038 patent without a license and thereby committed patent infringement in 2009 and again in 2010 when they used the NightOWL to produce the Jiang and Xie articles. Plaintiff argues that defendants induced this direct infringement by producing a marketing brochure [Doc. 37–6, Ex. E] and PowerPoint presentation [Doc. 37–6, Ex. F], both of which give instructions on how to use a NightOWL II camera to conduct fluorescence imaging. Plaintiff contends that defendants sent these documents to researchers at MIT in order to encourage or assist the researchers' infringement. In support of this argument, plaintiff submits that "it is standard procedure for instrumentation manufacturers such as [defendants] to supply prospective and existing customers with information about scientific applications for their products" *[Id.* at 8]. Defendants contend that plaintiff has produced no evidence that defendants sent the documents in question to MIT or any other institution, and as a result, has not presented a genuine issue of material fact as to whether defendants encouraged MIT researchers to infringe the #038 patent.

[4] 35 U.S.C. § 271(b) states: "[w]hoever actively induces infringement of a patent shall be liable as an infringer." The Supreme Court has held that induced infringement under § 271(b) "requires knowledge that the induced acts constitute patent infringement." *Global–Tech Appliances, Inc. v. SEB S.A.*, ––– U.S. ––––, ––––, 131 S.Ct. 2060, 2068, 179 L.Ed.2d 1167 (2011). In light of the Supreme Court's ruling in *Global–Tech*, the Sixth Circuit set forth four requirements a plaintiff must satisfy to establish a claim for inducement infringement: (1) specific acts of direct infringement by a third-party; (2) the defendant took active steps that induced the third-party's infringement; (3) the defendant intended the third-party to take the infringing acts; and (4) the defendant knew or willfully disregarded the risk that those actions by the third-party would constitute direct infringement. *Static Control Components, Inc. v. Lexmark Int'l, Inc.* 697 F.3d 387, 415

(6th Cir .2012); *see also Akamai Techs., Inc. v. Limelight Networks, Inc.*, 692 F.3d 1301, 1308 (Fed.Cir.2012) (en banc) (" '[I]nducement requires that the alleged infringer knowingly induced infringement and possessed specific intent to encourage another's infringement.' ") (quoting *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1306 (Fed.Cir.2006) (en banc)).

***5 [5]** In this case, assuming *arguendo* that the MIT researchers infringed the #038 patent, plaintiff must also present evidence showing that defendants knowingly encouraged the researchers to infringe the #038 patent as required by the test set forth in *Static Control.* Defendants sold the NightOWL and shipped all accompanying instructions and applications to MIT in 2003, prior to the issuance of the #038 patent and prior to plaintiff informing defendants of the existence of the #038 patent in 2006 [Doc. 37 at 4]. Any of defendants' activities in regard to the sale of the NightOWL prior to 2006, then, cannot serve as evidence of inducing infringement because defendants did not know about the #038 patent. *See Static Control*, 697 F.3d at 415 (noting that plaintiff must show defendant knew or willfully disregarded the risk that others would infringe patent). The only two actions that plaintiff relies upon as proof of inducement by defendants are the publication of the brochure [Doc. 37–6, Ex. E] and the PowerPoint presentation [Doc. 37–6, Ex. F], both of which discuss the NightOWL II, a newer model of the device owned by MIT.

Plaintiff submits that "it is standard procedure for instrumentation manufacturers" such as defendants to send information to current and past customers about applications for their products [Doc. 37 at 8]. This general statement about the practices of instrumentation manufacturers cannot satisfy plaintiff's burden of creating a genuine issue of material fact as to whether these were actually sent by defendants to the MIT researchers who subsequently produced the Jiang and Xie articles. Conclusory allegations and unsubstantiated assertions are not evidence and are not adequate to oppose a motion for summary judgment. *Miller v. Aladdin–Temp–Rite, LLC*, 72 F. App'x 378, 380 (6th Cir.2003) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990)); *see also Roopchan v. ADT Sec. Sys., Inc.*, 781 F.Supp.2d 636, 650 (E.D.Tenn.2011) (noting conclusory allegations in plaintiff's response to motion for summary judgment did not raise a genuine issue for trial). Plaintiff has not presented evidence that defendants have a procedure whereby they periodically send out marketing materials to past customers or that defendants had a history of sending marketing materials to academic institutions such as MIT. Rather, plaintiff infers that because some manufacturers send such information, defendants sent the materials in question here and that information enabled the MIT researchers to infringe the patent. This assertion, without any other evidence that defendants sent MIT researchers the marketing materials intending that they be used to commit patent infringement, does not demonstrate the type of "specific facts showing a genuine issue for trial" necessary to defeat a well-supported motion for summary judgment under Rule 56. Fed.R.Civ.P. 56(e); *Matsushita*, 475 U.S. at 586.

Defendants have submitted evidence rebutting plaintiff's claim that the brochure and presentation were used to infringe the #038 patent in showing that there is no genuine dispute as to any material fact. In reply to plaintiff's response, defendants submitted an affidavit from Rhonda Mullins ("Mullins"), the president of defendant Berthold Technologies, U.S.A [Doc. 38]. Mullins testified that the PowerPoint presentation in question was created by defendant Berthold Technologies GMBH & Co., KG ("Berthold Germany") and is used in employee sales training in Germany, noting that the presentation was not sent to MIT *[Id.* ¶ 2]. Mullins further testified that the brochure in question was also created by Berthold Germany for the NightOWL II and that the brochure was not provided to MIT *[Id.* ¶ 3].

***6** As plaintiff has not presented evidence showing that MIT received the brochure or PowerPoint from defendants, and defendants have presented evidence that they did not send either of the materials to MIT, the Court concludes that there is no genuine issue of material fact as to whether defendants induced the MIT researchers to infringe the #038 patent. Accordingly, the Court will grant defendants' motion for summary judgment of non-infringement as to the # 038 patent. [5]

III. Conclusion

For the reasons stated, defendants' motion [Doc. 35] will be **GRANTED,** plaintiff's claims against defendants will be **DISMISSED,** and this case will be **CLOSED.**

ORDER ACCORDINGLY.

Footnotes

1 Although plaintiff alleges both direct and indirect infringement of the #159 patent against defendant in its complaint [Doc. 1], defendants note that in response to interrogatories plaintiff has clarified it is only pursuing an action for direct infringement of the #159 patent [Doc. 36 at 3 (citing Doc. 36–1 at 5)].

2 The Court notes that plaintiff did not offer argument regarding the #159 patent in its response brief [Doc. 37].

3 Later brochures produced by defendants similarly indicate the date of creation in vertical text on the last page *[See* Doc. 1–1 at 63, 73, 87].

4 Because the Court finds that defendants did not engage in any potentially infringing activity after issuance of the #159 patent, the Court need not address defendants' other arguments.

5 While plaintiff initially alleged that defendants also induced researchers at the University of Indiana to commit patent infringement, the Court notes that plaintiff does not address this claim in response to defendants' motion for summary judgment. Nonetheless, the Court applies the same analysis and reaches the same conclusion that there is no genuine issue of material fact for which a jury could rule in plaintiff's favor.

439 Fed.Appx. 513
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
Sixth Circuit Rule 28. (Find CTA6 Rule 28)
United States Court of Appeals,
Sixth Circuit.

Robert BOZUNG, Plaintiff–Appellant,
v.
Officer Travis RAWSON, Officer John Wilson, and The Charter Township of DeWitt, Defendant–Appellees.

No. 10–1050. | Oct. 7, 2011.

Synopsis

Background: Arrestee brought § 1983 action against police officers and township, alleging excessive force, failure to train officers in proper use of force, gross negligence, assault and battery, and violation of Michigan Persons with Disabilities Civil Rights Act. The United States District Court for the Western District of Michigan granted motion for summary judgment in favor of defendants. Arrestee appealed.

Holding: The Court of Appeals, Curtis L. Collier, Chief District Judge, sitting by designation, held that police officer did not use excessive force by using straight-arm bar takedown technique on arrestee.

Affirmed.

Boggs, Circuit Judge, filed a dissenting opinion.

West Headnotes (1)

[1] Arrest
Use of force

Police officer did not use excessive force by using straight-arm bar takedown technique on arrestee, as would violate Fourth Amendment, despite arrestee's contention that officer slammed him to ground without first giving him instructions to place his hands behind his back, and that officer placed his knee or foot on arrestee's back, contributing to arrestee's spinal cord injuries; it was reasonable for officer to employ takedown technique to neutralize arrestee and handcuff him, inasmuch as officer had very limited knowledge of arrestee when he asked arrestee to step out of vehicle, it was not clear to officer, at time of incident, whether arrestee posed immediate threat to him, and at time of incident, arrestee had been told to place his hands behind his back, and two to three minutes passed between time arrestee walked around back of his vehicle until time officer employed takedown technique. U.S.C.A. Const.Amend. 4.

4 Cases that cite this headnote

***513** On Appeal from the United States District Court for the Western District of Michigan.

***514** Before: BOGGS and KETHLEDGE, Circuit Judges; and COLLIER, Chief District Judge. *

Opinion

CURTIS L. COLLIER, Chief District Judge.

Plaintiff–Appellant Robert Bozung ("Bozung") appeals an order of the district court granting a motion for summary judgment in favor of Defendant–Appellees Travis Rawson ("Officer Rawson"), John Wilson ("Officer Wilson") and the Charter Township of DeWitt (or the "Township") in regards to Bozung's federal 42 U.S.C. § 1983 claims. As previously stipulated by the parties, all claims against Officer Wilson on appeal have been dismissed.

For the reasons set forth below, we AFFIRM the district court's judgment.

I. Relevant Facts/Procedural History

A. Factual Background

On June 6, 2007, Bozung was returning from a trip to a local grocery store in Lansing, Michigan. Bozung was fifty-four

(54) years old and had health issues arising from a stroke he suffered at age twenty-eight (28). He had also suffered from a fractured ankle and had a hip replacement due to a bone deficiency.

One of Bozung's neighbors had asked him to give her a ride to buy groceries; however, Bozung explained to her that he could not drive because his license was suspended. As a result, the neighbor suggested that Bozung allow a friend of hers to drive his truck. Subsequently, the three of them—Bozung, his neighbor, and his neighbor's friend—drove to the grocery store.

As the three approached Bozung's apartment complex upon their return, Officer Rawson of the DeWitt Township Police Department stopped Bozung's vehicle because Officer Rawson considered the rosary hanging from Bozung's rear-view mirror to be a vision obstruction. The unknown driver of Bozung's vehicle stopped the vehicle in the middle of the street and fled the scene. Officer Rawson pursued the individual in his patrol car and called for back up, but he was unable to apprehend the individual. When he returned to the truck, he observed Bozung, who had moved over into the driver's seat, slowly driving the vehicle into the parking lot of the apartment complex. According to Officer Rawson, he ordered Bozung to stop the vehicle; Bozung, however, claims Officer Rawson did not say anything to him nor did he motion for Bozung to stop the vehicle.

Once Officer Rawson approached the truck, he made contact with Bozung and his neighbor. He asked them to identify the fleeing driver, but both claimed they did not know him. In Officer Rawson's opinion, Bozung was obviously intoxicated. He smelled of alcohol, later registered a .18% blood alcohol level, and had urinated himself. Officer Rawson confirmed with dispatch that Bozung was the owner of the truck. He also ran a LEIN check for outstanding warrants. Bozung did have a misdemeanor warrant for failure to appear in a local court. Once Officer Rawson advised Bozung there was a warrant for his arrest, he ordered Bozung to get out of the truck and informed him that he was under arrest. It is at this point that Bozung's and Defendant–Appellees's versions of events differ greatly.

1. Bozung's Version of Events

According to Bozung, he exited the truck and complied with Officer Rawson's ***515** instructions to face the truck. He then placed his hands on the bed of his truck. At that time, Officer Rawson asked Bozung to spread his legs. Although Bozung states he told Officer Rawson that he was disabled and could not physically comply with the orders quickly, Bozung states Officer Rawson began kicking the inside of Bozung's legs. Bozung also asserts he told Officer Rawson his age, and he told him that he had a total right hip-replacement and had plate and screws in his right ankle. In Bozung's view, because he was not moving quickly enough, Officer Rawson told him they could handle the situation "the easy way or the hard way." Then, despite Bozung's protests, Officer Rawson grabbed one of Bozung's arms and brought Bozung down on to the pavement or asphalt. Bozung contends "he was thrown to the ground almost immediately after advising the officer of his handicap." In addition, he states Officer Rawson failed to advise him as to why he was being arrested, and Officer Rawson did not ask him to place his hands or arms behind his back before he was thrown to the ground. According to Bozung, his interaction with Officer Rawson, prior to being taken down to the ground, lasted approximately two to three minutes.

Once Bozung was on the ground, Officer Rawson pulled Bozung's arms behind his back to handcuff him. Bozung claims he asked Officer Rawson to loosen the handcuffs because they were too tight. However, Officer Rawson refused to do so.

At some point, Officer John Wilson, a public safety officer at the Capitol Region Airport Authority, arrived at the scene. Bozung suggests Officer Wilson was involved in throwing Bozung to the ground, and he specifically alleges Officer Wilson put his foot on Bozung's neck while he was lying, face-down, on the pavement. Still, Bozung admits he could not see Officer Wilson while he was lying face-down on the ground. Bozung also alleges Officer Rawson had his knee in the center of Bozung's back. As a result of these interactions, Bozung suffered from lacerations to his face, a broken thumb, and permanent spinal cord injuries.

In response to the Defendant–Appellees' motions for summary judgment, Bozung presented the deposition testimonies of two witnesses to corroborate parts of his story. James Leggions ("Leggions"), one of Bozung's neighbors, testified he saw the events unfold as the driver fled from Bozung's truck. He later saw Bozung get out of his vehicle. To him, Bozung appeared to be holding onto the back of his truck to keep his balance. However, he did not hear Bozung say anything to the officers, and he could not generally understand what the officers said to Bozung, except he thought Officer Rawson ordered Bozung to stay inside the

truck. Nonetheless, he testified it was clear Bozung was having trouble walking, and in his opinion, Officer Rawson "slammed" Bozung to the ground because Bozung would not give the identity of the driver. According to Leggions, it was Officer Rawson who placed his foot somewhere on Bozung's neck.

Melanie Harris ("Harris"), who was supposedly Bozung's girlfriend at the time of the incident, testified that she saw Officer Rawson kicking Bozung's legs apart when Bozung first got out of his truck. She also states she heard Bozung asking the officer to stop because he was disabled. In addition, Harris contends other individuals in the forming crowd, including herself, shouted at Officer Rawson to tell him that Bozung was "handicapped." Despite their protests, Officer Rawson told Bozung he must "want this done the hard way," and he twisted Bozung's arm and slammed him to the ground. According to her testimony, it was the second officer, Officer Wilson, ***516** who placed his foot on the upper part of Bozung's back. Like Leggions, she believed Officer Rawson threw Bozung to the ground immediately after Bozung informed him of his disabilities.

As a result of these events, Bozung claims he "suffered lacerations to the face which required stitches[,] ... [h]is thumb was broken[,] ... [and] [t]he handcuffs cut his hand, leaving permanent marks." Bozung also contends he suffered more serious injuries. In the three weeks following his arrest, "he began to lose the use of his arms and had trouble walking. He experienced numbness from the back of his neck, between the shoulders, working down both arms, then down his legs. An MRI revealed cervical cord contusion."

2. Officer Rawson's Version of Events

According to Officer Rawson, when he ordered Bozung to get out of his vehicle, Bozung "walked on his own volition along the side of it." Although he asked Bozung to spread his legs, Officer Rawson contends he did not use his foot to kick Bozung's legs apart, and he contends Bozung never informed him of any disabilities. Indeed, Officer Rawson asserts there was no indication that Bozung was physically unable to comply with the orders or that he was disabled. At the time, Bozung did not have a disability sticker on his license plate or a disability tag hanging from his rearview mirror. He also did not park in a parking spot designated for disabled drivers.

Officer Rawson then ordered Bozung to place his hands behind his back to be handcuffed, and he gave him multiple opportunities to comply with the order over the course of thirty seconds. Bozung allegedly refused and gripped the bed of the truck. Nonetheless, Officer Rawson concedes Bozung stated, "wait, wait," or "I am, I am" in response to Officer Rawson's commands. Still, Officer Rawson asserts Bozung did not provide any explanation as to why he could not put his hands behind his back to be handcuffed. After unsuccessfully trying a "muscling technique" to release Bozung's grip on the truck, Officer Rawson believed "further action was warranted," even though he would not characterize Bozung's non-compliance as active resistance.

At this point, Officer Rawson decided to employ a technique called a "straight arm bar takedown." This is a "soft empty hand control technique." However, when Officer Rawson grabbed Bozung's right hand, it appeared to him that Bozung was pulling away from him. Once Bozung was on the ground, Officer Wilson, who Officer Rawson noticed for the first time, assisted Officer Rawson in handcuffing Bozung.

At this time, Officer Rawson admits he may have had his knee on Bozung's shoulder blade, but this was done to help secure the handcuffs. After Bozung was handcuffed, he was assisted to his feet by the officers and placed in Officer Rawson's patrol car. Because Officer Rawson noticed Bozung had a small cut above his eye and an injury to his thumb, Bozung was transported to the hospital for treatment. Bozung was released from the hospital after a few hours.

3. Officer Wilson's Version of Events

Officer Wilson was on duty at the Capitol Region Airport on June 6, 2007. He heard the transmission from Officer Rawson stating he was in pursuit of a fleeing suspect and needed assistance.

When he arrived at the scene, Officer Wilson observed a crowd forming outside of the apartment complex. He then saw Bozung standing outside of his truck, and he heard Officer Rawson inform Bozung of ***517** the outstanding warrant for his arrest. Although Officer Wilson did not hear Bozung respond to this information, he saw Bozung walking, on his own volition, to the rear end of Bozung's truck. There, Bozung grabbed onto and held the bed of the truck.

When Officer Rawson ordered Bozung to place his hands behind his back, Bozung responded, "I am, I am." At no point did Officer Wilson hear Bozung explain to Officer Rawson that he was disabled, nor did Bozung ever make such statement to Officer Wilson. Instead, it appeared to Officer

Wilson that Bozung was being noncompliant by continuing to hold onto the bed of the truck. Finally, after giving Bozung multiple opportunities to place his hands behind his back, Officer Rawson grabbed Bozung's arm to pry him away from the truck.

It appeared to Officer Wilson that once Officer Rawson freed Bozung's arm, Bozung tried to pull away from Officer Rawson. Unsure as to whether Bozung was attempting to flee, Officer Wilson grabbed Bozung's other arm in an effort to assist. As a result of Officer Rawson's straight-arm bar takedown, all three of the men went to the ground.

While Bozung was on the ground, Officer Wilson claims he crouched alongside Bozung in order to guide one of Bozung's arms behind his back so Officer Rawson could handcuff Bozung. At no point did he place his foot on Bozung's neck.

B. Procedural History

Bozung filed a complaint in the Western District of Michigan on April 11, 2008. The complaint alleged Officer Rawson, Officer Wilson, and the Charter Township of DeWitt violated Bozung's civil rights pursuant to 42 U.S.C. § 1983. Specifically, Bozung alleged Officer Rawson and Officer Wilson used unreasonable and excessive force in effectuating his arrest. Plaintiff then contended the Township failed to train its officers in the proper use of force and failed to train its officers to properly accommodate individuals with disabilities. Bozung's three remaining counts were brought under state law. He alleged the officers's conduct constituted gross negligence. He also asserted claims for assault and battery against the officers. Finally, Bozung brought a claim against all three of the defendants for violating the Michigan Persons with Disabilities Civil Rights Act.

In response to Bozung's complaint, Officer Wilson, Officer Rawson, and the Township filed motions for summary judgment. The district court granted in part and denied without prejudice in part Officer Wilson's motion, dismissing the federal law claims against Officer Wilson. The district court also granted in part and denied in part Officer Rawson and the Township's motion for summary judgment. All federal claims were dismissed against them as well. Finally, because the Court had dismissed all federal claims against all of the defendants, it declined to exercise supplemental jurisdiction over Bozung's state law claims.

On Bozung's § 1983 claims, the district court found Bozung had not "established the actions of the officers were unreasonable under the totality of the circumstances." *Bozung v. Rawson*, No. 1:08–cv–339, 2009 WL 2413624, at *6 (W.D.Mich. Aug.4, 2009). Although the court considered the facts in a light most favorable to Bozung, it found summary judgment was warranted. As to Officer Rawson, the court found he acted reasonably when he forced Bozung to comply through his straight-arm bar takedown. To support this finding, the court cited the following facts: "(1) when [Officer Rawson] attempted to stop [Bozung's] vehicle, ***518** the driver of the vehicle had fled the scene; (2) [Bozung], the owner of the vehicle, [had] a warrant for his arrest; and (3) neither the vehicle nor [Bozung] had been searched." *Id.* (internal citations omitted). The court also credited Officer Rawson's and Officer Wilson's testimony that Bozung had been given a number of opportunities to place his hands behind his back, and he failed to comply. In addition, Bozung failed to explain why he was unable to do so. *Id.*

As to Officer Wilson, the district court found Bozung's allegations were totally contradicted by the record. *Id.* at *7. Indeed, Bozung did not see who placed a foot on his neck, and none of the witnesses saw Officer Wilson do so.

Next, the district court found that even if the officers made a mistake, they were entitled to qualified immunity. *Id.* According to that court, any mistake made was reasonable, and Bozung failed to demonstrate that the officers had violated a clearly established right. *Id.* at *8, 9. Because the district court found no individual defendant violated Bozung's constitutional rights, it also dismissed the federal claims against the Township. *Id.* at *9.

As a result of the district court's rulings, Bozung filed a motion for reconsideration. *Bozung v. Rawson*, No. 1:09–cv–339, 2009 WL 5149917 (W.D.Mich. Dec.16, 2009). That motion was denied. Bozung now appeals the district court's decision, and he moves this Court to reverse the district court's grant of summary judgment in favor of Officer Rawson and the Township.

II. Standard of Review

Because Bozung appeals the district court's grant of summary judgment, this Court must review *de novo* the district court's ruling. *Alspaugh v. McConnell*, 643 F.3d 162, 168 (6th Cir.2011). Summary judgment is proper "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter

of law." Fed.R.Civ.P. 56(a). The moving party bears the burden of demonstrating no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Leary v. Daeschner*, 349 F.3d 888, 897 (6th Cir.2003). The Court should view the evidence, including all reasonable inferences, in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 907 (6th Cir.2001). Here, Bozung alleges the district court disregarded or discredited his version of events. However, "[c]onstruing the facts on summary judgment in the light most favorable to the non-moving party usually means adopting the plaintiff's version of the facts." *Coble v. City of White House, Tenn.*, 634 F.3d 865, 868 (6th Cir.2011). On the other hand, if plaintiff's version of events "is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).

In addition, to survive a motion for summary judgment, "the nonmoving party must go beyond the pleadings and come forward with specific facts to demonstrate that there is a genuine issue for trial." *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 424 (6th Cir.2002). Indeed, a "[plaintiff] is not entitled to a trial on the basis of mere allegations." *Smith v. City of Chattanooga*, No. 1:08–cv–63, 2009 WL 3762961, at *2, 3 (E.D.Tenn. Nov.4, 2009) (explaining the Court must determine whether "the record contains sufficient ***519** facts and admissible evidence from which a rational jury could reasonably find in favor of [the] plaintiff"). In addition, should the non-moving party fail to provide evidence to support an essential element of the case, the movant can meet its burden by pointing out such failure to the Court. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir.1989).

At summary judgment, the Court's role is limited to determining whether the case contains sufficient evidence from which a jury could reasonable find for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). If the Court concludes a fair-minded jury could not return a verdict in favor of the non-movant based on the record, the Court should enter summary judgment. *Id.* at 251–52, 106 S.Ct. 2505; *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir.1994).

III. Analysis

A. Officer Rawson

To prevail on his 42 U.S.C. § 1983 claim against Officer Rawson, Bozung must show that "a person acting under color of state law deprived [him] of a right secured by the Constitution or laws of the United States." *Smoak v. Hall*, 460 F.3d 768, 777 (6th Cir.2006). Here, Bozung alleges two distinct instances of excessive force, which is prohibited under the Fourth Amendment. *Slusher v. Carson*, 540 F.3d 449, 454 (6th Cir.2008). First, he alleges either Officer Rawson or Officer Wilson, or both, threw him to the ground as he was standing by the truck. Second, he alleges once he was on the ground, one or both of the officers placed their knee or foot on his spinal cord.

"A claim of excessive force under the Fourth Amendment requires that a plaintiff demonstrate that a seizure occurred, and that the force used in effecting the seizure was objectively unreasonable." *Rodriguez v. Passinault*, 637 F.3d 675, 680 (6th Cir.2011). Whether a constitutional violation based on excessive force occurred "depends on the facts and circumstances of each case viewed from the perspective of a reasonable officer on the scene and not with 20/20 hindsight." *Fox v. DeSoto*, 489 F.3d 227, 236 (6th Cir.2007) (citing *Graham v. Connor*, 490 U.S. 386, 395–96, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). In making its determination, the Court should "pay particular attention to '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.' " *Schreiber v. Moe*, 596 F.3d 323, 332 (6th Cir.2010) (citing *Kostrzewa v. City of Troy*, 247 F.3d 633, 639 (6th Cir.2001)). This is not an "exhaustive list," and the inquiry ultimately turns on whether the seizure was reasonable under the "totality of the circumstances." *Slusher*, 540 F.3d at 455.

In addition, "[e]ach defendant's liability must be assessed individually based on his own actions." *Binay v. Bettendorf*, 601 F.3d 640, 650 (6th Cir.2010). Here, Bozung must show Officer Rawson "(1) actively participated in the use of excessive force, (2) supervised the officer who used excessive force, or (3) owed the victim a duty of protection against the use of excessive force." *Id.* (citing *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir.1997)).

According to Bozung, his version of events leading to his arrest support a finding that Officer Rawson used

excessive force and acted unreasonably under the totality of circumstances. Specifically, Bozung alleges Officer Rawson slammed him to the ground without first giving him any instructions to place his hands behind his back. Bozung contends that although he was attempting to obey Officer Rawson ***520** and explain his limitations, Officer Rawson acted without provocation anyway. In addition, Bozung states Officer Rawson placed his knee or foot on Bozung's back, contributing to Bozung's spinal cord injuries. Although Bozung's version of events differ from that of Officer Rawson, the Court finds Bozung has not established a genuine issue of material fact regarding whether Officer Rawson used excessive force.

Indeed, considering the facts in a light most favorable to Bozung, it is clear it was reasonable for Officer Rawson to employ the straight-arm bar takedown technique to neutralize Bozung and to handcuff Bozung. *See Slusher*, 540 F.3d at 455 (explaining that although the Court should evaluate the decision to use force "from the perspective of an objective officer," the facts must still be viewed in a light most favorable to the plaintiff). When Officer Rawson asked Bozung to step out of his vehicle, he had very limited knowledge about Bozung. He knew Bozung had been drinking, he knew the driver of Bozung's vehicle had fled the scene, and he knew there was a warrant for Bozung's arrest. Here, the record unequivocally shows Bozung was being arrested on a misdemeanor offense. Indeed, he was not being arrested for a "violent or serious crime, and this fact weighs in favor of using less force in arresting someone for such conduct." *Carpenter v. Bowling*, 276 Fed.Appx. 423, 426 (6th Cir.2008) (citing *Thacker v. Lawrence County*, 182 Fed.Appx. 464, 472 (6th Cir.2006)) (internal brackets and citations omitted). However, neither Bozung nor Officer Rawson has offered evidence to show at what point Officer Rawson became aware of the fact Bozung's arrest warrant was for a misdemeanor offense (*see* Appellant Brief at 50, n. 13).

Next, it was not clear to Officer Rawson, at the time of the incident, whether Bozung posed an immediate threat to him. Although there is no evidence to suggest Bozung possessed a weapon or made verbal or physical threats to the officers, *see, e.g., Meirthew v. Amore*, 417 Fed.Appx. 494, 497 (6th Cir.2011), the record indicates the officers did not have an opportunity to search Bozung or his vehicle prior to employing the straight-arm bar takedown technique. In addition, it may have been "difficult for the officers to judge [Bozung's] intentions" given the facts mentioned above. *See, e.g., Wysong v. City of Heath*, 260 Fed.Appx. 848, 855 (6th Cir.2008). Although the evidence indicates "Bozung was cooperative and was not boisterous, combative, or disrespectful," there was a growing crowd forming at the scene, and Officer Rawson needed to be concerned about his safety and the safety of others.

Finally, in the context of this case, the most important *Graham* factor is whether Bozung was resisting arrest by not complying with Officer Rawson's orders to place his hands behind his back prior to the takedown. Although Bozung argues on appeal he does not recall Officer Rawson asking him to place his hands behind his back, he conceded before the district court in his response in opposition to the motions to dismiss that he had been told to place his hands behind his back. (District Court Record No. 65) ("Both defendant officers admit that Bozung responded to Rawson's command to place his hands behind his back as saying "wait, wait," and "I am, I am," which is consistent with [Bozung's] claim that he never refused to place his hands behind his back, but rather simply needed more time to comply"). In addition, during his deposition testimony, Bozung states two to three minutes passed between the time he walked around from the back of his truck until the time Officer Rawson employed the straight-arm bar technique. The Court finds, in light of ***521** Bozung's concession before the district court and the amount of time Bozung gripped the bed of his truck, there was a sufficient amount of time for Bozung to comply with the officer's request to put his hands behind his back.

Finally, regarding whether Officer Rawson used excessive force while Bozung was on the ground, it is clear Bozung has not demonstrated that there is a genuine issue of material fact. *See, e.g., Goodrich v. Everett*, 193 Fed.Appx. 551, 556 (6th Cir.2006). Bozung alleges Officer Rawson put his knee on Bozung's back. "Taking the evidence in light most favorable to [Bozung], the kneeing ... occurred not when [Bozung] was neutralized, but while the officers were handcuffing him." *Id.*; *cf. Harris v. City of Circleville*, 583 F.3d 356, 367 (6th Cir.2009) (explaining that excessive force on a suspect who has been restrained and placed in handcuffs is unconstitutional). Therefore, such action was objectively reasonable.

B. The Township

The district court properly found the Township was also entitled to summary judgment because "no individual defendant violated [Bozung's] rights." *Bozung*, 2009 WL 2413624, at *9. "To succeed on a municipal liability claim, a plaintiff must establish that his or her constitutional

rights were violated and that a policy or custom of the municipality was the 'moving force' behind the deprivation of the plaintiff's rights." *Miller v. Sanilac Cnty.*, 606 F.3d 240, 254–55 (6th Cir.2010). Because this Court finds Officer Rawson did not use excessive force in violation of Bozung's Fourth Amendment rights, the Township cannot be held liable.

IV. Conclusion

For these reasons, we AFFIRM the decision of the district court.

BOGGS, Circuit Judge, dissenting.

Because I believe there are factual disputes that go to the heart of whether the force employed by Officer Rawson in handcuffing Bozung was reasonable, I cannot join the majority opinion. Viewing the facts in the light most favorable to Bozung, Officer Rawson's conduct was objectively unreasonable and violated a clearly established constitutional right. I would therefore reverse the grant of summary judgment for Rawson and remand for further proceedings.

Rawson is entitled to summary judgment if he did not violate Bozung's constitutional right to be free from excessive force. As the majority correctly explains, the reasonableness of arresting officers' use of force depends on the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). "Authorities must be allowed 'to graduate their response to the demands of any particular situation.' " *United States v. Montoya de Hernandez*, 473 U.S. 531, 542, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985) (quoting *United States v. Place*, 462 U.S. 696, 709 n. 10, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983)). Law enforcement surely has an interest in securing a suspect. If an individual suspected of a minor crime puts up even a low level of resistance to arrest, he may be subjected to some force. *Wysong v. City of Heath*, 260 Fed.Appx. 848, 854–55 (6th Cir.2008).

Our case law makes it clear, however, that there is no government interest in tackling someone who is compliant and not attempting to flee. *See Pershell v. Cook*, 430 Fed.Appx. 410, 415 (6th Cir.2011) (knocking suspect to the ground was unreasonable ***522** when suspect "did not resist arrest or pose an immediate danger to officers"); *Kijowski v. City of Niles*, 372 Fed.Appx. 595, 600 (6th Cir.2010) (use of Taser against suspect presenting no risk of harm unreasonable); *Lawler v. City of Taylor*, 268 Fed.Appx. 384, 386–87 (6th Cir.2008) (officer's "use of force in throwing [suspect] to the floor was disproportionate to any threat he faced," given that suspect had merely insulted officer and "raised his left arm slightly"); *Smoak v. Hall*, 460 F.3d 768, 784 (6th Cir.2006) (unreasonable to tackle cuffed and compliant suspect); *Solomon v. Auburn Hills Police Dep't*, 389 F.3d 167, 174 (6th Cir.2004) (attempting leg sweep and shoving plaintiff against wall unreasonable when plaintiff was complying with the officers' demands); *McDowell v. Rogers*, 863 F.2d 1302, 1307 (6th Cir.1988) (unreasonable to strike unresisting suspect).

Although the true version of what happened between Bozung and the officers is certainly disputed, on summary judgment the facts must be viewed in the light most favorable to Bozung. In my view, Bozung has alleged facts and provided evidence sufficient to justify the conclusion that there is a genuine issue of material fact as to whether Rawson violated his Fourth–Amendment rights by using the straight-arm bar takedown technique when Bozung was not resisting arrest, and when Rawson could not reasonably have concluded that he was doing so.

Rawson stopped Bozung's vehicle for a trivial infraction. Although the driver fled, and Bozung had an outstanding warrant, Rawson had no reason to believe that Bozung had committed a serious crime. Bozung did not attempt to flee. Instead, after parking, he exited the truck and moved to the back of the vehicle as directed. Bozung did not threaten Rawson, and there was no evidence that he had a weapon. According to Rawson's deposition testimony, Bozung was "calm and collected" and was not "boisterous or combative in any way." Bozung exited the vehicle slowly, holding onto the truck bed for balance. Neighbor James Leggions testified in his deposition that Bozung was "off balance" and "walked like he had a problem with his legs." Bozung advised Rawson that he had had a total hip replacement and had a plate and screws in his right ankle. Onlookers also shouted that Bozung was handicapped.

I agree with the majority that we must assume that Rawson told Bozung to place his hands behind his back, even though Bozung argues on appeal that he never received such an order. Bozung stated in his deposition that he did not recall

receiving an order from Rawson to put his hands behind his back. Bystanders Leggions and Melonie Harris did not report hearing such an order. Bozung's lawyer, however, argued to the district court that Bozung was ordered to place his hands behind his back but, given his disability, needed more time to comply with the order. Bozung's response to the defendants' motions for summary judgment states that Rawson ordered him "to walk to the rear of the vehicle and to place his hands behind his back to be cuffed." Bozung cannot present a new argument on appeal. *See Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 329 (6th Cir.2006) ("Allowing [plaintiff] to present a new theory of her case on appeal that was not alleged below would permit her two bites at the apple, a practice that would be very disruptive of orderly trial procedure.").

The majority's reliance on *Scott v. Harris* is misplaced. The record shows that "opposing parties [have told] two different stories," and a "genuine" dispute as to the sequence of events exists. ***523** *Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (citing Fed.R.Civ.P. 56(c)). Even if we assume Bozung received an order to place his hands behind his back, whether Rawson's actions were reasonable turns on disputed issues of fact. We do not know how clear and forceful the order was, nor how long Rawson gave Bozung to comply with the order before taking him to the ground. The majority emphasizes Bozung's "concession" in his deposition that he stood outside the truck for "maybe ... two to three minutes" before he was taken to the ground, construing this delay as evidence that Bozung resisted Rawson's order. But we must view the facts as a whole in the light most favorable to Bozung, not simply pounce on any detail that could weaken his case. Officer Wilson's testimony suggests that the delay was shorter: he estimated that "at least 30 seconds passed" between the time that Rawson gave Bozung the instruction and when he performed the takedown maneuver. Leggions testified that "after [Bozung] got almost around his truck, [Rawson] ran over and thr[ew] him to the ground." Even if Bozung was out of the truck for two minutes, moreover, we do not know how long after he exited the truck the order to place his hands behind his back was given. There is also a factual dispute as to whether Bozung struggled when Rawson attempted to handcuff him. The plaintiff's version of events is *not* "blatantly contradicted by the record," and a "reasonable jury could believe it." *Ibid.* With so much uncertainty as to what actually happened, the "facts must be viewed in the light most favorable to the nonmoving party." *Ibid.*

More importantly, there are disputed facts regarding whether Bozung's handicap and his inability to comply at once with Rawson's order should have been apparent to Rawson. Bozung, Officer Wilson, and Ms. Harris all testified that Bozung indicated to Rawson that he was attempting to comply with the order. Bozung stated in his deposition that he told Rawson he was disabled and said, "it's going to take me a few minutes." Harris stated that Bozung yelled, "wait and minute, wait a minute," but that Rawson responded, "well, I guess you want this done the hard way" and grabbed him. Officer Wilson testified that Bozung responded to Rawson's command to place his hands behind his back by saying "I am, I am." According to Bozung, Rawson ignored these protests and slammed him to ground with sufficient force to lacerate his forehead and fracture his hand. Construing the facts in the light most favorable to Bozung, a jury could find, in light of Bozung's handicap and lack of resistance, that it was unreasonable for Rawson to perform the takedown maneuver to handcuff Bozung, and that Rawson's conduct thus violated Bozung's Fourth–Amendment rights.

Furthermore, Rawson is not entitled to qualified immunity. A "defendant enjoys qualified immunity on summary judgment unless the facts alleged and the evidence produced, when viewed in the light most favorable to the plaintiff, would permit a reasonable juror to find that (1) the defendant violated a constitutional right; and (2) the right was clearly established." *Morrison v. Bd. of Trs. of Green Twp.*, 583 F.3d 394, 400 (6th Cir.2009). A right is clearly established if "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Binay v. Bettendorf*, 601 F.3d 640, 646–47 (6th Cir.2010). The facts, taken in the light most favorable to Bozung, would permit a finding that the force Rawson used was not only unnecessary, but would have been recognized as such "by a reasonable officer in his position." *Phelps v. Coy*, 286 F.3d 295, 302 (6th Cir.2002). The right to be free from excessive force is clearly established, ***524** *see Graham*, 490 U.S. at 394–95, 109 S.Ct. 1865, as is "the right to be free from physical force when one is not resisting the police," *Wysong*, 260 Fed.Appx. at 856. Here, there is a genuine issue of material fact as to whether Bozung resisted arrest. If he did not resist, a reasonable officer would have known that it was unnecessary to force him to the ground to handcuff him. The grant of summary judgment for Rawson was therefore improper.

Parallel Citations

2011 WL 4634215 (C.A.6 (Mich.))

Footnotes

* The Honorable Curtis L. Collier, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

468 Fed.Appx. 491
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
Sixth Circuit Rule 28. (Find CTA6 Rule 28)
United States Court of Appeals,
Sixth Circuit.

Keith COCKRELL, Plaintiff–Appellee,
v.
CITY OF CINCINNATI, and David Hall, Individually and in his official capacity, Defendants–Appellants.

No. 10–4605. | Feb. 23, 2012.

Synopsis

Background: Misdemeanant brought § 1983 action against police officer and city, alleging that officer's use of taser as he was fleeing scene of non-violent misdemeanor constituted excessive force. Officer moved to dismiss on qualified immunity grounds. The United States District Court for the Southern District of Ohio, Timothy S. Black, J., 2010 WL 4918725, denied motion. Officer appealed.

Holding: The Court of Appeals, Boggs, Circuit Judge, held that officer did not violate clearly established law, and thus was entitled to qualified immunity.

Reversed in part and remanded.

Cole, Circuit Judge, filed concurring opinion.

West Headnotes (1)

[1] Civil Rights
Sheriffs, police, and other peace officers

Although officer's use of taser in dart mode against misdemeanant, who fled from the scene of a jaywalking violation, offered no other resistance and disobeyed no official command, may have constituted constitutionally excessive force, officer did not violate clearly established law, and thus was entitled to qualified immunity. U.S.C.A. Const.Amend. 4.

17 Cases that cite this headnote

***491** On Appeal from the United States District Court for the Southern District of Ohio.

Before: BOGGS, COLE, and SUTTON, Circuit Judges.

Opinion

BOGGS, Circuit Judge.

Cincinnati Police Officer David Hall tased Keith Cockrell as he fled from the scene of a non-violent misdemeanor, jaywalking. Cockrell brought this action under 42 U.S.C. § 1983, alleging that Hall's taser use constituted excessive force. Hall moved to dismiss on qualified-immunity grounds; the district court denied the motion. Hall appeals. To affirm, we would have to answer "yes" to two questions: (1) Did Hall violate Cockrell's right to be free from excessive force by shooting him with a taser as he fled from the scene of a jaywalking violation? and (2) was it clearly established that Hall's actions were unconstitutional at the time of the incident? Because ***492** we cannot answer the second question in the affirmative, we reverse.

I

Keith Cockrell was in the Fay Apartment Complex[1] on July 3, 2008, visiting his girlfriend, Miranda Jones. Cockrell left Jones's apartment, and crossed the street to borrow a pair of hair clippers from a friend. He jaywalked.[2] Officer Hall observed Cockrell's conduct, got out of his car, and ran toward Cockrell. Cockrell ran away. There is no indication in the record that Hall ordered Cockrell to halt or put him under arrest. After chasing Cockrell for a short distance, Hall deployed his X26 TASER device in "probe mode." The taser temporarily paralyzed Cockrell, causing him to crash headlong into the pavement. Unable to break his fall, he sustained "lacerations and abrasions to his face, chest, [and] arms."

The X26 TASER is a type of electric stun-gun.[3] It has two modes: dart mode—called probe mode here—and drive-stun mode. In dart mode,

> [t]he X26 uses compressed nitrogen to propel a pair of "probes"—aluminum darts tipped with stainless steel barbs connected to the X26 by insulated wires—toward the target at a rate of over 160 feet per second. Upon striking a person, the X26 delivers a 1200 volt, low ampere electrical charge through the wires and probes and into his muscles. The impact is as powerful as it is swift. The electrical impulse instantly overrides the victim's central nervous system, paralyzing the muscles throughout the body, rendering the target limp and helpless. The tasered person also experiences an excruciating pain that radiates throughout the body.
>
> *Bryan v. MacPherson*, 630 F.3d 805, 824 (9th Cir.2010) (internal citations omitted). In drive-stun mode, "the operator removes the dart cartridge and pushes two electrode contacts located on the front of the taser directly against the victim. In this mode, the taser delivers an electric shock ... but does not cause an override of the victim's central nervous system as it does in dart-mode." *Mattos v. Agarano*, 661 F.3d 433, 443 (9th Cir.2011) (en banc).

The City of Cincinnati's use-of-force policy reminds officers that "they may use whatever force is reasonably necessary to apprehend the offender or affect [sic] the arrest and no more." R. 8–4 at 6 (City of Cincinnati use-of-force policy); *see also id.* at 8 (citing *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). It further instructs officers to "avoid using unnecessary violence," *id.* at 6, and requires that any use of force be ***493** "reasonable under the circumstances." *Id.* at 8.

The policy also includes specific guidelines for taser use. It recommends that officers "[u]se the TASER X26 for self defense or to control subjects that are actively resisting arrest." R. 8–4 at 9.[4] "When possible," it continues, officers should "give the subject a verbal warning that the TASER will be deployed unless exigent circumstances exist that would make it imprudent to do so." *Ibid.* The policy also provides:

> Officers should avoid using the TASER X26 on obviously pregnant females and those individuals under the age of 7 or over the age of 70 due to the potential for these individuals to fall when incapacitated by the TASER, unless the encounter rises to the level of a deadly force situation .... [and][o]fficers should avoid using the TASER X26 on individuals who are on an elevated surface unless the encounter rises to the level of a deadly force situation. *Ibid.*

Cockrell filed this 42 U.S.C. § 1983 action in April 2010, alleging that Hall violated his Fourth Amendment right to be free from the excessive use of force. He also sought "a review of the policies and training within the Cincinnati Police Department to insure that Tasers are only deployed consistent with constitutional limits on use of force." Hall moved to dismiss the excessive-force claim on qualified-immunity grounds. The district court denied the motion. It used the three-factor balancing test from *Graham*, 490 U.S. 386, 109 S.Ct. 1865, to determine that, taken in the light most favorable to Cockrell, Officer Hall's use of force was objectively unreasonable, and thus violated the Fourth Amendment. The district court then held "that it was clearly established on July 3, 2008 that the use of a taser, against a fleeing ... non-violent misdemeanant who posed no threat of harm to anyone, was prohibited by the Constitution." R. 10 at 13.[5] Hall appeals.

II

Section 1983 creates a private right of action against state officials who deprive individuals of their constitutional rights, under color of state law. 42 U.S.C. § 1983. Civil liability, however, does not attach simply because a court determines that an official's actions were unconstitutional. "Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, —— U.S. ——, 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149 (2011). We need not address these two elements in order, and indeed "should think carefully before expending scarce judicial resources to resolve difficult and novel questions of constitutional or statutory interpretation that will have no effect on the outcome of the case." *Ibid.* (quoting *Pearson v. Callahan*, 555 U.S. 223, 236–37, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)) (internal quotation marks omitted); *see also* Pierre N. Leval, *Madison Lecture, Judging Under the Constitution:* ***494** *Dicta About Dicta*, 81 N.Y.U.L. REV. 1249, 1275–81 (2006) (criticizing rule from *Saucier v. Katz*, 533 U.S. 194, 200–01, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), which required that courts decide whether action violated

constitution, before deciding whether right allegedly violated was clearly established); *Lyons v. City of Xenia*, 417 F.3d 565, 580–84 (6th Cir.2005) (Sutton, J. concurring) (same).

Because "[q]ualified immunity is an affirmative defense ... [t]he defendant bears the burden of pleading" it in the first instance. *Sheets v. Mullins*, 287 F.3d 581, 586 (6th Cir.2002). The burden then shifts to the plaintiff, who must show that the official violated a right so clearly established "that every reasonable official would have understood that what he [was] doing violate[d] that right." *al-Kidd*, 131 S.Ct. at 2083; *Sheets*, 287 F.3d at 586; *Dominque v. Telb*, 831 F.2d 673, 676–77 (6th Cir.1987). The plaintiff "bears the ultimate burden of proof to show that the individual officers are not entitled to qualified immunity." *Garretson v. City of Madison Heights*, 407 F.3d 789, 798 (6th Cir.2005). If the plaintiff fails to carry this burden as to either element of the analysis, qualified immunity applies and the state official is proof against the plaintiff's suit.

We review the denial of a motion to dismiss on qualified-immunity grounds *de novo*, treating all allegations in the complaint as true and drawing all inferences in favor of the non-moving party. *Heyne v. Metro. Nashville Public Schools*, 655 F.3d 556, 562–63 (6th Cir.2011) ("We apply the ordinary standard used in reviewing motions to dismiss," when considering denial of a motion to dismiss on qualified-immunity grounds) (citing *Back v. Hall*, 537 F.3d 552, 556 (6th Cir.2008)).

III

We accept *Pearson*'s invitation and begin by considering whether the right allegedly violated was clearly established on the date of the incident. *See Pearson*, 555 U.S. at 236–37, 129 S.Ct. 808. "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." *al-Kidd*, 131 S.Ct. at 2083 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)) (internal quotation marks omitted). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). Existing case law from our circuit and others, guidance from experts in a field, and even "[t]he obvious cruelty inherent in [a] practice" can contribute to the conclusion that an act was so aberrant that every reasonable official would have understood that it was unconstitutional. *See id.* at 741–46, 122 S.Ct. 2508.

"The difficult part of this inquiry is identifying the level of generality at which the constitutional right must be clearly established." *Casey v. City of Federal Heights*, 509 F.3d 1278, 1284 (10th Cir.2007) (McConnell, J.). Without question, the use of objectively unreasonable force violates the Fourth Amendment. *Ibid.* (citing *Graham*, 490 U.S. at 395, 109 S.Ct. 1865 (1989)). The Supreme Court, however, has "repeatedly told courts ... not to define clearly established law at a high level of generality. The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *al-Kidd*, 131 S.Ct. at 2084 (internal citations omitted). "In other words, the fact that it is clear that any ***495** unreasonable use of force is unconstitutional does not mean that it is always clear *which* uses of force are unreasonable." *Casey*, 509 F.3d at 1284 (emphasis in original).

Taking this guidance into account, we define the question this case presents as whether a misdemeanant, fleeing from the scene of a non-violent misdemeanor, but offering no other resistance and disobeying no official command, had a clearly established right not to be tased on July 3, 2008. Because neither case law, nor external sources, nor "[t]he obvious cruelty inherent" in taser use, *Hope*, 536 U.S. at 745, 122 S.Ct. 2508, would have put every reasonable officer on notice that Hall's conduct violated the Fourth Amendment in July 2008, we hold that Hall is entitled to qualified immunity, even if he did use excessive force. [6]

Cases addressing qualified immunity for taser use fall into two groups. The first involves plaintiffs tased while actively resisting arrest by physically struggling with, threatening, or disobeying officers. In the face of such resistance, courts conclude either that no constitutional violation occurred, or that the right not to be tased while resisting arrest was not clearly established at the time of the incident. *Mattos*, 661 F.3d 433 (holding, in consolidated cases, that 2004 and 2006 taser deployments constituted excessive force, but did not violate clearly established law, where one plaintiff, a pregnant woman pulled over for speeding, refused to sign citation, became agitated, screamed at officers, clung to steering wheel, and was tased three times, and other plaintiff, also a woman, was shot with taser in dart mode as she stood between officers and her large, drunken, aggressive

husband who was under arrest); *McKenney v. Harrison*, 635 F.3d 354 (8th Cir.2011) (holding that 2007 taser deployment against misdemeanant who made sudden move toward window while being questioned by police and told not to "try anything stupid" did not constitute excessive force, even though misdemeanant fell out of window to his death after being tased); *Bryan*, 630 F.3d 805 (holding that 2005 taser deployment against motorist yelling angrily and acting erratically after traffic stop for failing to wear seatbelt violated Fourth Amendment, but not clearly established law); *Baird v. Ehlers*, No. C10–1540JLR, 2011 WL 5838431 (W.D.Wash. Nov.21, 2011) (holding that using taser three times on man who, in "drunken stupor," was physically removed from city bus, and engaged in verbal and physical confrontation with officer, may have been excessive use of force, but that law regarding taser use was not clearly established as of November 2009); *Carter v. City of Carlsbad*, 799 F.Supp.2d 1147 (S.D.Cal.2011) (holding that use of taser against large, belligerent, drunken ex-marine who "took an offensive fighting stance" may have been excessive, but did not violate clearly established law on October 31, 2009); *Azevedo v. City of Fresno*, No. 1:09–CV–375, 2011 WL 284637 (E.D.Cal. Jan. 25, 2011) (holding that use of taser against suspect detained during investigation of burglary, who fled after being asked about weapons then was warned to stop, may have violated Fourth Amendment, but did not violate clearly established law, as of November 2007); *Sanders v. City of Dothan*, 671 F.Supp.2d 1263 (M.D.Ala.2009) (holding that officer who tased detained, but uncooperative, suspect using drive-stun mode did not violate clearly established law, as of August 2005); *Beaver v. City of Federal Way*, 507 F.Supp.2d 1137 (W.D.Wash.2007) (holding ***496** that, of five August 2004 taser deployments against suspect who fled scene of residential burglary and refused to obey command to stop, first three were not excessive uses of force, since officer had to make split-second decisions on how to subdue disobedient, fleeing felon, while last two constituted excessive force because suspect was no longer immediate threat; qualified immunity still was appropriate, however, because law was not clearly established).

In the second group of cases, a law-enforcement official tases a plaintiff who has done nothing to resist arrest or is already detained. Courts faced with this scenario hold that a § 1983 excessive-force claim is available, since "the right to be free from physical force when one is not resisting the police is a clearly established right." *Kijowski v. City of Niles*, 372 Fed.Appx. 595, 601 (6th Cir.2010) (quoting *Wysong v. City of Heath*, 260 Fed.Appx. 848, 856 (6th Cir.2008)); *see also Brown v. City of Golden Valley*, 574 F.3d 491 (8th Cir.2009) (holding that tasing non-violent passenger during traffic stop for failure to hang up from 911 call violated clearly established law, as of October 2005); *Landis v. Baker*, 297 Fed.Appx. 453 (6th Cir.2008) (holding that repeated use of taser against subdued defendant lying face-down in swamp water violated clearly established law, as of November 2004); *Casey*, 509 F.3d 1278 (holding that officers' tasing compliant, non-violent misdemeanant violated clearly established law, as of August 2003); *Shekleton v. Eichenberger*, No. C10–2051, 2011 WL 1578421 (N.D.Iowa Apr.26, 2011) (holding that tasing non-violent misdemeanant, who did not resist arrest, struggle with, or pose a threat to, officers, or attempt to flee, violated clearly established law, as of September 2008); *Borton v. City of Dothan*, 734 F.Supp.2d 1237 (M.D.Ala.2010) (holding that tasing mentally disturbed patient who was not under arrest three times, even though she was secured to a gurney with handcuffs and restraints, was violation of clearly established law, as of August 2006); *Orsak*, 675 F.Supp.2d 944 (holding that officers who pulled cyclist from bike, stood him up, and shot him with taser may have violated clearly established law, as of September 2006); *Asten v. City of Boulder*, 652 F.Supp.2d 1188 (D.Colo.2009) (holding that "the unforewarned tasing of a mentally unstable woman [who was not under arrest] in her own home" violated clearly established law, as of October 2006).

This case does not fit cleanly within either group. At no point did Cockrell use violence, make threats, or even disobey a command to stop.[7] He simply fled. Yet flight, non-violent though it may be, is still a form of resistance. *See Azevedo*, 2011 WL 284637, at *8 ("[A]lthough Azevedo was not physically resisting arrest, he was actively fleeing.... The active evasion or flight by a non-felon generally favors a police officer's use of non-deadly force."); *Casey*, 509 F.3d at 1281 (noting that determination whether officer used excessive force requires analysis of "whether [the person being pursued was] actively resisting arrest or attempting to evade arrest by flight") (quoting *Graham*, 490 U.S. at 396, 109 S.Ct. 1865 (1989)). Neither line of cases, then, dictates a particular result in this scenario; both apply in some measure.

The most we can draw from today's case law, in summary, is this: in no case where courts denied qualified immunity was the ***497** plaintiff fleeing, and in at least some of these cases, the court specifically referred to the fact of non-flight. *See, e.g., Casey*, 509 F.3d at 1281 (considering "whether [plaintiff was] actively resisting arrest or attempting to evade arrest by

flight"); *Shekleton*, 2011 WL 1578421, at *9 ("In assessing the reasonableness of Deputy Eichenberger's conduct, the Court considers that ... Shekleton did not struggle with officers, resist arrest, or attempt to escape."). By contrast, in all cases where a plaintiff fled from police, the court held that qualified immunity was appropriate, and some courts referred specifically to the plaintiff's flight. *See, e.g., Azevedo*, 2011 WL 284637, at * 8 ("[A]lthough Azevedo was not physically resisting arrest, he was actively fleeing.... The active evasion or flight by a non-felon generally favors a police officer's use of non-deadly force."); *Beaver*, 507 F.Supp.2d at 1144 ("Initially, Mr. Beaver was attempting to flee and the Court has no trouble concluding that the first tasing was justified to stop him."). These broad principles do not establish the contours of the right Hall allegedly violated so clearly that every reasonable officer would know his actions were unconstitutional, even today. It certainly did not do so in July 2008.

Neither does guidance from outside sources show that Hall's actions were objectively unreasonable. The district court emphasized that the Department of Justice [8] and other law-enforcement agencies nationwide "have determined that the use of a taser against a non-violent suspect who is fleeing on foot creates a risk of serious injury and recommend that such use be prohibited or discouraged." It also noted that the manufacturer of the device, TASER International, "warned that the use of the device against individuals who are running can cause serious injury or death." At the same time, "a study by six university departments of emergency medicine found that 99.7 percent of those Tased by police suffer no injuries or, at most, mild ones." *Mattos*, 661 F.3d at 454 (Kozinski, C.J., concurring in part and dissenting in part) (citing William P. Bozeman et al., *Safety and Injury Profile of Conducted Electrical Weapons Used by Law Enforcement Against Criminal Suspects*, 53 Annals Emergency Med. 480, 484 (2009)). And "[t]he research division of the Department of Justice concluded that Taser deployment has a margin of safety as great or greater than most alternatives, and carries a significantly lower risk of injury than physical force." *Ibid.* (citing John H. Laub, Director, Nat'l Inst. of Justice, *Study of Deaths Following Electro Muscular Disruption* 30–31 (2011)). Of course, the materials the district court cited focus specifically on suspects fleeing from law enforcement. But this does not diminish the force of arguments concerning tasers' relative safety, as compared to other methods of detaining suspects—even suspects who are running from the police. *See ibid.* (discussing dangers of alternative methods of subduing suspects). Data from outside sources, then, confirms our analysis of taser-use case law: it is not clear that every reasonable officer would believe that Hall's actions violated Cockrell's right to be free from excessive force.

Finally, there is no "obvious cruelty inherent" in the use of tasers, *Hope*, 536 U.S. at 745, 122 S.Ct. 2508, which would render Hall's conduct objectively unreasonable. Tasers in general, and particularly devices like the X26, which are designed to cause temporary paralysis, ***498** involve a significant degree of force. As Judge Murphy of the Eighth Circuit observed: "especially with the newer tasers, the nature and quality of their intrusion on the individual's Fourth Amendment interests is somewhat unique in that they render even the most pain tolerant individuals utterly limp." *McKenney*, 635 F.3d at 362 (Murphy, J., concurring). Similarly, the Ninth Circuit has observed: "The X26 ... intrudes upon the victim's physiological functions and physical integrity in a way that other non-lethal uses of force do not." *Bryan*, 630 F.3d at 825. However, argues Ninth Circuit Chief Judge Kozinski, even if tasers do involve a significant degree of force, they are a highly desirable and extremely effective law-enforcement tool. They allow an officer to deter an uncooperative suspect from a safe distance, without undue risk to either party. *Mattos*, 661 F.3d at 453–54 (Kozinski, C.J., concurring in part and dissenting in part). [9] We take no position on the merits of any judge's argument; nor do we need to do so. It is enough to say that such a difference of opinion among reasonable jurists demonstrates that taser use is not so inherently cruel that it is objectively unreasonable on that basis alone.

IV

In short, it is not clear whether tasing a suspect who fled from the scene of a nonviolent misdemeanor constituted excessive force, as of July 2008. Nor is there consensus that taser use is categorically improper, unsafe, or cruel. We cannot, therefore, say that "every reasonable official would have understood that what [Hall was] doing" violated Cockrell's Fourth–Amendment rights. *al-Kidd*, 131 S.Ct. at 2083.

We hold that the district court erred by failing to grant Officer Hall qualified immunity. [10] We REVERSE IN PART the decision below, and REMAND for further proceedings consistent with this opinion.

COLE, Circuit Judge, concurring.

I am persuaded that Cockrell, as of July 3, 2008, did not have a clearly established right not to be tased for fleeing from a non-violent misdemeanor. I write separately because, given the totality of the circumstances, I believe that Officer Hall's use of force was excessive.

In several of the cases cited by the majority, in which courts found that the use of a taser against a resisting arrestee constituted excessive force, the courts placed great weight on the officer's failure to warn the suspect prior to deploying the taser. *See Mattos v. Agarano*, 661 F.3d 433, 451 (9th Cir.2011) (en banc) (finding excessive force and reasoning that the officer's failure to warn the plaintiff before deploying her taser "pushes this use of force far beyond the pale," but that jurisprudence restricting taser usage was not clearly established in August 2006); *Bryan v. MacPherson*, 630 F.3d 805, 831, 833 (9th Cir.2010) (finding excessive force and noting that the officer's failure to warn the plaintiff before tasing her "militate[s] ***499** against finding [the defendant's] use of force reasonable," but that relevant taser jurisprudence was not clearly established in July 2005); *Casey v. City of Federal Heights*, 509 F.3d 1278, 1285 (10th Cir.2007) (finding excessive force and a violation of clearly established law, reasoning that "[t]he absence of any warning" before the officer deployed her taser ... "makes the circumstances of this case especially troubling"). Likewise, the City of Cincinnati's use-of-force policy advises officers to "give the subject a verbal warning that the TASER will be deployed unless exigent circumstances exist that would make it imprudent to do so." R.8–4 at 9.

Here, Hall does not allege that he warned Cockrell of the impending use of his taser—or even that he ordered him to stop—nor does he allege that exigent circumstances prevented him from doing so. Thus, I would find that his use of a taser under these circumstances violated Cockrell's Fourth Amendment right to be free from excessive force.

Parallel Citations

2012 WL 573972 (C.A.6 (Ohio))

Footnotes

1 The Cincinnati police maintain a substation in the Fay Apartment Complex, and patrol the area day and night.

2 Jaywalking is a minor misdemeanor, which does not normally justify custodial arrest. Hall's counsel suggested at argument that, once Cockrell fled, he was guilty of the more serious misdemeanor of Obstructing Official Business, OHIO REV.CODE § 2921.31, and therefore could have been arrested.

3 Jack Cover, a NASA scientist, called the stun gun he created "Thomas A. Swift's Electric Rifle," or TASER. *Orsak v. Metro. Airports Comm. Airport Police Dept.*, 675 F.Supp.2d 944, 951 n. 2 (D.Minn.2009). This acronym paid homage to a book by the Stratemeyer Syndicate, published under the pseudonym Victor Appleton, titled *Tom Swift and His Electric Rifle, or, Daring Adventures in Elephant Land* (1911), where Tom Swift hunted wildlife on the African savannah with an electric rifle he invented. The first appearance of Tom's futuristic weapon, however, was in the slightly earlier book, *Tom Swift in the Caves of Ice, or, The Wreck of the Airship* (1911), where he used the still-unperfected electric rifle to thwart a horde of rampaging musk-oxen. *Id.* at 162–64.

4 Although, at this point, the policy itself is not at issue, we note that the version of the Cincinnati Police Division Procedure Manual Cockrell excerpted in his submission below was not the same policy in effect on July 3, 2008. Rather, the policy Cockrell provided is a March 2010 revision, which replaces an August 2009 version. *See* R. 8–4.

5 The district court also held that Cockrell's municipal-liability claim, based on the city's policies, could proceed. Appellants do not challenge this conclusion.

6 Because we resolve this case on the 'clearly established' element of qualified immunity, we express no opinion on the constitutionality of Hall's actions.

7 At oral argument, Hall's counsel urged us to infer that Hall ordered Cockrell to stop. There is, however, no evidence of such a command in the record. At this stage, we are required to draw all inferences in Cockrell's favor. *Heyne*, 655 F.3d at 562–63. We therefore assume that Hall said nothing to Cockrell before tasing him.

8 The district court's citation is to a memorandum from the Department of Justice's Civil Rights Division.

9 Notably, Chief Judge Kozinski and Judge Murphy cite different studies, reporting different rates of injury to suspects tased. *Compare Mattos*, 661 F.3d at 454 ("a study by six university departments of emergency medicine found that 99.7 percent of those Tased by police suffer no injuries or, at most, mild ones.") *with McKenney*, 635 F.3d at 363 ("As many as thirteen percent of taser targets are injured by falls.").

10 We note that Appellants did not challenge the district court's ruling on Cockrell's claim against the City of Cincinnati. That claim, of course, may proceed.

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488 Fed.Appx. 971
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
Sixth Circuit Rule 28. (Find CTA6 Rule 28)
United States Court of Appeals,
Sixth Circuit.

Edward F. HAYS, Plaintiff–Appellant,
v.
Aaron BOLTON; Richard Grassing; Vermilion Police Department; Robert Kish; City of Vermilion, Defendants–Appellees.

No. 11–3123. | July 18, 2012.

Synopsis

Background: Following acquittal of domestic violence charges, arrestee brought action against city, police department, and police officers, alleging warrantless entry and arrest without probable cause in violation of the Fourth Amendment, municipal liability, false arrest, malicious prosecution, and various Ohio state law violations. The United States District Court for the Northern District of Ohio, 2011 WL 53099, granted defendants' motion for summary judgment and dismissed claims. Arrestee appealed.

Holdings: The Court of Appeals, Suhrheinrich, Circuit Judge, held that:

[1] officers were entitled to qualified immunity on arrestee's Fourth Amendment claims for warrantless entry, and

[2] officers were entitled to qualified immunity on arrestee's Fourth Amendment claims for false arrest.

Affirmed.

Karen Nelson Moore, Circuit Judge, filed an opinion concurring in the judgment.

West Headnotes (2)

[1] Civil Rights
Sheriffs, police, and other peace officers

Police officers' entry into residence with daughter's apparent consent was reasonable, and thus officers were entitled to qualified immunity on arrestee's Fourth Amendment claims for warrantless entry; 18 year old daughter who lived in house called 911 with express request that a police office be dispatched to scene to get her things from inside house, and arrestee's purported objection came too late to withdraw or otherwise invalidate daughter's consent for officers to enter home. U.S.C.A. Const.Amend. 4.

[2] Arrest
Information from Others

Arrest
Appearance, acts, and statements of persons arrested

Civil Rights
Sheriffs, police, and other peace officers

Police officers had probable cause to arrest arrestee for domestic violence, and thus officers were entitled to qualified immunity on arrestee's Fourth Amendment claims for false arrest; arrestee's daughter called 911 for officer assistance after her father "threw [her] out of the house," without any shoes at nearly midnight in the middle of the winter with sub-freezing temperatures and snow on the ground, when the officers arrived at the scene, daughter agreed that her father had "grab[bed]," "threw," and "pulled" her outside and that her shoes had come off as he did so, she was visibly upset, once the officers were inside, arrestee refused to come down the stairs or explain his conduct, and under Ohio law, intent to cause family or household member physical harm was sufficient to constitute domestic violence. U.S.C.A. Const.Amend. 4; Ohio R.C. § 2919.25(A).

***972** On Appeal from the United States District Court for the Northern District of Ohio.

BEFORE: SUHRHEINRICH, MOORE and CLAY, Circuit Judges.

Opinion

SUHRHEINRICH, Circuit Judge.

After a jury acquitted him of domestic violence against his daughter, Defendant–Appellant Edward Hays brought various claims against those responsible for his arrest: the City of Vermillion, the Vermillion Police Department, Vermillion Police Chief Robert Kish, and Vermillion Police Officers Bolton and Grassnig. The district court found that Officers Bolton and Grassnig were entitled to qualified immunity and dismissed each of Hays' claims. Hays appeals. For the reasons stated, we **AFFIRM.**

I. Background

This case arises from the arrest and subsequent prosecution of Defendant–Appellant ***973** Edward Hays (Hays) for domestic violence against his then-eighteen year old daughter Heather.

Late on the night of December 7, 2008, Heather, angry because Hays had grounded her for lying about her whereabouts earlier that night, told her parents that she was moving out of their home. Heather admitted at trial that she had previously threatened to move out but had nonetheless continued to live with her parents. Heather packed her belongings while fighting loudly with her mother and Hays yelled at her to be quiet. When Heather did not stop screaming, Hays emerged from his bedroom and told her "if you're going to leave, you need to leave, but this fighting has to stop.

Hays put one hand on Heather's shoulder and walked with her down the stairs and out the door, locking the door behind her. Although Heather's slip-on shoes had fallen off while being led down the stairs, Hays testified that he did not know Heather was barefoot when he locked her out of the house. The temperature that night was approximately nineteen degrees with a wind chill of fourteen degrees and there was snow on the ground.

Heather's friend Brie had driven to the Hays residence and was waiting outside when Hays locked her out. Although her feet were one or two sizes smaller than Heather's, Brie gave Heather her shoes to wear. Heather then realized that she had forgotten some of her things inside the home. At 11:35 p.m., she called the Vermilion Police Department, telling them:

> I was like, dad, I need my stuff. If I don't have my stuff I'll call a police officer over here so I can get my clothes and he threw me out without any shoes on. I was barefoot and my friends came and I just need a police officer to go get my stuff.

Dispatch radioed Vermilion Police Department Officers Bolton and Grassnig to the scene for a "father daughter domestic. The daughter is 18, she's locked out of the house at this time.

Heather waited in the car with Brie until the officers arrived. When they did, she exited the car and told them that "I had all my stuff in a yellow bin and I had my shoes and everything and like I was wearing slippers. So then like he like pulled me downstairs and they fell off and like my bin is not there anymore, nothing is there. She was upset and crying. Audio from the officers' patrol cars records Heather affirming to the officers that she was forcibly removed from the home:

> Officer [Bolton]: How did you end up outside, did he grab you—
>
> Officer [Grassnig]: He threw her out (inaudible).
>
> Officer [Bolton]:—and you pulled you outside?
>
> Heather: Yes.

Id. at 8. The officers knocked loudly on the door, rang the doorbell, and telephoned Hays to have him come to the door. While doing so, the officers discussed the fact that Heather was a resident of the home she was trying to enter:

> Officer [Bolton]: It's her house, so, she lives here.
>
> Officer [Grassnig]: Yep.
>
> Officer [Bolton]: (Inaudible) breaking and entering, breaking into her own house.
>
> Officer [Grassnig]: Nope.
>
> Heather: I don't want to break anything.

***974** Officer [Grassnig]: You live here.

Heather: I honestly don't want to cause trouble, I just want my stuff.

Officer [Grassnig]: Well, that's what we're saying, you live here, if you want to go in and get your stuff.

Heather: Can you stop banging?

Id. at 10–11. Officer Bolton then left to check the doors and windows around the home. He reported back that "everything is locked." *Id.* at 12. Officers Bolton and Grassnig were standing at the front door with Heather when it was discovered that the garage door had since been opened.

Heather proceeded into the house and the two officers followed. While the officers searched the first floor for residents, Heather went upstairs to gather additional belongings from her bedroom. Hays then came out from his upstairs bedroom and objected to the officers' presence in his home. He asked whether they had broken in, to which Officer Grassnig responded that they had not, and Heather stated that the garage door was open. Officers Bolton and Grassnig asked Hays to come down the stairs and speak with them. Hays again questioned the officers' authority to be in his home and he did not immediately proceed down the steps toward them. The officers then arrested Hays for domestic violence.

Hays proceeded to trial and was found not guilty. He then brought suit in the federal District Court for the Northern District of Ohio against the City of Vermillion, the Vermillion Police Department, Vermillion Police Department Chief Robert Kish, and Vermillion Police Officers Bolton and Grassnig (collectively, Defendants) alleging warrantless entry and arrest without probable cause in violation of the Fourth Amendment, municipal liability, false arrest, malicious prosecution, and various Ohio state law violations. After extensive discovery, the district court granted Defendants' motion for summary judgment on Hays' claims against Officers Bolton and Grassnig, finding that they were entitled to qualified immunity. The district court also granted Defendants' motion for summary judgment on Hays' remaining claims, all of which were predicated upon Officers Bolton and Grassnig's alleged wrongdoing. [1] Hays appeals.

II. Analysis

A. Standard of Review

We review the district court's grant of summary judgment *de novo. Knott v. Sullivan,* 418 F.3d 561, 567 (6th Cir.2005). In doing so, we view evidence in the record and make all reasonable inferences in favor of the nonmoving party. *Combs v. Int'l Ins. Co.,* 354 F.3d 568, 576–77 (6th Cir.2004) (citing *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)). "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided ***975** that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251–52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

B. Qualified Immunity

[1] The sole claim presented on appeal is whether the district court erred in granting Defendants' motion for summary judgment on Hays' claims against Officers Bolton and Grassnig, finding the officers entitled to the protection of qualified immunity. [2] The Supreme Court has held that the doctrine of "[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan,* 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). If an officer's error is entitled to the protection of qualified immunity, such protection "applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Id.* (internal quotation marks and citations omitted).

Whether officers are entitled to qualified immunity for their actions is a question of law we review *de novo. Phillips v. Roane Cnty., Tenn.,* 534 F.3d 531, 538 (6th Cir.2008). Generally, the first step in identifying its applicability is to determine whether "in the light most favorable to the party asserting the injury, ... the facts alleged show the [officers'] conduct violated a constitutional right[.]" *Parsons v. City of Pontiac,* 533 F.3d 492, 500 (6th Cir.2008) (quoting *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) *receded from by Pearson v. Callahan,*

555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)). If a constitutional right has been violated, we must then ask "whether the right was clearly established." *Id.* (citing *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151. If necessary, we may clarify the analysis by also asking "whether the plaintiff offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Parsons*, 533 F.3d at 500 (citing *In re Carter v. City of Detroit*, 408 F.3d 305, 311 n. 2 (6th Cir.2005)). In *Pearson*, the Supreme Court reconsidered the two-step process in *Saucier* and held that "while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory." *Pearson*, 555 U.S. at 236, 129 S.Ct. 808 (affirming, however, that the *Saucier* sequence may be preferred because "it often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be.") (quoting *Lyons v. Xenia*, 417 F.3d 565, 581 (6th Cir.2005) (Sutton, J., concurring)). Post-*Pearson*, we have held that although our Court "still [is] required to address the ***976** same questions in conducting our qualified immunity analysis, ... we are free to consider those questions in whatever order is appropriate in light of the issues before us." *Moldowan v. City of Warren*, 573 F.3d 309, 333 (6th Cir.2009).

Hays claims the district court erred in finding Officers Bolton and Grassnig entitled to qualified immunity because they violated his Fourth Amendment right against unreasonable search and seizure when they conducted a non-consensual search of his home and arrested him without probable cause. As explained more fully below, we find that the officers' conduct was reasonable and affirm the district court's dismissal of Hays' Fourth Amendment claims.

1. Officers Bolton and Grassnig entered the Hays residence with Heather's apparent consent

Generally, the Fourth Amendment protects individuals from warrantless searches of their homes and possessions. *Illinois v. Rodriguez*, 497 U.S. 177, 181, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990). The Fourth Amendment's protection does not apply. If consent is given by one who has actual or apparent authority over the item or place to be searched. *United States v. Caldwell*, 518 F.3d 426, 429 (6th Cir.2008). "When one person consents to a search of property owned by another, the consent is valid if 'the facts available to the officer at the moment ... warrant a man of reasonable caution in the belief that the consenting party had authority over the premises.' " *United States v. Jenkins*, 92 F.3d 430, 436 (6th Cir.1996) (quoting *Rodriguez*, 497 U.S. at 188, 110 S.Ct. 2793).

We find that there is ample evidence to support the district court's conclusion that Heather had apparent authority to consent to a warrantless entry into the Hays residence. At approximately 11:35 p.m. on a below-freezing night in the middle of the winter, Heather called 911 representing that Hays had "thr[own] [her] out without any shoes on." She called with the express request that a police officer be dispatched to the scene to "go get [her] stuff." *Id.* When Officers Bolton and Grassnig arrived, Heather maintained that her father had "pulled [her] downstairs" and that she ended up outside because Hays had "grab[bed]" her, "threw," and "pulled" her out. Though given multiple opportunities to do so, Heather never indicated that she had ostensibly "moved out" of the Hays residence.

Heather stood by without objection while Officers Bolton and Grassnig, who had been sent to the Hays residence pursuant to Heather's request, attempted to gain entry into the home. She did not correct the officers when they twice-mentioned that she lived at the residence. Although she asked the officers to "stop banging" on the door, she did not tell them she no longer wanted to get into the house. *Id.* at 11. Indeed, when the garage door was discovered to be partially open, Heather led them inside. As the district court recognized, Heather had no problem with the officers following her in (in fact, she testified she believed they would do so) and only became "upset" when "they started arresting [her] father."

We have held that "magic words" are not necessary for effective consent; rather, the totality of the circumstances, including a party's non-verbal conduct, should be considered in determining whether consent exists. *See United States v. Carter*, 378 F.3d 584, 588 (6th Cir.2004) (finding consent "considering th[e] testimony ***977** and all [of] the circumstances" where an ordinary citizen would have recognized that assent had been given). Here, the totality of the circumstances suggested that Heather was a forcibly removed co-tenant with authority to consent to a warrantless search of the residence. Even assuming Heather was no longer a resident and lacked the actual authority to consent to a search, we conclude that she displayed apparent authority

sufficient to justify Officers Bolton and Grassnig's conduct under the Fourth Amendment. [3]

a. Hays' objection to the officers' presence did not withdraw Heather's consent under clearly established law

Hays argues that even assuming Heather had apparent authority to give the officers consent to enter the Hays residence, his objection to their presence withdrew Heather's consent and invalidated his subsequent arrest. His argument rests upon a seminal Supreme Court case—*Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006)—and an unpublished decision by this Court—*United States v. Tatman*, 397 Fed.Appx. 152 (6th Cir.2010)—interpreting it.

Neither *Randolph* nor *Tatman* espouses a principle that would strip Officers Bolton and Grassnig from governmental immunity in this case. In *Randolph*, the Supreme Court held that a co-tenant who is physically present and objects to a police officer's entry prevails over a co-tenant who grants permission for a search. *Randolph*, 547 U.S. at 106, 126 S.Ct. 1515. The decision specifically cabins an objecting co-tenant's power, however, giving him effect only when he voiced his objection as part of the initial discussion of consent to enter the premises. *Randolph*, 547 U.S. at 121, 126 S.Ct. 1515 ("[When] a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out."). Thus, *Randolph* limits, clearly and succinctly, an objecting co-tenant's ability to vitiate the previously given consent of his co-tenant to situations where the objecting co-tenant voices his complaint before the search or entry has taken place. *Id.* The Supreme Court itself noted that so long as no foul play was involved in "remov[ing] the potentially objecting tenant from the ***978** entrance for the sake of avoiding a possible objection," there is practical value to its bright-line distinction "recognizing the co-tenant's permission when there is no fellow occupant on hand" before the search commences. *Id.* The Court explained that common sense justified its formalism, noting that "it would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received." *Id.* at 122, 126 S.Ct. 1515. A simple application of this principle shows that Officers Bolton and Grassnig were legally entitled to search the Hays residence when Heather, the only tenant with actual or apparent authority over the premises to participate in the threshold colloquy regarding entrance therein, granted them permission to do so.

Four years after *Randolph* and two years *after* the events in this case, our Court decided. In that case, Tatman's wife had apparent authority to allow officers to search her husband's home within which she no longer lived. *Tatman*, 397 Fed.Appx. at 156. Tatman was standing upstairs when the officers crossed the threshold to his home and he immediately objected to the sheriff's presence before any search was conducted. *Id.* The sheriff nonetheless conducted a search of Tatman's residence and arrested him for domestic violence. *Id.* Considering the seemingly arbitrary nature of *Randolph*'s holding, we concluded that the Supreme Court "did not intend [its] 'at the door' language to be talismanic." *Id.* at 161. We thus held that, because Tatman was a physically present co-tenant who objected to a search the officer had not yet commenced, his objection invalidated any consent Tatman's wife had given. *Id.* at 162–63. "That he voiced this objection from the top, rather than the foot, of his staircase," we reasoned, "does not change this fact." *Id.* at 162.

Relying on *Tatman*, Hays contends that his objection to Officers Bolton and Grassnig's presence in his home withdraws any consent Heather had to allow the police entry. We reject this argument and find *Tatman* unpersuasive for at least two reasons. To begin, *Tatman* was not decided until two years *after* the events in this case. *See Tatman, supra.* An unpublished case not yet in existence cannot possibly supply the "clearly established" constitutional right an officer must violate to disqualify himself of governmental immunity. *See Parsons*, 533 F.3d at 500 (citing *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151) (holding that if an officer's conduct is found to have violated a constitutional right, we must ask "whether the right was clearly established."). Requiring police officers to exercise clairvoyance, rather than a reasonable understanding of existing law, is a dangerous and unwise precedent we decline to set.

Furthermore, even if Officers Bolton and Grassnig could somehow be required to understand *Randolph* as *Tatman* had not yet interpreted it, *Tatman* is factually distinguishable from the instant case and its holding inapposite. Although *Tatman* found that a co-tenant could effectively withdraw consent to search from the top of a staircase because

Randolph did not require him to be *literally* "at the door," *Tatman*, 397 Fed.Appx. at 161–63, Tatman objected before the search began. *Id.* at 156. Here, Hays' objection came *after* police had entered his home. Thus, the situation here is one we did not address in *Tatman*, i.e., whether a co-tenant can ***979** withdraw his fellow tenant's valid consent after a legitimate search has already begun. In *Randolph*, which *was* clearly established law when these events took place, the Supreme Court answered the question with a resounding "no." *Randolph*, 547 U.S. at 121, 126 S.Ct. 1515. While *Tatman* clarified *Randolph* on other points, nothing in that decision undermines this clearly established principle. In sum, although Hays cites *Randolph* in support of his argument in this case, *Randolph*'s holding makes clear that Hays' purported objection came too late to withdraw or otherwise invalidate his daughter's consent for Officers Bolton and Grassnig to enter the home. For these reasons, we affirm the district court's judgment that the officers' ongoing acceptance of Heather's consent to enter the Hays residence was reasonable, did not violate Hays' clearly established constitutional rights, and is protected under the doctrine of qualified immunity.

2. Officers Bolton and Grassnig had probable cause to arrest Hays for domestic violence

[2] Finally, Hays argues that even if police could reasonably have searched his home, they lacked probable cause to arrest him for domestic violence. We do not agree. "[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford*, 543 U.S. 146, 152, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004). Whether probable cause is present "depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." *Id.* We have held that once an officer has sufficient probable cause, he has no duty to conduct a further investigation. *Klein v. Long*, 275 F.3d 544, 551 (6th Cir.2001). Moreover, in the domestic violence context, police officers need only have a belief in the probability that an offense was committed, even if they lack proof of every element of the crime. *Thacker v. City of Columbus*, 328 F.3d 244, 256 (6th Cir.2003).

Under Ohio law, domestic violence is committed when a person "knowingly cause[s] or attempt[s] to cause physical harm to a family or household member." Ohio Rev.Code Ann. § 2919.25(A) (West 2010). Where a police officer has "reasonable grounds to believe the offense of domestic violence ... has been committed and reasonable cause to believe that a particular person is guilty of committing the offense, it is the preferred course of action in [Ohio] that the officer arrest and detain...." Ohio Rev.Code Ann. § 2935.03(B)(3)(b) (West 2011).

Applying the facts of this case to the domestic violence standard under Ohio law, it was reasonable for Officers Bolton and Grassnig to believe that Hays intended to cause physical harm to his daughter. Heather called 911 for officer assistance after her father "threw [her] out of the house," without any shoes at nearly midnight in the middle of the winter with sub-freezing temperatures and snow on the ground. When the officers arrived at the scene, Heather agreed that her father had "grab[bed]," "threw," and "pulled" her outside and that her shoes had come off as he did so. She was visibly upset. Once the officers were inside, Hays refused to come down the stairs or explain his conduct.

While Hays makes much of the fact that Heather neither complained of nor exhibited any injuries, this is hardly dispositive. Under Ohio law, the *intent* to cause a family or household member physical harm ***980** is sufficient to constitute domestic violence. *See* Ohio Rev.Code Ann. § 2919.25(A) (West 2010). Whether or not such harm actually came to pass, either when Hays forcibly threw Heather out of the house or when he locked her outside barefoot, is immaterial. Hays also argues that the officers must not have believed that Hays was an aggressor because they allowed Heather to gather her things from a room nearby while they stayed downstairs. Without comment on the wisdom of this decision, this too fails to demonstrate that Hays lacked the intent to harm his daughter. Indeed, Officer Bolton testified that he and Officer Grassnig "still had eyes on [Heather]" when she went upstairs to get her things.

In sum, Heather's representations to the 911 dispatcher and to Officers Bolton and Grassnig, the extremely cold weather, the fact that Heather had been thrown outside with no shoes, and Hays' refusal to explain his conduct supports the officers' decision to arrest him for domestic violence. Under these straightforward circumstances, the officers' conduct did not violate Hays' constitutional rights, much less clearly established protections. Accordingly, we affirm the district court's judgment that Officers Bolton and Grassnig had probable cause to arrest Hays and that their conduct is protected by the doctrine of qualified immunity.

III. Conclusion

For the reasons set forth herein, we **AFFIRM** the district court's grant of Defendants' motion for summary judgment.

KAREN NELSON MOORE, Circuit Judge, concurring in the judgment.

I agree with the majority that Heather Hays had apparent authority to consent to Officers Grassnig's and Bolton's entry into the Hays household. I am unconvinced that the officers did not thereafter violate Edward Hays's Fourth Amendment rights by refusing to leave the house after he objected to their presence, however. *See Georgia v. Randolph*, 547 U.S. 103, 122–23, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006). Because *Randolph* is unclear as to when a tenant must object in order to override a co-tenant's consent, and because our subsequent clarification of the issue in *United States v. Tatman*, 397 Fed.Appx. 152, 160–62 (6th Cir.2010), postdates the events at the Hays household that led to this litigation, I can concur in the majority's holding that Grassnig and Bolton are entitled to qualified immunity on the grounds that the contours of the right identified in *Randolph* were not clearly established at the time. The majority's discussion of the scope of *Randolph* is thus unnecessary. Because I also believe that it is incorrect, I must briefly respond.

To the extent that the majority reads *Randolph* as holding that Hays must have objected before the officers entered his home in order to revoke Heather's previously given consent, I disagree for the reasons explained in *Tatman*. *See* 397 Fed.Appx. at 160–63; *see also Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 426 (5th Cir.2008) (following *Randolph*, "[i]t is only a small step to conclude that a physically present co-occupant may revoke or withdraw the consent given by another occupant" after police have entered). Assuming that the majority's description of *Randolph* as holding that a co-tenant's objection is ineffective "after a legitimate search has already begun" means something other than "after the police have entered," I still question the soundness of this standard. It is unclear at what point after the police ***981** enter a residence that a search begins for the purposes of this view of *Randolph*.

Read in context, the better understanding of *Randolph*'s "fine line" rule, 547 U.S. at 121, 126 S.Ct. 1515, is that a tenant cannot revoke a co-tenant's previously given consent for the police to enter or search a residence once the police have already discovered contraband or once probable cause for an arrest has been established; similarly, an absent tenant cannot later argue that a search within the residence to which a co-tenant consented was unlawful if the government seeks to use evidence discovered during that search. The Court explained that the purpose of this rule was to align the holding in *Randolph* with *Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990), and *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), which held that evidence seized in a warrantless search of the defendant's residence was admissible at trial when a third party with actual or apparent common authority had consented to the search, as well as to clarify that officers are not required "to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received." *Randolph*, 547 U.S. at 121–22, 126 S.Ct. 1515. Neither purpose is undermined by requiring officers to heed the objection of a co-tenant who arrives on the scene once the police have already entered the house but prior to the seizure of evidence.

With these observations, I concur in the judgment affirming the district court's grant of summary judgment on qualified-immunity grounds.

Parallel Citations

2012 WL 2913765 (C.A.6 (Ohio))

Footnotes

1 The district court granted Defendants' motion for summary judgment on Hays' state constitutional claims on the additional basis that Hays had neither opposed Defendants' motion nor provided any evidence to support a state constitutional violation.

2 Hays' brief mentions no other claims and we thus consider them waived. *See Ahlers v. Schebil*, 188 F.3d 365, 374 (6th Cir.1999) (claims not raised in the plaintiff's appellate brief are waived) (internal citations omitted). Even if we were to address them on their merits, however, Hays' remaining claims fail because they are predicated on the assumption, rejected *infra*, that Officers Bolton and Grassnig's conduct was unlawful.

3 Following Defendants' motion for summary judgment in this case, Heather submitted a sworn affidavit in which she claimed she did not consent to Officers Bolton and Grassnig entering the Hays residence and she did not tell the officers that her father had dragged her down the steps. The district court struck the affidavit because it materially contradicted Heather's deposition testimony, relying

on *Reid v. Sears, Roebuck and Co.*, 790 F.2d 453, 460 (6th Cir.1986) (holding that a party cannot create a genuine issue of material fact by filing a post-motion for summary judgment affidavit that materially contradicts his or her prior testimony). Hays argues that *Reid*'s holding is inapplicable because it regarded the affidavit of a *party himself* and not a mere testifying witness. Whether *Reid* is in fact so limiting is a matter we need not decide, for even if we were to consider Heather's statement, it does not create a genuine issue of material fact to overcome summary judgment. While Heather claims she gave no consent to enter the Hays residence, for example, she does not contest her statements to the 911 dispatcher or her non-verbal conduct that formed the basis for the district court's ruling that she had provided apparent consent. Moreover, even if Heather never told the officers her father *dragged* her outside —as she claims in the affidavit—the officers still had probable cause to arrest Hays based, *inter alia*, on the freezing temperatures outside and Heather's insistence that she had been *thrown* out of the house.

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479 Fed.Appx. 1
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publication in the Federal Reporter.
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See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
Sixth Circuit Rule 28. (Find CTA6 Rule 28)
United States Court of Appeals,
Sixth Circuit.

Lori Marie McCOLMAN, Plaintiff–Appellant,
v.
ST. CLAIR COUNTY, St. Clair County Sheriff's Department, and Sergeant Hernandez, Defendants,
and
Deputy Greg Doan, Defendant–Appellee.

No. 10–2567. | April 12, 2012.

Synopsis

Background: Arrestee, a double amputee with below-the-knee prosthetics, brought action against county, its sheriff's department, and county police officers, alleging that officers used excessive force and were grossly negligent in connection with her arrest for drunk driving. After parties stipulated to dismissal of all defendants except arresting officer, the United States District Court for the Eastern District of Michigan, Paul D. Borman, J., 2010 WL 4483389, granted that officer's motion for summary judgment. Arrestee appealed.

Holdings: The Court of Appeals, Julia Smith Gibbons, Circuit Judge, held that:

[1] arrestee failed to state excessive force claim based on handcuffing;

[2] excessive force claim based on handcuffing was not tried by consent;

[3] officer did not use excessive force when he pulled arrestee across back seat of police vehicle;

[4] officer was not grossly negligent in placing arrestee sideways in back seat of police vehicle; and

[5] officer was not grossly negligent in leaving arrestee under another officer's supervision at hospital.

Affirmed.

West Headnotes (5)

[1] Civil Rights
Arrest and detention

Allegations in arrestee's complaint that she was handcuffed, hands behind her back, and then ordered to get into police vehicle, that because arrestee was double amputee she could not get into police vehicle without assistance while her hands were behind her back, and that arresting officer violated § 1983 and Constitution by using excessive force, failed to state § 1983 excessive force claim against officer based on handcuffing. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[2] Federal Civil Procedure
Issues tried by consent of parties

Arrestee's § 1983 excessive force claim against county police officer based on handcuffing was not tried by consent, as would allow arrestee to amend her pleadings to raise excessive force handcuffing claim; case was disposed of on summary judgment, and officer did not consent to trying handcuffing claim, but rather, he objected to that claim both in his motion for summary judgment and at oral argument on that motion. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rules 15(b)(2), 56(c), 28 U.S.C.A.

[3] Arrest
Use of force

County police officer did not use excessive force, in violation of Fourth Amendment, when he pulled handcuffed arrestee, a double amputee with below-the-knee prosthetics, across back seat of police vehicle, allegedly causing arrestee's

prosthetic leg to fall off and bruising on her arms; arrestee was arrested for driving under the influence of alcohol, an unquestionably serious crime which could, under some circumstances, lead to volatile situation, and officer's pulling arrestee into back seat was not objectively unreasonable, since his previous encounter with her after her domestic dispute with her husband apprised him of her aggressive behavior, and he had to use some force to get woman of her weight into vehicle. U.S.C.A. Const.Amend. 4.

[4] Counties

Acts of officers or agents

County police officer was not grossly negligent in placing handcuffed arrestee, a double amputee with below-the-knee prosthetics, sideways in back seat of police car in manner that allowed her to fall and hit her head when officer turned corner, and thus officer was entitled to immunity under Michigan's Governmental Immunity Act from arrestee's state law claims arising from incident; officer placed arrestee sideways because he believed she would have difficulty getting her prosthetic legs underneath cage if her turned her facing forward, arrestee did not tell officer she was unstable in position in which he situated her, and there was no indication that officer was driving at excessive rate of speed or recklessly when arrestee fell over and hit her head. U.S.C.A. Const.Amend. 4; M.C.L.A. § 691.1407(2)(c).

[5] Counties

Acts of officers or agents

Arresting county police officer was not grossly negligent in leaving arrestee, a double amputee with below-the-knee prosthetics, under another officer's supervision at hospital when arresting officer went to fill out hospital paperwork, during which time arrestee fell off gurney, and thus arresting officer was entitled to immunity under Michigan's Governmental Immunity Act from arrestee's state law claims arising from incident; arresting officer anticipated that he would need backup at hospital, called for backup, and was met at hospital by other officer, and even if other officer failed to stay in room with arrestee, and she was therefore left unattended, it was reasonable for arresting officer to ask other officer to supervise arrestee while he could not. U.S.C.A. Const.Amend. 4; M.C.L.A. § 691.1407.

***2** On Appeal from the United States District Court for the Eastern District of Michigan.

Before: GIBBONS, GRIFFIN and DONALD, Circuit Judges.

Opinion

JULIA SMITH GIBBONS, Circuit Judge.

Lori McColman, a double amputee with below-the-knee prosthetics, sued St. Clair County, its Sheriff's Department, and two St. Clair County police officers alleging that the officers used excessive force and were grossly negligent in connection with her arrest for drunk driving. McColman brought claims for deprivation of her civil rights and use of excessive force in violation of 42 U.S.C. § 1983; assault and battery; and gross negligence pursuant to Michigan Compiled Laws § 691.1407. After the parties stipulated to the dismissal of all defendants except St. Clair County Sheriff's Deputy Greg Doan, Doan moved for summary judgment. The district court granted Doan's motion, concluding that Doan did not use excessive force when he pulled McColman into the back seat of his police vehicle after her arrest and that, even if he did, he was entitled to qualified immunity. The district court further held that Doan was not grossly negligent in placing McColman sideways in the back seat of the police vehicle and that Doan was not grossly negligent when he left McColman sitting on a gurney in the hospital emergency room under the supervision of another officer. McColman appeals. ***3** For the reasons that follow, we affirm the judgment of the district court.

I.

Lori McColman, a double, below-the-knee amputee who ambulates with prosthetics, was arrested for drunk driving on August 28, 2008. The week before her drunk driving arrest, police officers were called to the house of McColman's husband, Donald McColman, Jr., to respond to a domestic dispute. Doan and Sergeant Joseph Hernandez responded

to the call and interviewed McColman and her husband. From these interviews, they learned that McColman had set the couple's marriage certificate on fire and had pushed her husband, and that he knocked her down, causing her to fall, hit her head, and black out. McColman's husband alleges that she only pretended to black out, at which point he called 9–1–1. The officers separated the couple for the night, sending McColman to her own home.

In the early morning hours of August 28, 2008, Doan observed McColman's car weaving between lanes, pulled her over, and gave her several field sobriety tests. McColman performed poorly on at least one of these tests. Doan then administered a breathalyzer test which revealed that McColman's blood alcohol level was .18, which was over the legal limit. He told McColman that she was being arrested for drunk driving and directed her to place her hands behind her back. Doan then handcuffed McColman. McColman testified that Doan placed the handcuffs on her "[w]ay too tight[ly,]" causing her to scream out in pain, "I'm hurting. You're hurting me, you're hurting me." She further testified that the handcuffs were so tight that they were cutting into the skin on her wrists, but Doan did not adjust the handcuffs in response to her complaint. Doan testified that he checked the tightness of the handcuffs by inserting a finger along McColman's wrist bone, determined that they were not too tight, and left them as they were.

Doan then sat McColman on the back seat of the police car, and asked her to scoot into the vehicle. McColman told Doan she couldn't "scoot" into the back seat because she needed her hands to propel her. Doan then walked around to the other side of the car, opened the door, grabbed McColman by her upper arms, and pulled her across the seat and into the car. McColman testified that she was "yanked ... across the seat" in a manner that "caused excruciating pain." When Doan pulled McColman into the back seat, one of her prosthetic legs fell off, but Doan reattached it to her residual limb. At the time of her arrest, McColman weighed approximately 170 pounds.

Doan testified that he left McColman sitting sideways on the back seat because he thought that she would have difficulty getting her prosthetic legs around and underneath the cage of the vehicle. Doan began to drive McColman to the jail, but as a result of her sitting sideways on the back seat, when Doan made a right turn, McColman fell over and hit her head on the car seat or door. McColman testified that she blacked out from the extreme pain she was feeling in her wrists—from the handcuffs—and from hitting her head. Doan heard a thud in the back seat, stopped the police car, and checked on McColman. McColman was breathing and moving, but not talking. Because McColman was unresponsive, Doan took her to the hospital.

Doan radioed for backup to meet him at the hospital, and Deputy Martin Stoyan was dispatched to assist Doan. Doan testified that he radioed for backup to avoid having to leave McColman unattended while he was doing paperwork at the hospital. ***4** When they reached the hospital, Doan and Stoyan helped McColman onto a gurney and an orderly took her into an examination room. McColman testified that she was then left unattended in the examination room with the police officers standing outside the door of the room.

At some point, McColman fell off the gurney and hit her right elbow on the floor. She testified that one of her prosthetic legs was slipping off, and, as she was trying to hold it on with her other leg, she fell off the gurney after she lost her balance due to her hands being handcuffed behind her back.

McColman testified that after her fall, she experienced excruciating pain in her wrists and hands, which were going numb, and in her right elbow. Despite her complaints of pain, McColman was medically cleared to go to jail, and Doan transported her there. McColman's handcuffs were only removed when she reached the jail.

McColman saw two doctors in the aftermath of the arrest, one of whom testified that her pre-existing carpal tunnel syndrome was exacerbated as a result of the way she was handcuffed.

II.

Doan moved for summary judgment, and the district court held a hearing on the motion on September 29, 2010.[1] At the hearing, Doan argued that McColman had never pled a claim that Doan used excessive force in handcuffing her. Although her complaint contained allegations of excessive force, it did not allege that Doan subjected her to excessive force by handcuffing her too tightly. The court agreed that there was no excessive force handcuffing claim pled in the complaint and that such a claim was therefore not before the court. McColman argued that Doan was on notice, through discovery, that McColman was pursuing an excessive force claim related to her handcuffing and orally moved to amend the complaint to allege this claim. The district court declined

to grant the motion orally, directing McColman's counsel to file a motion if he wished to amend the complaint. McColman's counsel indicated that he would move for leave to amend. However, more than one month later, when the district court granted Doan's motion for summary judgment, McColman's counsel still had not moved for leave to amend the complaint.

In its opinion granting Doan's motion for summary judgment, the district court held that McColman's excessive force handcuffing claim was not before the court; that Doan did not use excessive force when he pulled McColman across the back seat of the police car, and that even if he did, he was entitled to qualified immunity; that Doan was not grossly negligent when he situated McColman sideways in the back seat or when he left McColman under Stoyan's supervision at the hospital; and that Doan was entitled to governmental immunity on the state law assault and battery claims. Accordingly, the district court entered summary judgment in Doan's favor. McColman appealed but abandoned her assault and battery claims on appeal.

III.

We review a district court's grant of summary judgment *de novo*. *Alspaugh v.* ***5** *McConnell*, 643 F.3d 162, 168 (6th Cir.2011). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 'show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law.' " *Binay v. Bettendorf*, 601 F.3d 640, 646 (6th Cir.2010) (quoting Fed.R.Civ.P. 56(c)). The moving party bears the burden of proving that no genuine issue of material fact exists, but it can discharge that burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Bennett v. City of Eastpointe*, 410 F.3d 810, 817 (6th Cir.2005) (internal quotation marks omitted). In reviewing a summary judgment motion, we view the evidence and the inferences therefrom "in the light most favorable to the non-moving party." *Id.* (citing *Matsushita Elec. Indus., Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

A.

McColman argues that the complaint properly pled an excessive force claim based on handcuffing. We do not agree.

"[T]he pleading standard Rule 8 announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal quotation marks omitted). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Id.* (internal quotation marks omitted). "Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Id.* (internal quotation marks and alteration omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.* at 1950 (internal quotation marks and alteration omitted).

[1] McColman cites paragraphs 10–11 and 22–23 of her complaint as those that contain sufficient factual and legal allegations to plead her excessive force handcuffing claim. Paragraph 10 states, in full, "That the officers determined that an arrest should be made for operating while intoxicated. The Plaintiff was handcuffed, hands behind her back, and then ordered to get into the police vehicle." (R. 1, at ¶ 10.) Paragraph 11 merely alleges that because McColman is a double amputee she could not get into the police car "without assistance while her hands were handcuffed behind her back." (*Id.*, at ¶ 11.) These paragraphs describe the fact that McColman was handcuffed, but nothing in these paragraphs can be construed as an allegation that Doan used excessive force in placing handcuffs too tightly on McColman's wrists.

Paragraphs 22 and 23 of the complaint allege that Doan violated 42 U.S.C. § 1983 and the Constitution by using excessive force and that a reasonable officer in his position would have known he was violating McColman's constitutional rights. (*Id.*, at ¶¶ 22–23.) These paragraphs do not even mention handcuffing but merely recite the legal elements of an excessive force claim.

The well-pleaded facts of McColman's complaint do not permit an inference that Doan violated 42 U.S.C. § 1983 by using excessive force in handcuffing McColman too tightly. Accordingly, the district court correctly concluded that McColman failed to plead an excessive force handcuffing claim.

***6** **[2]** Further, the handcuffing claim was not tried by consent, as McColman argues. Federal Rule of Civil Procedure 15(b)(2) provides:

> When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

By its plain terms, Rule 15(b)(2) only applies to claims that are tried, and this case was disposed of on summary judgment. Further, Doan did not consent to trying the handcuffing claim —he *objected* to the claim in both his motion for summary judgment and at oral argument on that motion. *Cf. Siler v. Webber*, 443 Fed.Appx. 50, 58 (6th Cir.2011) (holding that an issue cannot be tried by the parties' consent pursuant to Rule 15(b)(2) where one of the parties opposes trial by moving for summary judgment).

The fact that Doan would not have been prejudiced or surprised by an amendment is irrelevant, given that McColman never moved for leave to amend her complaint. The district court properly declined to consider a claim that was not pled.

B.

McColman next argues that the way in which Doan pulled her across the back seat of the police vehicle constituted excessive force in violation of 42 U.S.C. § 1983. We conclude that Doan's use of force was reasonable.

The Fourth Amendment prohibits officers from using excessive force in the course of making an arrest. *Graham v. Connor*, 490 U.S. 386, 394–95, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). "To determine whether a constitutional violation based on excessive force has occurred, this Court applies the objective-reasonableness standard, which depends on the facts and circumstances of each case viewed from the perspective of a reasonable officer on the scene and not with 20/20 hindsight." *Binay*, 601 F.3d at 647 (internal quotations marks omitted).

Factors relevant to the reasonableness inquiry include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396, 109 S.Ct. 1865.

As we have explained:

> Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chamber, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

Dunigan v. Noble, 390 F.3d 486, 493 (6th Cir.2004) (emphasis omitted) (quoting *Graham*, 490 U.S. at 396–97, 109 S.Ct. 1865).

[3] In granting Doan's motion for summary judgment, the district court noted that McColman was arrested for driving while under the influence of alcohol, "an unquestionably serious crime which can, under certain circumstances, lead to a volatile situation." The court acknowledged that McColman did not actively resist arrest and that the manner in which Doan pulled her into the car caused her prosthetic leg to fall off and caused bruising on her arms. However, the district court concluded that Doan's pulling McColman ***7** into the back seat was not objectively unreasonable because his previous encounter with her after her domestic dispute apprised him of her aggressive behavior, and he had to use some force to get a woman of her weight into the police vehicle. Doan did not use "gratuitous violence" or "gratuitous force" to get McColman into the car. The court also concluded that even if Doan's use of force was objectively unreasonable, he was entitled to qualified immunity.

The district court's analysis is sound. Doan knew that McColman had previously set a fire in her husband's home, suggesting she was inclined toward dangerous behavior when she was upset. He also knew that she had been

driving while intoxicated. The severity of the crime justified keeping McColman in handcuffs after she was arrested, especially given Doan's knowledge that McColman could present a threat to the safety of others. *See Graham*, 490 U.S. at 396, 109 S.Ct. 1865. Thus, Doan's decision not to remove McColman's handcuffs was objectively reasonable. McColman told Doan she could not scoot into the back seat of the police car without the use of her hands. Thus, Doan, having made a reasonable decision not to remove McColman's handcuffs, had to apply *some* force to get her into the back seat so that he could close the door and transport her to jail. *See Graham*, 490 U.S. at 396, 109 S.Ct. 1865 (holding that a government officer has the right to use some degree of physical coercion to effect an arrest). Grabbing her by her upper arms and pulling McColman across the seat was not a gratuitous use of force, even if it did result in some minor bruising to McColman's arms. *See Miller v. Sanilac Cnty.*, 606 F.3d 240, 252 (6th Cir.2010) ("In determining whether there has been a violation of the Fourth Amendment, we consider not the 'extent of the injury inflicted' but whether an officer subjects a detainee to 'gratuitous violence.' " (quoting *Morrison v. Bd. of Trs. of Green Twp.*, 583 F.3d 394, 407 (6th Cir.2009))). Doan applied force sufficient, but not greater than necessary, to get McColman into the vehicle without removing her handcuffs. Accordingly, Doan did not use excessive force in pulling McColman across the back seat of the vehicle.

C.

McColman next argues that the district court erred in holding that Doan was not grossly negligent in placing McColman in the back seat of the police vehicle in a manner that allowed her to fall and hit her head when he turned a corner. She also argues that the district court erred in concluding that Doan was not grossly negligent in leaving her unattended on the gurney at the hospital, from which she fell while she was trying to keep one prosthetic leg on with the other.

Under Michigan's Governmental Immunity Act, Mich. Comp. Laws § 691.1407, "a governmental employee is not liable in tort for personal injuries so long as the employee's 'conduct does not amount to gross negligence that is the proximate cause of the injury or damage.' " *Oliver v. Smith*, 269 Mich.App. 560, 715 N.W.2d 314, 317 (2006) (quoting Mich. Comp. Laws § 691.1407(2)(c)). Under Michigan law, a police officer may be held liable in tort only if "the officer has utilized wanton or malicious conduct or demonstrated a reckless indifference to the common dictates of humanity." *Bennett v. Krakowski*, 671 F.3d 553, 560 (6th Cir.2011) (internal quotation marks omitted). Further, tort liability will not lie unless the officer's conduct "is *the* proximate cause of the injury or damage." *Livermore ex rel. Rohm v. Lubelan*, 476 F.3d 397, 408 (6th Cir.2007) (internal quotation marks omitted). ***8** "[T]he Michigan Supreme Court [has] defined 'the proximate cause' under § 691.1407(2)(c) to mean 'the one most immediate, efficient, and direct cause preceding an injury.' " *Id.* (quoting *Robinson v. City of Detroit*, 462 Mich. 439, 613 N.W.2d 307, 317 (2000)).

[4] Viewing the facts in the light most favorable to McColman, Doan was not grossly negligent in placing McColman sideways in the back seat of the police car. Doan placed McColman sideways because he believed she would have difficulty getting her prosthetic legs underneath the cage if he turned her facing forward. McColman did not tell Doan she was unstable in the position in which he situated her. There is no evidence in the record that Doan was driving at an excessive rate of speed or recklessly when McColman fell over and hit her head.

Doan's response when McColman hit her head undermines any claim that Doan's conduct was "wanton or malicious ... or demonstrated a reckless indifference to the common dictates of humanity." *Bennett*, 671 F.3d at 561 (internal quotation marks omitted). When Doan heard a thud in the back seat, he stopped the police car and checked on McColman. McColman was breathing and moving but not talking. Doan immediately took McColman to the hospital because she had fallen over and was unresponsive. At most, Doan's failure to anticipate that McColman would fall over and hit her head because she was positioned sideways was garden-variety negligence, not gross negligence. Accordingly, the district court correctly concluded that Doan was not grossly negligent in placing McColman sideways in the back seat of the police car and that he was therefore entitled to governmental immunity.

[5] Similarly, Doan was not grossly negligent in leaving McColman under Stoyan's supervision when he went to fill out hospital paperwork and paperwork necessary to obtain a warrant for a blood draw. Doan anticipated that he would need backup at the hospital, called for backup, and was met at the hospital by Stoyan. McColman testified that she was left unattended in the examination room with the police officers standing outside the door of the examination room. At some point, McColman fell off the gurney and hit her right elbow

on the floor. McColman testified that one of her prosthetic legs was slipping off, she was trying to hold it on with her other leg, and she fell off the gurney after she lost her balance due to her hands being handcuffed behind her back.

Crediting McColman's version of events, as we must at the summary judgment stage, Doan is still entitled to governmental immunity because Doan exercised due care in asking Stoyan to supervise McColman while he filled out paperwork. Even if Stoyan failed to stay in the room with McColman, and she was therefore left unattended, it was reasonable for Doan to ask another officer to supervise an arrestee while he could not. There is no evidence in the record that Doan knew or should have known that Stoyan would not watch McColman at all times. On these facts, Doan did not engage in conduct that was "wanton or malicious ... or demonstrated a reckless indifference to the common dictates of humanity." *See Bennett*, 671 F.3d at 561 (internal quotation marks omitted).

Moreover, Doan's actions were not the proximate cause of McColman's fall and consequent injury. *See* Mich. Comp. Laws § 691.1407(2)(c). According to McColman's own testimony, she only fell because she was trying to keep one prosthetic leg on with the other, and lost her balance ***9** because her hands were handcuffed behind her back. The most direct cause of McColman's injury was her decision to use one of her prosthetic legs to try to keep on the other, which was falling off. Because McColman's actions, not Doan's, were the most direct cause of her fall and injury, Doan was entitled to governmental immunity. *See Livermore*, 476 F.3d at 408.

IV.

For the foregoing reasons, we affirm the district court's judgment.

Parallel Citations

2012 WL 1237845 (C.A.6 (Mich.))

Footnotes

1 Prior to the hearing, the parties stipulated to the dismissal with prejudice of all defendants except Doan, and to the dismissal of Count IV of the Complaint, which alleged that St. Clair County and the St. Clair County Sheriff's Department violated McColman's civil rights in violation of 42 U.S.C. § 1983 by failing to properly supervise, monitor, and train their police officers and by establishing a pattern and practice of violating their citizens' constitutional rights.

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Only the Westlaw citation is currently available.
United States District Court, E.D. Tennessee.

UNITED STATES of America
v.
Justin HOLIFIELD.

No. 1:12–CR–21. | Dec. 7, 2012.

Attorneys and Law Firms

Gregg L. Sullivan, U.S. Department of Justice, Chattanooga, TN, for Plaintiff.

Mary Ellen Coleman, Federal Defender Services of Eastern Tennessee, Inc., Chattanooga, TN, for Defendant.

Opinion

MEMORANDUM

CURTIS L. COLLIER, District Judge.

***1** Defendant Justin Holifield ("Defendant") has filed a motion to suppress all evidence seized as the result of a traffic stop on November 24, 2011 (Court File No. 16). Defendant's motion was referred to United States Magistrate Judge William B. Mitchell Carter, who held a hearing and subsequently filed a report & recommendation ("R & R") recommending Defendant's motion be denied (Court File No. 24). Defendant timely objected (Court File No. 25) and the Government filed a response (Court File No. 27). For the following reasons, the Court will **ACCEPT** and **ADOPT** the R & R (Court File No. 24). Accordingly, the Court will **DENY** Defendant's motion to suppress (Court File No. 16).

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The Court incorporates those portions of the magistrate judge's recitation of the facts to which objections have not been made, and only recounts the facts underlying the issues addressed in this memorandum. The Court will identify Defendant's objections to the factual findings.

On November 24, 2011, at approximately 1:00 a.m., Chattanooga Police Department Officer Derek Roncin was on routine patrol in a marked vehicle. He was in an area known to have a high number of break-ins during the holiday season. Roncin observed a vehicle approaching from the opposite direction, but because of the vehicle's bright headlights, he could not see the individuals inside. Roncin turned into a driveway on the left. As the car passed approximately ten to fifteen feet from the rear of Roncin's patrol car, he looked over his shoulder and observed the vehicle's rear license plate was expired. At the evidentiary hearing, Roncin testified he always looks at vehicle tags while on duty. Defendant contends Roncin would not have been able to clearly see the vehicle tag and, therefore, would not have been able to determine whether it was expired. At the hearing, Roncin testified that parts of the neighborhood were lit with streetlights.

Roncin subsequently followed the car as it turned into a nearby driveway. The magistrate judge found Roncin parked his patrol car on Eldridge Road. Defendant, however, contends Roncin parked directly behind Defendant's vehicle, blocking him in the driveway.

Defendant then stepped out of the car. Roncin advised Defendant to return to the vehicle and to provide his license and registration information. Defendant, backing away, pointed at the house in whose driveway he was parked and stated the items were inside. Roncin observed Defendant was also looking at the house next door. Defendant continued to back away and Roncin ordered Defendant to stop. Defendant then fled and Roncin pursued yelling "Stop, police!" Roncin deployed his taser, which proved ineffective. Roncin finally restrained Defendant after chasing him between two houses. He pinned Defendant to the ground until back-up arrived. During this time, Defendant made statements such as "God help me, God help me. I'm done this time, I'm screwed." While restraining Defendant, Roncin also felt a hard metal object in Defendant's right hand underneath Defendant's body.

***2** When Defendant was later handcuffed and patted down, a second officer discovered Defendant had a loaded .9 mm handgun on his person. Roncin found a loaded .32 chambered pistol on the ground near the spot where he had struggled with Defendant. After Defendant was read his *Miranda* rights, Defendant explained one of the guns was for personal protection and the other belonged to his mother. He also voluntarily gave an officer at the scene a bottle containing marijuana and prescription pills.

After checking the vehicle's registration, Roncin learned the vehicle did not belong to Defendant. He also learned

Defendant's driver's license had been revoked and Defendant did not have a permit to carry a concealed weapon. Finally, he discovered Defendant had no connection to the area where he had been detained. Defendant was arrested for driving with a revoked license, resisting arrest, unlawful possession of a firearm, and possession of marijuana.

On February 29, 2012, Defendant was indicted by a federal grand jury and charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Defendant's motion to suppress is pending.

II. STANDARD OF REVIEW

The Court must conduct a *de novo* review of those portions of the R & R to which objection is made. 28 U.S.C. § 636(b)(1)(C). However, *de novo* review does not require the district court rehear witnesses whose testimony has been evaluated by the magistrate judge. *See United States v. Raddatz*, 447 U.S. 667, 675–76, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). The magistrate judge, as the factfinder, had the opportunity to observe and hear the witnesses and assess their demeanor, putting him in the best position to determine credibility. *Moss v. Hofbauer*, 286 F.3d 851, 868 (6th Cir.2002); *United States v. Hill*, 195 F.3d 258, 264 (6th Cir.1999). The magistrate judge's assessment of witnesses' testimony is therefore entitled to deference. *United States v. Irorere*, 69 F. App'x 231, 236 (6th Cir.2003).

III. DISCUSSION

Defendant objects to two of the magistrate judge's factual findings and argues, more broadly, that the magistrate judge erred in concluding Defendant's seizure did not violate the Fourth Amendment. The Court will address each issue in turn.

A. Factual Findings

Defendant first objects to the magistrate judge's finding that Roncin could clearly see Defendant's vehicle tag and could determine it was expired. The magistrate judge made this finding, however, based upon the testimony offered by Roncin at the evidentiary hearing. Roncin testified it was his regular practice to check vehicle tags for proper registration while on patrol at night (Court File No. 26 ("Hr'g Tr."), at 28). He explained that, after pulling into a nearby driveway, he observed Defendant's license plate by looking over his shoulder at Defendant's vehicle, which was approximately ten to fifteen feet away (*id.* at 27). He saw Defendant's license plate and observed Defendant's registration was expired (*id.* at 9–10, 25, 32). When questioned about visibility due to the late hour, Roncin explained parts of the neighborhood were lit with streetlights. Defendant offered no testimony or evidence at the hearing to refute Roncin's testimony nor has he offered any evidence to discredit Roncin's testimony. Thus, the Court will deny Defendant's first objection.

***3** Next, Defendant contends the magistrate judge erred when he failed to find Roncin blocked Defendant's vehicle in the driveway, preventing him from leaving. At the hearing, however, Roncin explicitly stated, "I did not follow [Defendant's vehicle] into the driveway. I stayed on Delashmitt or, I'm sorry, Eldridge" (*id.* at 28). Based on this and other testimony, the magistrate judge found Roncin was parked on Eldridge Road. In the absence of any other evidence to the contrary, the Court will again deny Defendant's objection.

Accordingly, the Court will accept and adopt all of the magistrate judge's factual findings.

B. Legal Conclusions

Because Defendant's objections to the factual findings in the R & R lack merit, it also follows that Defendant's objections to the magistrate judge's legal conclusions must also fail. Defendant argues he was racially profiled and, because Roncin could not see Defendant's tag, Roncin lacked sufficient grounds to conduct a traffic stop. Defendant also contends Roncin's conduct amounted to a warrantless *Terry* stop.

A law enforcement officer "legally may stop a car when he has probable cause to believe that a civil traffic violation has occurred." *United States v. Blair*, 524 F.3d 740, 748 (6th Cir.2008) (citing *United States v. Sanford*, 476 F.3d 391, 394 (6th Cir.2007)). [1] Here, based on the magistrate judge's factual findings, which this Court has adopted, Roncin had probable cause to stop Defendant because he observed Defendant's tag was expired, in violation of Tenn.Code Ann. § 55–4–101(f). Section 55–4–101(f), *inter alia*, requires that a party must maintain valid vehicle registration. Moreover, as noted by the magistrate judge, once Defendant fled during the traffic stop, he committed a second crime, and one for which he could be arrested. *See* Tenn.Code Ann. § 39–16–602. [2] Thus, after Defendant was arrested, any subsequent search would have been lawful incident to the arrest. *United States v. McCraney*, 674 F.3d 614, 618–19 (6th Cir.2012).

Defendant also contends he was unlawfully stopped on the basis of race. There is no evidence in the record, however, that Defendant was racially profiled. Moreover, because Roncin had probable cause to stop Defendant for the traffic violation, Roncin's actual intentions were irrelevant. *See Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (noting "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis"). Thus, even if Roncin had some other intent, the Court's determination that Roncin did not violate Defendant's Fourth Amendment rights remains unaltered.

Finally, the magistrate judge was correct to alternatively conclude Roncin was justified to effect a *Terry* stop once Defendant fled.[3] An officer may effect a *Terry* stop when he "has reasonable, articulable suspicion that [a] person *has been*, is, or is about to be engaged in criminal activity." *United States v. Atchley*, 474 F.3d 840, 847 (6th Cir.2007) (quoting *United States v. Hensley*, 469 U.S. 221, 227, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985)). In the instant case, Roncin had several facts upon which he could form reasonable suspicion. It was a late hour and the area was known to have a high number of break-ins. Moreover, Defendant stated his documents were in one house, yet he was looking in a different direction as he was backing away. Most importantly, Defendant fled. Considering the totality of the evidence, Roncin had reasonable suspicion to determine a crime had been or was about to be committed. *See Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570, (2000) (noting unprovoked flight is a significant factor to consider in determining reasonable suspicion); *Blair*, 524 F.3d at 750 (noting that being in a high crime area and it being a late hour can support reasonable suspicion when considered alongside other factors).

***4** Because Defendant's Fourth Amendment rights were not violated, evidence obtained as a result of the traffic stop and subsequent detention should not be suppressed.

IV. CONCLUSION

For the foregoing reasons, the Court will **ACCEPT** and **ADOPT** the magistrate judge's R & R (Court File No. 24). The Court will **DENY** Defendant's motion to suppress (Court File No. 16).

An Order shall enter.

Footnotes

1 In fact, although the case law in this circuit is split, under some circumstances, the Court can even apply the more-deferential reasonable suspicion standard. *United States v. Taylor*, 471 F. App'x 499, 510–11 (6th Cir.2012). *See United States v. Simpson*, 520 F.3d 531, 541 (6th Cir.2008) (concluding that with respect to an "ongoing offense," civil or criminal, the proper standard for an investigatory traffic stop under the Fourth Amendment is reasonable suspicion).

2 Section 39–16–602(a) provides:

> (a) It is an offense for a person to intentionally prevent or obstruct anyone known to the person to be a law enforcement officer ... from effecting a stop, halt, arrest or search of any person, including the defendant, by using force against the law enforcement officer or another.

3 Defendant's argument that the *Terry* stop began when the officer blocked Defendant's vehicle in the driveway is to no avail because the Court rejected Defendant's objection to the factual finding on this matter. Moreover, Defendant's reliance on *United States v. See*, 574 F.3d 309, 313 (6th Cir.2009) is misplaced because, in addition to the incident occurring at 1:00 a.m. and the neighborhood being a high-crime area during the holidays, Roncin had additional facts supporting his reasonable suspicion determination.

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United States District Court,
M.D. Tennessee,
Nashville Division.

Kenetha VERGE, Plaintiff,
v.
CITY OF MURFREESBORO, et al., Defendants.

No. 3:08–1230. | Sept. 14, 2009.

Attorneys and Law Firms

Kerry E. Knox, Castelli & Knox, LLP, Roger Steven Waldron, Waldron & Fann, Murfreesboro, TN, for Plaintiff.

Jennifer G. Rowlett, Marc Bradley Gilmore, Parker, Lawrence, Cantrell & Dean, Nashville, TN, for Defendants.

Opinion

MEMORANDUM

ALETA A. TRAUGER, District Judge.

***1** Pending before the court is the defendants' Motion for Summary Judgment (Docket No. 22) and the plaintiff's Motion for Leave to Amend (Docket No. 19). For the reasons discussed herein, the defendants' motion will be granted, the plaintiff's motion will be denied, and this case will be dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of the arrest of Kenetha Verge in a Wal–Mart parking lot in Murfreesboro, Tennessee in the early morning hours of October 20, 2008.[1] Initially, the plaintiff sued the City of Murfreesboro, Murfreesboro Police Chief Glenn Chrisman, Officer Brad Hobbs, and an unknown officer, "John Doe." (Docket No. 1 Ex. 1 at 5.) Hobbs and "Doe" are accused of actually making the unlawful arrest. (*Id.* at 9–10.) Through her Motion for Leave to Amend, noted above, the plaintiff seeks to identify the John Doe defendant as Officer Trevor Young and also seeks to add Sergeant Allen Cox, who was also on the scene at the time of the incident, as a defendant. (Docket No. 19.)

In the hours leading up to the arrest, the plaintiff, her cousin, Catrina Bowen, and Ms. Bowen's three children, ages 5, 2, and eight months, had been visiting with friends and family in Murfreesboro, taking photographs, and running errands. To get around, they had been using a Cadillac that Verge had borrowed from Ms. Bowen's mother, Cynthia Johnson. Verge had been driving the Cadillac, as Ms. Bowen did not have a driver's license. (Docket No. 22 Ex. 6 at 66.)

As a final stop for the night, Verge drove to a Wal–Mart SuperCenter to drop off the pictures that she had taken for development. According to footage from the Wal–Mart parking lot taken by Wal–Mart's security camera, Verge pulled into a parking space in the parking lot at 12:19:25 a.m. on the morning of the October 20th. At this point, Verge was in the driver's seat, Bowen was in the passenger's seat, and Bowen's three children were asleep in the back seat. At 12:20:17, a woman who, all parties agree, is Verge, leaves the car, headed into the store, and she is out of view of the security camera by 12:20:34. (Docket No. 27.) The parties agree that Verge took the keys to the Cadillac with her when she went into the store. (Docket No. 22 Ex. 4 at 66.) At this time, the temperature was roughly 41 degrees Fahrenheit.

At 12:20:48, the surveillance tape shows a woman who, all parties agree, is Ms. Bowen, exiting the car. (Docket No. 27.) She appears to briefly open a rear door of the car (perhaps speaking to the children in the backseat) before closing all doors and heading toward the store at 12:21:00. (*Id.*) At this point, the three children, all under age 5, were alone in the car. Shortly thereafter, a passerby noticed the children alone in the car and called the police. Officers Hobbs, Young, and Anthony Skok were dispatched, and the first police car arrived on the scene at 12:32:30. (*Id.*) Hobbs spoke with the complainant at the scene, and she reported that she had been watching the car with unattended children inside of it for at least ten minutes before the police arrived. At this time, the officers ran the plate on the Cadillac, and they identified Ms. Johnson and her husband as the owners of the car. One of the officers went into the store and had a Wal–Mart representative page Ms. Johnson and her husband, informing them that they needed to return to their vehicle. Bowen and Verge heard the page, understood that there had to be a problem related to the car that Verge had been driving, and they exited the store—Bowen first at around 12:39:00, with Verge following less than a minute later. (Docket No. 27.)

***2** It is not entirely clear how much of this 18–19 minute period Verge and Bowen spent together inside of the Wal–

Mart. As noted above, the security camera shows Bowen exiting the car within seconds after Verge exited the car, and, on the tape, as she is approaching the store, Bowen appears to be possibly be waving in the direction that Verge was headed, as if calling for Verge's attention. (Docket No. 27.) In her deposition, Verge stated that, shortly after entering the Wal–Mart store, she turned around and observed that Bowen was also in the store. The parties agree that, at this time, Verge admonished Bowen to "get back out there with [her] kids ." However, at her deposition, Bowen testified that, after giving this admonishment, Verge said that, as Bowen was already in the store, Bowen should go ahead and get the items that she needed, as long as she could do so quickly. (Docket No. 22 Ex. 5 at 24.) Then, Verge left Bowen at the front of the store and headed toward the photo department, which is located in the back of the store.

It took Verge a few minutes to get back to the photo department and another few minutes to transact her business in the photo department. Bowen did not return to the car, but, as she testified in her deposition, she headed toward the baby supply section to get diapers and formula. (Docket No. 22 Ex. 5 at 24–34.) Bowen recalls that, after she left the baby supply section, she headed to the photo department, where she met up with Verge. (*Id.*) At that point, Verge and Bowen, together, made their way from the camera section in the back of the store toward the cash registers in the front of the store. (*Id.*) As they approached the front of the store, they stopped at a candy display, where Verge considered purchasing some candy, before deciding against it. (*Id.*) Around this time, Verge and Bowen heard the page regarding their vehicle over the public address system, and they quickly exited the store and went outside to meet the police. [2]

At this point, the officers on the scene (Hobbs, Young, and Skok) began an investigation of the incident, speaking with both Verge and Hobbs independently, along with the complaining witness. During the course of this investigation, Sergeant Cox arrived on the scene as well. (Docket No. 31 Ex. 4 at 16.) After speaking to all parties involved, the officers gained what both parties appear to recognize as a fair impression of the incident—that is, that Verge left the vehicle first, taking the keys to the car, and, shortly thereafter, Bowen left the car as well, leaving the children in the car; Verge and Bowen saw each other in the store shortly thereafter and, at various times during her almost twenty-minute visit to Wal–Mart, Verge understood that Bowen was in the store as well, even if she did not approve of that. (Docket No. 22 Ex. 6 at 10–11.) That is, Hobbs "determined that Ms. Verge and the mother both had knowledge [that] the children were left in the car alone for approximately 15 to 20 minutes in the Walmart parking lot ... Verge had direct knowledge that the mother was with her, or she had run into the mother inside of Walmart, and she did nothing to correct the situation, to send their mother back out there or go out there herself, since she had the keys to the vehicle." (*Id.* at 4, 13 .)

***3** While, after his arrival, Sergeant Cox let the officers on the scene continue their investigation without his interference, at some point, Cox and Hobbs discussed the potential crimes with which the women could be charged. (*Id.* at 11; Docket No. 21 Ex. 1 at 21.) Hobbs wanted to charge both women with child neglect, but Cox told him that reckless endangerment would be a more appropriate charge because proof of injury to the child was required for a claim of child neglect. (*See* Docket No. 29 Ex. 6 at 43.) Cox also suggested that the women could be charged with a traffic code violation for leaving the children alone in the car. [3] (*Id.* at 25–26.)

Hobbs claims that, while all of the officers agreed that both women should be arrested, the ultimate decision to arrest was made by Sergeant Cox. (Docket No. 22 Ex. 6 at 11.) Sergeant Cox claims that he is merely a supervisor, and that, in this context, the ultimate decision to arrest rests with patrol officers, such as officer Hobbs. (Docket No. 29 Ex. 6 at 40.) Either way, Hobbs, after the investigation and discussion discussed above, placed both Bowen and Verge in custody and drove them both to the Rutherford County Sheriff's Office, which is a few miles from the Wal–Mart. (Docket No. 22 Ex. 6 at 15–16.) A precise crime with which the women were to be charged was apparently not specified at this time. It is undisputed that, as an alternative to placing Verge in custody, Hobbs could have delayed until he got an opinion on the propriety of charging Verge from a District Attorney, the City Attorney, or the Judicial Commissioner on call that evening.

Once at the Sheriff's Department, Bowen and Verge were booked and placed in a holding cell. (*Id.*) Hobbs then went to the Judicial Commissioner's office to obtain arrest warrants for Bowen and Verge. (*Id.*) The Judicial Commissioner on duty at the time was Brittani Wright, who had been employed as a Rutherford County Judicial Commissioner since December 2007. As the defendants repeatedly point out, Ms. Wright was not, at that time, a lawyer, but she was a first-year student at Nashville School of Law.

After discussing the incident with Hobbs, Ms. Wright chose not to issue child neglect/child abuse warrants against Bowen or Verge in the absence of injury to the children. Ms. Wright did, without much hesitation, issue three reckless endangerment warrants for Bowen, but she balked at issuing any reckless endangerment warrants for Verge because Wright did not feel that Verge had any "responsibility" for the children. In the course of their brief conversation regarding charges against Verge, Wright also suggested to Hobbs that, if she issued a reckless endangerment warrant against Verge, the case against Verge would eventually be thrown out of court. After Wright impressed on Hobbs the difficulties of maintaining any charges against Verge, Hobbs contacted Young and instructed Young to release Verge and to drive her home, which Young did in short order.

ANALYSIS

***4** The plaintiff has asserted claims under 42 U.S.C. § 1983 against two Murfreesboro police officers (Brad Hobbs and "John Doe"), the Murfreesboro Police Chief, and the City of Murfreesboro for violating her constitutional rights in conjunction with her October 20, 2008 arrest. The plaintiff also asserts a state law claim of intentional infliction of emotional distress against the individual officers and, in the alternative, a state law claim against the City of Murfreesboro for the negligent infliction of emotional distress caused by its agents. The plaintiff has also moved for leave to amend her Complaint to identify the "John Doe" officer as Trevor Young and to add Sergeant Cox as a defendant in this case. The defendants have moved for summary judgment on the plaintiff's claims and argue that, because there was no constitutional violation here, any amendment of the Complaint would be futile, and, therefore, the plaintiff's motion for leave to amend should be denied.

I. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). To prevail, the moving party must meet the burden of proving the absence of a genuine issue of material fact as to an essential element of the opposing party's claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Logan v. Denny's, Inc.*, 259 F.3d 558, 566 (6th Cir.2001).

In determining whether the moving party has met its burden, the court must view the factual evidence and draw all reasonable inferences in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir.2000). "The court's function is not to weigh the evidence and determine the truth of the matters asserted, 'but to determine whether there is a genuine issue for trial.' " *Little Caesar Enters., Inc. v. OPPCO, LLC*, 219 F.3d 547, 551 (6th Cir.2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

If the non-moving party fails to make a sufficient showing on an essential element of the case with respect to which she has the burden, however, the moving party is entitled to summary judgment as a matter of law. *See Williams v. Ford Motor Co.*, 187 F.3d 533, 537–38 (6th Cir.1999). To preclude summary judgment, the non-moving party "must go beyond the pleadings and come forward with specific facts to demonstrate that there is a genuine issue for trial." *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 424 (6th Cir.2002). "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Shah v. Racetrac Petroleum Co.*, 338 F.3d 557, 566 (6th Cir.2003) (quoting *Anderson*, 477 U.S. at 252). If the evidence offered by the non-moving party is "merely colorable," or "not significantly probative," or not enough to lead a fair-minded jury to find for the non-moving party, the motion for summary judgment should be granted. *Anderson*, 477 U.S. at 249–52. "A genuine dispute between the parties on an issue of material fact must exist to render summary judgment inappropriate." *Hill v. White*, 190 F.3d 427, 431 (6th Cir.1999) (citing *Anderson*, 477 U.S. at 247–49).

II. Whether the Arrest Violated Verge's Constitutional Rights

***5** Verge's primary claim is that she was arrested without probable cause, resulting in a violation of her Fourth Amendment rights.[4] *Crockett v. Cumberland College*, 316 F.3d 571, 580 (6th Cir.2003) ("It is well established that any arrest without probable cause violates the Fourth Amendment.") For probable cause for an arrest to exist, the

"facts and circumstances within the officer's knowledge must be sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing or is about to commit an offense." *Thacker v. City of Columbus*, 328 F.3d 244, 255 (6th Cir.2003) (internal citation and quotation omitted). Whether "a probability of criminal activity" exists is assessed under a "reasonableness standard" that is based on a consideration of "all facts and circumstances within an officer's knowledge at the time of an arrest." *Id.* In short, "there is no precise formula for determining the existence or nonexistence of probable cause; rather, a reviewing court is to take into account the factual and practical considerations of everyday life that would lead a reasonable person to determine that there is a reasonable probability that illegality has occurred." *U.S. v. Strickland*, 144 F.3d 412, 415 (6th Cir.1998) (internal quotation omitted).

In determining whether probable cause for an arrest existed, the key question is not whether, at the time of arrest, the arresting officer correctly and precisely identified the criminal charge that best fit the circumstances of the relevant incident; rather, the key question is whether a reasonable officer would have concluded that there was a reasonable "probability" of some "illegality." *See id.* As succinctly stated by the Ninth Circuit, "probable cause need only exist as to any offense that could be charged under the circumstances." *Blankenhorn v. City of Orange*, 485 F.3d 463, 473 (9th Cir.2008). While probable cause is often a jury question, if, based on the standard discussed above, the only reasonable determination is that there was probable cause for the arrest at issue, then the court should grant summary judgment in favor of the arresting officer. *See Gardenhire v. Schubert*, 205 F.3d 303, 315 (6th Cir.2000).

As discussed above, the arresting officers on the scene in this case, through their investigation, became aware of several troubling facts. One, Verge, took the keys to the Cadillac, and she left Bowen and Bowen's three young children in an unheated car, on a cold night, in a sparsely populated parking lot shortly after midnight. Two, Bowen exited the car very shortly after Verge did, and Verge, shortly after her entrance into Wal–Mart, was aware that Bowen was in the store as well. And three, neither woman did anything to correct the obvious problem that three young children were alone in a car in cold weather in the middle of the night. Instead, both women continued to shop for almost twenty minutes, only coming back outside when they were paged by the Wal–Mart public address system.

***6** Given the nature of the conduct here, there is a very strong case that a reasonable person would conclude that both women probably engaged in some illegality. Indeed, the Tennessee reckless endangerment statute provides that "a person commits an offense who recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury." T.C.A. § 39–13–103. As the defendants point out, given the totality of the circumstances, particularly the time of night, the age of the children, the temperature outside, the location of the Cadillac, the length of time that the children were left unattended, and the fact that both individuals knew that the children were left unattended, the conclusion that both women engaged, for instance, in reckless endangerment certainly seems reasonable. [5] (Docket No. 24 at 9.)

In response, the plaintiff makes several, ultimately unavailing, arguments. First, Verge claims that she "was arrested for nothing more than merely being present at the scene of a crime" and that "she owed no legal duty to Ms. Bowen's children." (Docket No. 29 at 5.) This is, simply put, a misstatement of the undisputed facts. On the night in question, Verge was clearly at least partially responsible for the safety of the children, as she was the one operating the vehicle in which they were traveling. Moreover, she was the only one who had the keys to the vehicle, and it is undisputed that she took the keys to the vehicle when she left the car to go into the Wal–Mart. After she left the car, the children were directly dependent on Verge's return for heat and for their general safety, whether Bowen was in the car or not. Therefore, Verge was obviously responsible for the well-being of the children that night, even if she had no custodial relationship with the children.

Relatedly, the plaintiff argues that her conduct was "passive" because she "did not leave the car with the children unattended[,] she did not actively engage in conduct to leave the children alone," and she initially admonished Bowen to return to the car. (Docket No. 29 at 7.) Again, these arguments are, at least somewhat, inconsistent with the record. While, at her deposition, the plaintiff struggled to remember the details of the incident, Bowen testified that, other than this brief admonishment, the plaintiff did nothing to ensure the safety of the children—who, again, were traveling in a car for which Verge was responsible. In fact, Bowen testified that Verge encouraged Bowen to get the items that Bowen needed, and she also testified that she and Verge spent a significant amount of time in the Wal–

Mart together, essentially browsing through the store, while the three children remained alone outside. (Docket No. 22 Ex. 5 at 24–34.) Again, even viewing the facts in the light most favorable to the plaintiff, the record simply does not support the notion that there was any reason for the officers to believe that Verge was a passive bystander during this incident.

***7** The plaintiff also focuses on the fact that Hobbs, the primary arresting officer, initially wanted the plaintiff to be charged with child neglect/abuse, a charge that both Cox (on the scene) and Judicial Commissioner Wright (at the Sheriff's Department) told Hobbs was not sustainable because of the absence of evidence of physical injury. (Docket No. 29 at 8.) As discussed above, the fact that Hobbs may have initially sought an inappropriate charge against the plaintiff does not mean that probable cause was lacking. As noted above, probable cause exists when, considering the totality of the circumstances, a reasonable officer would conclude that there is a "reasonable probably" that some "illegality" has occurred. *Strickland*, 144 F.3d at 415. Simply put, Hobbs is not required to have the Tennessee criminal code memorized, and the fact that he was initially mistaken about the most appropriate charge does not bear on the general validity of his probable cause determination. [6]

Finally, the plaintiff also focuses on the fact that Judicial Commissioner Wright "found that probable cause was absent" and, therefore, a "reasonable jury could do the same." (Docket No. 29 at 1.) While it is true that Wright declined to issue a criminal warrant for Verge for reckless endangerment, Wright's deposition revealed that, for whatever reason, at the time of her conversation with Hobbs at the Sheriff's Department, she had a relatively poor understanding of the relevant events. For instance, Wright testified that she "didn't even know if [Verge] knew the children were left unattended in the car," that she had no idea of the "timeline" of events, that Verge had the keys to the Cadillac (and therefore the car was not heated or running), or that Verge and Bowen had been together for some time in the store. (Docket No. 22 Ex. 9 at 31–35.) Wright went so far as to speculate that, if she had known these facts, her decision on the reckless endangerment warrant would have been different. (*Id.* at 35–36.)

Based on the record before the court, there is only one reasonable conclusion; that is, the arresting officers, most notably officer Hobbs, had probable cause to arrest Verge. They had every reason to be believe that Verge and Bowen had, at least for some time, been shopping together, and they knew that, despite having the keys to the car, Verge had knowingly allowed three young children, who were at least partially under her custody, to remain alone in a parking lot in the middle of a cold night for approximately twenty minutes. While a reasonable officer might not—at that moment—have been able to correctly and precisely identify the most apt charge for this conduct, a reasonable officer would conclude that Verge and Bowen had engaged in some illegality. Therefore, summary judgment for the arresting officers is appropriate. [7]

III. Claims Against Chrisman and the City of Murfreesboro

A. Chrisman

As noted above, the plaintiff also asserts a claim of supervisory liability against Police Chief Chrisman. (Docket No. 1 Ex. 1.) It is well settled that a Section 1983 claim against a supervisor cannot be based on a *respondeat superior* theory of liability. *Petty v. Franklin County*, 478 F.3d 341, 349 (6th Cir.2007). Rather, to impose individual liability against a supervisor, "at a minimum, a Section 1983 plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate." *Petty v. Franklin County*, 478 F.3d 341, 349 (6th Cir.2007).

***8** Here, as noted above, there was no constitutional violation, and, therefore, there can be no supervisory liability. *See id.* Moreover, as the plaintiff does not challenge in her response, there is no evidence that Chrisman had any direct connection to this incident whatsoever. As Chrisman testified in his deposition, he was not even aware of the incident until he was served with the lawsuit in this case. (Docket No. 22 Ex. 7 at 15–16.) Therefore, the claims against Chrisman will be dismissed.

B. City of Murfreesboro

Like a Section 1983 claim against a supervisor, it is well settled that a Section 1983 claim against a municipality cannot be based on a *respondeat superior* theory of liability. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). That said, if it is shown that a municipality's failure to train its employees appropriately has created a "policy or custom" that violates federally protected rights, then the municipality can be held liable for Section 1983 violations. *Berry v. City of Detroit*, 25 F.3d 1342, 1345 (6th Cir.1994).

The claim here is premised on the Whitehall letter, as the plaintiff argues that the Murfreesboro Police Department ignored the allegedly clear message of that letter, which is "an adult who was only remotely associated with children unattended in a car is not necessarily guilty of a crime, and [ ] an arrest in such a situation may well be unconstitutional." (Docket No 29 at 10.) In light of the agreement between Sergeant Cox and Officer Hobbs that the plaintiff should be arrested, the plaintiff argues that "it is apparent that the City of Murfreesboro enforces its own set of values regarding children being left unattended in vehicles without consideration of the requirements of criminal statutes or the constitutional rights of the adults who are arrested." (*Id.*)

First, a prerequisite to municipal liability under Section 1983 is an underlying constitutional violation by the arresting officers. *Wilson v. Morgan*, 477 F.3d 326, 340 (6th Cir.2007). As the court finds that there was no underlying violation in this case, this claim against the City of Murfreesboro is not sustainable. Moreover, even if an underlying constitutional violation had been found, the plaintiff's entire premise is flawed. In his letter, District Attorney General Whitehall simply made no reference to any pre-existing relationship between the adult and the child that must exist prior to reckless endangerment charges being appropriate. Therefore, there is no evidence that the City of Murfreesboro instituted a "policy" or "custom" in contravention of Whitehall's direction as far as unattended children are concerned. Rather, all of the evidence indicates that the officers on the scene made a conclusion, based on their experience and common sense, as to whether the facts of this incident warranted an arrest. Therefore, the claims against the City of Murfreesboro will be dismissed.

IV. State Law Claims

***9** As noted above, the plaintiff has also asserted state law claims of negligent infliction of emotional distress (NIED) and intentional infliction of emotional distress (IIED) against the arresting officers in this case. The federal claim in this case, the Section 1983 claim, will be dismissed, and, therefore, the court declines to exercise supplemental jurisdiction over these state law claims.

A federal district court "may decline to exercise supplemental jurisdiction ... if ... the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). District courts are generally considered to have broad discretion over whether to dismiss a state law claim in this instance. *See Saglioccolo v. Eagle Ins. Co.*, 112 F.3d 226, 233 (6th Cir.1997); *Musson Theatrical, Inc. v. Fed. Express Corp.*, 89 F.3d 1244, 1254 (6th Cir.1996). That said, given the "constitutional and prudential limits on the use of federal judicial power," the "balance of considerations" (considerations including judicial economy, convenience, fairness, and comity) for the district court will usually point "to dismissing the state law claims" in a federal question case in which no federal cause of action remains. *Musson*, 89 F.3d at 1254–55; *see also Aschinger v. Columbus Showcase Co.*, 934 F.2d 1402, 1412 (6th Cir.1991) (finding that "overwhelming interests in judicial economy" should be in play before the district court exercises its discretion to decide a pendant state court claim after the federal claim has been dismissed pre-trial.)

The Tennessee Governmental Tort Liability Act (TGTLA) T.C.A. § 29–20–101, *et seq.* provides an additional compelling basis to decline jurisdiction. Under Tennessee law, state law claims against a governmental entity, such as the plaintiff's NIED claim against the City of Murfreesboro, must be brought in strict compliance with the TGTLA. The TGTLA vests "exclusive original jurisdiction" over TGTLA actions in the state circuit courts. T.C.A. § 29–20–307. The Tennessee legislature's professed interest in having TGTLA litigation in Tennessee state courts, combined with the absence of a federal claim in this court, clearly dictates that the state law claims should be dismissed.

V. Motion for Leave to Amend the Complaint

As noted above, the plaintiff moved for leave to amend her Complaint to clarify that the "John Doe" defendant is Officer Young and to name Sergeant Cox as a defendant, primarily alleging that he failed to train the officers under his command. (Docket No. 19 Ex. 1 at 2.) Motions for such leave should be "freely" granted when "justice so requires." Fed.R.Civ.P. 15(a)(2). That said, a court may deny a motion for leave to amend when the amendment would be futile. *Wade v. Knoxville Utilities Bd.*, 259 F.3d 452, 458 (6th Cir.2001). Here, such an amendment would clearly be futile. As discussed in detail above, the court concludes that, as a matter of law, no constitutional violation took place, and, therefore, amending the complaint to clarify that officer Young is the John Doe defendant and to add claims against Sergeant Cox (which, to be viable, would require an underlying constitutional violation) would be futile. Therefore, the plaintiff's motion for leave to amend will be denied.

CONCLUSION

***10** For the reasons discussed herein, the defendants' Motion for Summary Judgment will be granted; that is, the court will dismiss the plaintiff's Section 1983 claims on the merits and decline to exercise supplemental jurisdiction over the remaining state law claims. The plaintiff's Motion for Leave to Amend will be denied as futile.

An appropriate order will enter.

Footnotes

1 Unless otherwise noted, the facts are drawn from the parties' statements of material facts (Docket Nos. 23, 30, 31 and 35) and related affidavits and exhibits. Although facts are drawn from submissions made by both parties, on a motion for summary judgment, all inferences are drawn in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir.2000).

2 While Verge had significantly more difficulty remembering the facts of the incident than Bowen did, Verge also stated that she noticed Bowen still in the store after Verge completed her business at the photo department, and Verge recognized that it was unsafe for both her and Bowen to be in the store while the young children were still in the car. (Docket No. 22 Ex. 4 at 34, 73–75.)

3 The distinction between child neglect and reckless endangerment in this context was apparently relatively fresh in Cox's mind. In a case (known as the "Hastings" matter), which had been resolved about six months earlier, a witness had observed an unattended child in a car and called the Murfreesboro police. (*See* Docket No. 22 Ex. 7 at 27–28.) The mother of the child was charged with child neglect. (*Id.*) After the charges had been filed and the case had proceeded for some time, District Attorney General William Whitesell decided to dismiss the child neglect charge, in part because there was no evidence of injury to the child. (*Id.*) In a letter, Whitesell relayed this decision to Police Chief Chrisman, and, in the same letter, Whitesell noted that the mother could have been charged with reckless endangerment or leaving a child unattended in a motor vehicle. (*Id.*) Chrisman then disseminated and distributed Whitesell's letter to subordinate supervisors, such as Cox, in part to communicate the distinction between child neglect and reckless endangerment.

4 In her Complaint, the plaintiff also alleges that her Fifth and Fourteenth Amendment rights were violated by the arrest because she was "deprived of life, liberty, and the pursuit of property without due process of law." (Docket No. 1 Ex. 1 at 10.) As the plaintiff's claims are exclusively rooted in her allegedly improper arrest and detention, these claims arise exclusively under the Fourth Amendment. *See e.g. Harvey v. City of Oakland*, 2008 WL 4790785, *4 (N.D.Cal. Oct.28, 2008) (citing *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).

5 Also, under Tennessee law, Verge could be potentially criminally liable for Bowen's conduct under an "aiding and abetting" theory of liability. *See* T.C.A. § 39–11–402(2). Tennessee courts have interpreted Section 39–11–402(2) to impose criminal responsibility for the primary offense on those who "associate [themselves] with the venture, act with knowledge that the offense is to be committed, and share in the criminal intent of the principle in the first degree." *State v. Whited*, 2006 WL 548228, *10 (Tenn.Crim.App. Mar.7, 2006) (internal quotation omitted); *see also State v. Carson*, 950 S.W.2d 951, 955–56 (Tenn.1997) (finding the evidence sufficient to sustain a conviction for felony reckless endangerment under an "aiding and abetting" theory of criminal responsibility).

6 The plaintiff also repeatedly refers to the Whitehall letter in the *Hastings* matter, discussed above. (Docket No. 29 at 7.) The plaintiff argues that, because that case dealt with the propriety of reckless endangerment charges against a *mother* who left a child unattended in an automobile, it should have been clear to the arresting officers that "a clearly defined legal relationship" is necessary before one can be charged with reckless endangerment in this context. (*Id.*) The Whitehall letter states that reckless endangerment is an appropriate charge when a child is left unattended in an automobile; there is simply nothing in the letter that indicates that Whitehall is of the opinion that such a charge is limited to those in a "clearly defined legal relationship" with the child left unattended. (Docket No. 22 Ex. 7 at 27–28.)

7 Because the court concludes that Verge's arrest was not a violation of her constitutional rights, it is not necessary to consider the arresting officers' alternative claim that, even if there was a constitutional violation, they would be entitled to qualified immunity. (Docket No. 24 at 13.) It is worth noting, however, that, in this context, qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." *Scott v. Clay County*, 205 F.3d 867, 873 (6th Cir.2000). Here, there is no evidence of incompetence or intentional violation of law, and, therefore, even if the facts raised a legitimate question as to a constitutional violation, qualified immunity would shield the arresting officers from liability.

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United States District Court, E.D. Tennessee.

Eric Jesse WRIGHT and Aline Wright, Plaintiffs,
v.
CITY OF CHATTANOOGA, and James Daves, individually and in his capacity as an officer with the City of Chattanooga Police Department, Defendants.

No. 1:10–CV–291. | Jan. 5, 2012.

Attorneys and Law Firms

Scott Raymond Maucere, Maucere Law Group, LLC, Chattanooga, TN, for Plaintiffs.

Phillip A. Noblett, Valerie L. Malueg, Office of the Chattanooga City Attorney, Bryan H. Hoss, Charles L. Davis, Davis & Hoss, PC, Chattanooga, TN, for Defendants.

Opinion

MEMORANDUM

CURTIS L. COLLIER, Chief Judge.

***1** Before the Court are motions for summary judgment filed by Defendants City of Chattanooga and Officer James Daves in his official capacity (Court File No. 24) and Officer Daves in his individual capacity (Court File No. 28). Plaintiffs Eric Jesse Wright and Aline Wright (collectively, "Plaintiffs") filed a response in opposition to Defendants' motions for summary judgment (Court File No. 47). Defendants submitted reply briefs (Court File Nos. 50, 58). For the following reasons, the Court will **GRANT IN PART** the motions for summary judgment filed by Defendants City of Chattanooga and Officer James Daves in his official capacity (Court File No. 24) and Officer Daves in his individual capacity (Court File No. 28). The Court will **GRANT** summary judgment for all Defendants on Plaintiffs' § 1983 and ADA claims. The Court will **DISMISS WITHOUT PREJUDICE** all state law claims against Defendants.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

Plaintiff Aline Wright suffers from cardiomyopathy, a condition that Plaintiffs claim puts her at risk for strokes and blood clots (Court File No. 47–1 ("Eric Wright Aff."), ¶ 10; Court File No. 47–2 ("Aline Wright Aff."), ¶ 9). She also is an amputee and has suffered the loss of her left leg. On June 16, 2010, around 11:30 p.m., Mrs. Wright began experiencing stroke-like symptoms at her residence. Her husband, Plaintiff Eric Jesse Wright, is a certified emergency medical technician (Eric Wright Aff. ¶¶ 3–7). Mr. Wright began administering medical care to his wife but determined she needed to receive emergency medical care at a hospital immediately (*id.* ¶ 6). He carried his wife to the car and began driving her to Erlanger Hospital's emergency room in the couple's green Subaru Forester (*id.* ¶ 12). Mr. Wright contacted the emergency room to inform the doctors of his wife's condition and their pending arrival (*id.* ¶ 13).

At approximately 11:50 p.m., Plaintiffs were traveling westbound on McCallie Avenue in Chattanooga toward Erlanger Hospital (*id.* ¶ 16; Court File No. 25 ("Daves Aff."), ¶ 6). Upon approaching the intersection of McCallie and Holtzclaw Avenue, Mr. Wright claims he "applied [his] brakes, slowed, flashed [his] headlights as well as [his] emergency/hazard lights, and honked [his] horn" (Eric Wright Aff. ¶ 16). After concluding the intersection was clear, Mr. Wright claims he proceeded through the intersection slowly. At least three other vehicles were at, near, or had just passed through the intersection (Court File No. 32–2 ("Eric Wright Dep."), at 87–88; *cf.* Court File No. 32–4 ("Traffic Report"), at 1). Officer James Daves with the Chattanooga Police Department ("CPD") observed Mr. Wright's vehicle run the red light and claims he had to "slam on [his] brakes" to avoid hitting Mr. Wright's vehicle (Daves Aff. ¶ 8). Also, Officer Daves claims Mr. Wright narrowly missed hitting a vehicle traveling northbound on Holtzclaw Avenue (*id.* ¶¶ 6–7).

***2** Officer Daves activated his blue lights and siren to conduct a traffic stop on Mr. Wright (*id.* ¶ 9). Officer Daves avers Mr. Wright was driving "at a high rate of speed and changing lanes erratically" (*id.* ¶ 10). Officer Daves also claims he observed Mr. Wright run through a second red light and, as Mr. Wright's vehicle approached the hospital, he observed pedestrians attempting to cross the street who had to run from the street to avoid being hit (*id.* ¶¶ 14–15). Mr. Wright admits to seeing Officer Daves pull behind him with his lights on and not stopping (Eric Wright Aff. ¶ 18; Eric Wright Dep. at 105–08). However, he disputes Officer Daves' characterization of his driving and claims he drove cautiously

toward the hospital with his hazard lights on (Eric Wright Aff. ¶¶ 19–20).

Upon arriving at the Erlanger emergency room entrance, Mr. Wright got out of his car and went around to the passenger side to get his wife (Eric Wright Aff. ¶ 23; Daves Aff. ¶ 16). He claims he loudly stated "my wife has a medical emergency" to Officer Daves, who had just emerged from the police car (Eric Wright Aff. ¶¶ 24–25). Mr. Wright claims Officer Daves grabbed his left arm as he was lifting Mrs. Wright out of the car (*id.* ¶ 26). Officer Daves claims Mr. Wright then shoved him (Daves Aff. ¶ 18). Mr. Wright asserts that, after he finally lifted his wife out of the car, Officer Daves proceeded to physically block their entrance to the emergency room (Eric Wright Aff. ¶ 28; Aline Wright Aff. ¶ 20). He claims Officer Daves told him "you are going to jail" and was angry (Eric Wright Aff. ¶¶ 31–32; Aline Wright Aff. ¶¶ 23–24). Plaintiffs assert it was not until "after some moments" that they were able to enter the emergency room (Eric Wright Aff. ¶ 33; Aline Wright Aff. ¶ 25). Mr. Wright claims Officer Daves then forced his way into the treatment area and "began interfering" with Mrs. Wright's treatment until he was asked to leave (Eric Wright Aff. ¶ 34).

After Mr. Wright assisted in stabilizing his wife, he claims he went back to the emergency room entrance to move his car and was approached by Officer Daves (Eric Wright Aff. ¶ 36). According to Mr. Wright, Officer Daves stated "[I'm going to] make you a felon!" and told him he would "make up something good" (Eric Wright Aff. ¶ 36). Officer Daves also allegedly used profanity (*id.* ¶ 37).

Officer Daves filed an affidavit of complaint seeking an arrest warrant for Mr. Wright on June 17, 2010 (Daves Aff. ¶¶ 35–36; Court File No. 32–8 ("Aff. of Complaint")). Finding probable cause, a magistrate judge issued an arrest warrant for Mr. Wright for disorderly conduct, reckless endangerment, felony evading arrest, assault, two red light violations, and expired registration (*id.*).

On June 18, 2010, at approximately 9:00 a.m., Mr. Wright was arrested and held at the Hamilton County Jail for approximately eight hours (Eric Wright Aff. ¶ 42). On June 22, 2010, the Hamilton County District Attorney dismissed all charges against Mr. Wright citing the defense of "necessity" (*id.* ¶ 43; Court File No. 47–6). The Internal Affairs Division of the Chattanooga Police Department investigated the incident and concluded Officer Daves did not directly violate any of the CPD's policies and procedures (Court File No. 24–8). On June 23, 2010, Plaintiffs met with the CPD's Interim Chief of Police Mark Rawlston and Officer Daves (Eric Wright Aff. ¶ 45). Chief Rawlston issued an apology on behalf of the CPD but informed Plaintiffs Officer Daves had not violated any of the CPD's policies or procedures (*id.* ¶ 45).

***3** At the time of the incident, the Chattanooga Police Department had in place policies and procedures for officer conduct, including policies on use of force and proper arrest procedures (Court File Nos. 29–1, 47–8 ("ADM–5"); Court File Nos. 29–2, 47–11 ("OPS–42")).

B. Procedural Background

On October 25, 2010, Plaintiffs filed a complaint against Defendants City of Chattanooga and Officer Daves, individually and in his official capacity (Court File No. 1–1 ("Complaint")). Plaintiffs allege the following violations against Defendants: (1) violation of Defendants' Fourth and Fourteenth Amendment rights pursuant to 42 U.S.C. § 1983; (2) violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.;* (3) violation of Article I, §§ 7, 8, and 13 of the Tennessee Constitution; (4) negligence; (5) negligence per se; (6) false arrest; (7) excessive force; (8) assault and battery; (9) outrageous conduct; (10) negligent infliction of emotional distress; (11) false imprisonment of both Mr. and Mrs. Wright; (12) false imprisonment of Mr. Wright; (13) malicious prosecution; (14) defamation; and (15) loss of consortium (Complaint ¶¶ 48–152). Plaintiffs seek compensatory and punitive damages, as well as attorney's fees (*id.* ¶¶ 157–160).

Defendants have moved for summary judgment on all claims (Court File Nos. 24, 28).

II. STANDARD OF REVIEW

Summary judgment is proper when "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." Fed.R.Civ.P. 56(a). The moving party bears the burden of demonstrating no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Leary v. Daeschner*, 349 F.3d 888, 897 (6th Cir.2003). The Court should view the evidence, including all reasonable inferences, in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct.

1348, 89 L.Ed.2d 538 (1986); *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 907 (6th Cir.2001).

To survive a motion for summary judgment, "the non-moving party must go beyond the pleadings and come forward with specific facts to demonstrate that there is a genuine issue for trial." *Chao v. Hall Holding Co.*, 285 F.3d 415, 424 (6th Cir.2002). Indeed, a "[plaintiff] is not entitled to a trial on the basis of mere allegations." *Smith v. City of Chattanooga*, No. 1:08–CV–63, 2009 WL 3762961, at *2, *3 (E.D.Tenn. Nov.4, 2009) (explaining the Court must determine whether "the record contains sufficient facts and admissible evidence from which a rational jury could reasonably find in favor of [the] plaintiff"). In addition, should the non-moving party fail to provide evidence to support an essential element of its case, the movant can meet its burden of demonstrating no genuine issue of material fact exists by pointing out such failure to the court. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir.1989).

***4** At summary judgment, the Court's role is limited to determining whether the case contains sufficient evidence from which a jury could reasonably find for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). If the Court concludes a fair-minded jury could not return a verdict in favor of the non-movant based on the record, the Court should enter summary judgment. *Id.* at 251–52;*Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir.1994).

III. SECTION 1983

Plaintiffs' 42 U.S.C. § 1983 claim alleges Defendants violated Plaintiffs' Fourth and Fourteenth Amendment rights (Complaint at ¶¶ 48–64). To state a general claim under § 1983, a plaintiff must set forth "facts that, when construed favorably, establish (1) the deprivation of a right secured by the Constitution or laws of the United States (2) caused by a person acting under the color of state law." *Sigley v. City of Parma Heights*, 437 F.3d 527, 533 (6th Cir.2006) (citing *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988)). When a party brings a suit against an officer in his official capacity, it is construed as a suit against the governmental entity. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Suits against a municipality also involve a two-prong inquiry. *Cash v. Hamilton Cnty. Dep't of Adult Prob.*, 388 F.3d 539, 542 (6th Cir.2004). The court must determine: (1) whether the plaintiff has been deprived of a constitutional right; and (2) whether the municipality is responsible for the violation. *Id.*

A municipality cannot be liable under a *respondeat superior* theory for § 1983 violations. *Id.* Rather, municipalities are liable when they "have caused a constitutional tort through 'a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.' " *Id.* (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988)). Additionally, even absent a policy "officially adopted" by a municipality's officers, a § 1983 plaintiff "may be able to prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). A plaintiff bears the burden of showing "that the unconstitutional policy or custom existed, that the policy or custom was connected to the [municipality], and that the policy or custom caused [the] constitutional violation." *Napier v. Madison Cnty.*, 238 F.3d 739, 743 (6th Cir.2001).

Failure to adequately train or supervise officers can rise to the level of a *de facto* unconstitutional policy or custom if a plaintiff can show: "(1) the training or supervision was inadequate to the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury." *Ellis v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 700 (6th Cir.2006). "[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Id.* (quoting *Board of Cnty. Comm 'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 410, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997)). "Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *Loggins v. Franklin Cnty.*, 218 F. App'x 466, 473 (6th Cir.2007) (quotation omitted).

***5** The Court will address Plaintiffs' § 1983 claims against each Defendant in turn.

A. Claims Against Officer Daves in his Individual Capacity

Plaintiffs assert Officer Daves violated the Fourth and Fourteenth Amendments of the United States Constitution, particularly with respect to Plaintiffs' right to be free from

(1) illegal seizure; (2) unlawful arrest; (3) illegal detention and imprisonment; and (4) physical abuse, coercion, and intimidation. Defendant, however, avers he is entitled to qualified immunity. Under the doctrine of qualified immunity, government officials are generally shielded from civil damages liability when performing discretionary functions "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Even if a government official deprives a plaintiff of a federal right, "qualified immunity will apply if an objective reasonable officer would not have understood, by referencing clearly established law, that his conduct was unlawful." *Painter v. Robertson*, 185 F.3d 557, 567 (6th Cir.1999). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). The plaintiff bears the burden of showing a defendant is not entitled to qualified immunity. *See Wegener v. Covington*, 933 F.2d 390, 392 (6th Cir.1991).

Courts typically employ a two-part test to determine whether qualified immunity will apply. First, a court must consider whether, when viewed in the light most favorable to the plaintiff, "the facts alleged show the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) (citing *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991)). It must also consider "whether the violation involved a clearly established constitutional right of which a reasonable person would have known." *Peete v. Metro. Gov't of Nashville & Davidson Cnty.*, 486 F.3d 217, 219 (6th Cir.2007) (citation omitted). This second inquiry looks closely at the particular context of the case rather than asking whether a right was clearly established "as a broad general proposition." *See Saucier*, 533 U.S. at 201. Since the failure of either prong is dispositive in favor of the defendant, the Court may address either prong of the test first. *See Pearson v. Callahan*, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

Because qualified immunity shields reasonable conduct, even when it is mistaken, the Sixth Circuit has at times added a third line of inquiry to the traditional two-part test: "whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Peete*, 486 F.3d at 219;*cf. Everson v. Leis*, 556 F.3d 484, 494 n. 4 (6th Cir.2009) (stating regardless of whether the two-prong or the three-prong test is applied, "the essential factors considered are [ ] the same"). "[I]f officers of reasonable competence could disagree [on the legality of the action], immunity should be recognized." *Malley*, 475 U.S. at 341.

***6** Here, Plaintiffs did not meet their burden of showing Defendant is not entitled to qualified immunity. Plaintiffs first assert Defendant violated their Fourth and Fourteenth Amendment rights by engaging in an unlawful seizure and arrest, as well as an unlawful detention. An arrest made pursuant to a facially valid warrant "is normally a complete defense to a federal constitutional claim for false arrest or false imprisonment made pursuant to § 1983." *Voyticky v. Vill. of Timberlake*, 412 F.3d 669, 677 (6th Cir.2005) (citing *Baker v. McCollan*, 443 U.S. 137, 143–44, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979)). The Fourth Amendment requires that "no Warrants be issued, but upon probable cause." U.S. Const. amend. IV. "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." *Logsdon v. Hains*, 492 F.3d 334, 341 (6th Cir.2007) (quoting *Henry v. United States*, 361 U.S. 98, 102, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959)). The officer's actual motives are irrelevant if the circumstances, viewed under an objective light, support a showing of probable cause. *Criss v. City of Kent*, 867 F.2d 259, 262 (6th Cir.1988). Moreover, even officers who "reasonably but mistakenly conclude that probable cause is present" are entitled to immunity. *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (quoting *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). "Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost." *Malley*, 475 U.S. at 344–45 (internal citation omitted).

Because there is no dispute that Officer Daves obtained a facially valid warrant from a magistrate judge, the key inquiry is whether his affidavit was, in fact, deeply lacking in any indicia of probable cause. Defendant sought a warrant against Mr. Wright for a number of violations, including reckless endangerment and evading arrest (Daves Aff. ¶¶ 35–36; Aff. of Complaint at 1). In determining whether an officer is authorized to make an arrest, state law generally governs. *Logsdon v. Hains*, 492 F.3d 334, 341 (6th Cir.2007). Therefore, this Court will look to Tennessee law to examine the charges against Mr. Wright that served as the bases for Officer Daves' affidavit.

With regard to reckless endangerment, Tenn.Code Ann. § 39–13–103(a) states, "[a] person commits an offense who recklessly engages in conduct that places another person in imminent danger of death or serious bodily injury." Reckless endangerment in Tennessee is a Class A misdemeanor and reckless endangerment committed with a deadly weapon is considered a Class E Felony. Tenn.Code Ann. § 39–13–103(b). Under Tennessee law, an automobile may be considered a deadly weapon under some circumstances. *See State v. McGouey*, 229 S.W.3d 668, 674 (Tenn.2007) (noting even an item that is not a deadly weapon per se can be deemed a deadly weapon "if the defendant in a particular case actually used or intended to use the item to cause death or serious bodily injury").

***7** With regard to evading arrest, Tenn.Code Ann. § 39–16–603(b)(1) states, "[i]t is unlawful for any person, while operating a motor vehicle on any street, road, alley or highway in this state, to intentionally flee or attempt to elude any law enforcement officer, after having received any signal from the officer to bring the vehicle to a stop." Violation of this provision is, at a minimum, a Class E Felony, and can be a Class D felony if "the flight or attempt to elude creates a risk of death or injury to innocent bystanders or other third parties." Tenn.Code Ann. § 36–16–603(b) (3).

A rational factfinder could conclude Officer Daves provided sufficient facts in his affidavit upon which a judicial officer could determine probable cause existed. Among other things, Officer Daves submits in his affidavit Mr. Wright ran through at least two red lights in his car while trying to reach Erlanger Hospital (Aff. of Complaint at 1). Even viewing the evidence in the light most favorable to Plaintiffs, Plaintiffs admit Mr. Wright drove through a red light at the first intersection and that at least three other cars were at, near, or had just passed through at the time of the alleged offense. Officer Daves personally insists he had to slam on his brakes to avoid hitting Mr. Wright's vehicle. Based even on just these facts, Officer Daves reasonably could have believed Mr. Wright was putting other people "in imminent danger of death or serious bodily injury" due to his conduct. Thus, Officer Daves' averment in his affidavit regarding the charge of reckless endangerment was not without support to establish probable cause.

Similarly, Officer Daves offered sufficient grounds in his affidavit upon which a magistrate judge could have concluded probable cause existed on the evading arrest charge. Officer Daves asserts he turned on his blue lights and siren to pull over Mr. Wright after Mr. Wright ran through the first light (Aff. of Complaint at 1). Even after seeing Officer Daves' lights, Mr. Wright refused to stop. Plaintiffs insist Mr. Wright was in no way "intentionally flee [ing] or attempting to allude" Officer Daves as required under the statute. However, Officer Daves had sufficient reason at the time to believe Mr. Wright had violated Tenn.Code Ann. § 39–16–603(b)(1). Moreover, because Officer Daves' belief was objectively reasonable although mistaken, it was still sufficient to establish probable cause.

Alternatively, Plaintiffs assert Officer Daves' affidavit contained "false facts and omitted material facts that had bearing on whether probable cause existed" (Court File No. 47 at 23). They also point to the fact that Officer Daves "maliciously and perjuriously swore out a warrant for Mr. Wright's arrest." Although Plaintiffs accuse Officer Daves of acting maliciously, his motive is irrelevant to the extent there has been a sufficient showing of probable cause upon which the magistrate judge issues a warrant. However, an officer can be held liable under § 1983 if he established probable cause and obtained the arrest warrant by "making material false statements either knowingly or in reckless disregard for the truth." *Vakilian v. Shaw*, 335 F.3d 509, 517 (6th Cir.2003). The plaintiff seeking to overcome the officer's qualified immunity defense, however, must demonstrate: "(1) a substantial showing that the defendant stated a deliberate falsehood or showed reckless disregard for the truth and (2) that the allegedly false or omitted information was material to the finding of probable cause." *Id.*

***8** Plaintiffs have not demonstrated that Defendant made a "deliberate falsehood" or "showed reckless disregard for the truth" when he sought the arrest warrant. Plaintiffs insist Defendant's affidavit "merely alludes to a claimed medical emergency." Moreover, they claim Defendant failed to mention that Plaintiffs had a legally justifiable defense. An officer's affidavit, however, need only contain "adequate supporting facts about the underlying circumstances to show that probable cause exists for the issuance of the warrant." *Wheeler v. City of Lansing*, 660 F.3d 931, 938 (6th Cir.2011). Officer Daves' affidavit clearly states that, as he approached Mr. Wright outside the hospital, Mr. Wright "yelled and said it was an emergency and that he was an EMT" (Aff. of Complaint at 1). Officer Daves then proceeds to describe the events at the hospital explaining that Mr. Wright took a female, presumably Mrs. Wright, into the emergency room. Plaintiffs have failed to demonstrate how this language evidences a "deliberate falsehood" or a "reckless disregard

for the truth." Furthermore, Officer Daves had no reason to mention whether Plaintiffs had any legally justifiable defenses, such as necessity, in his affidavit. His job in drafting the affidavit was to state the facts and circumstances with regard to whether an offense was committed, not weigh potential legal justifications for why an individual may have committed an offense.

In sum, no reasonable factfinder would conclude, even viewing the facts in the light most favorable to Plaintiffs, that Defendant violated Plaintiffs' Fourth Amendment right to be free from unlawful seizure, arrest, and detention. Thus, Defendant is entitled to qualified immunity on these claims.

Plaintiffs also claim Defendant violated their Fourth Amendment rights by engaging in "physical abuse, coercion, and intimidation." Construed more broadly as an excessive force claim, such a claim will arise under the Fourth Amendment "[i]f the plaintiff was a free person at the time of the incident and the use of force occurred in the course of an arrest or other seizure of the plaintiff." *Phelps v. Coy*, 286 F.3d 295, 299 (6th Cir.2002) (citing *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). When determining whether an officer engaged in excessive force, a court should apply "the objective-reasonableness standard, which depends on the facts and circumstances of each case viewed from the perspective of a reasonable officer on the scene and not with 20/20 hindsight." *Binay v. Bettendorf*, 601 F.3d 640, 647 (6th Cir.2010) (quoting *Fox v. DeSoto*, 489 F.3d 227, 236 (6th Cir.2007)). "This standard contains a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case." *Burchett v. Kiefer*, 310 F.3d 937, 944 (6th Cir.2002) (citing *Graham*, 490 U.S. at 395). In evaluating whether the officer's use of force was reasonable, a court should consider "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 or flight." *Id.* (citing *Darrah v. City of Oak Park*, 255 F.3d 301, 307 (6th Cir.2001)).

***9** Here, Plaintiffs do not allege any conduct was committed on the part of Defendant that would rise to a violation of the Fourth Amendment for use of excessive force. Officer Daves had no physical contact with Mrs. Wright. Defendant's only physical contact with Mr. Wright was when he grabbed his arm while Mr. Wright was assisting his wife out of the car. What Defendant knew at the time of the incident was that Mr. Wright had possibly committed two felonies, among other violations, in his presence. In particular, Mr. Wright ran through two red lights and failed to stop for a police car that had signaled him to stop. In the midst of having to discern Mr. Wright's true motives upon arriving at the hospital, it was not completely unreasonable for Defendant to have grabbed Mr. Wright's arm as he reached into the passenger side of the car. In retrospect, it was probably an unnecessary act given the totality of the circumstances. However, this assessment by the Court is made in hindsight, a perspective Defendant could not avail himself of at the time of the incident. Finally, even if the Court was to conclude Defendant's conduct—either the grabbing of Mr. Wright's arm or his temporarily blocking the couple from entering the hospital—was unreasonable, nothing Plaintiffs have alleged would support a claim that such force would have been "excessive."

Hence, the Court concludes Defendant is entitled to qualified immunity on Plaintiffs' § 1983 claim.

B. Claims Against City of Chattanooga and Officer Daves in his Official Capacity

Plaintiffs' Complaint alleges Defendant City of Chattanooga and Officer Daves in his official capacity violated their constitutional rights under § 1983. Generally speaking, Plaintiffs assert the City of Chattanooga engaged in a policy or custom allowing and encouraging Officer Daves and other officers to violate citizens' civil rights by making arrests without probable cause and using improper force (Complaint at 10–14). They also allege the City of Chattanooga failed to adequately train, supervise, and discipline officers who made improper arrests or used improper force.

As a preliminary matter, Plaintiffs insist the Court should disregard the affidavits of Susan Blaine, Captain of Internal Affairs of the CPD; Lon Eilders, Manager of Accreditation and Standards of the CPD; and Mark Smeltzer, Training Coordinator for the CPD (Court File No. 47). Plaintiffs assert Defendants failed to properly disclose these witnesses during discovery. Rule 37(c)(1) of the Federal Rules of Civil Procedure provides that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to used that information or witness to supply evidence on a motion ... unless the failure was substantially justified or is harmless." This rule "mandates that a trial court punish a party for discovery violations in connection with Rule 26 unless the violation was harmless or is substantially justified." *R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262, 271–72 (6th Cir.2010)

(quoting *Roberts v. Galen of Virginia, Inc.*, 325 F.3d 776, 782 (6th Cir.2003)). The burden is on the "potentially sanctioned party" to demonstrate harmlessness. *Id.*

***10** As support for their allegations, Plaintiffs first note Defendants did not mention these witnesses in response to Plaintiffs' "Notice to take Deposition of City of Chattanooga 30(b) (6) Representative Duces Tecum." Instead, Defendants only produced now-former Chief Mike Williams. Further, Plaintiffs claim Defendants disclosed Captain Susan Blaine as an expert witness after the expert disclosure deadline set in the parties' amended scheduling order. The deadline was September 16, 2011; Defendants did not submit this information until September 26, 2011. Due to Defendants' delay, Plaintiffs claim they had insufficient time to depose or serve interrogatories on Captain Blaine before the close of discovery. Finally, Plaintiffs aver Defendants never disclosed the names of Lon Eilders or Mark Smeltzer.

In response, Defendants claim they made clear to Plaintiffs that not one person would be able to speak to all the issues raised in Plaintiffs' notice (Court File No. 50–1 ("Aff. of Crystal Freiberg"), ¶ 4). Defendants also offer the deposition of former Chief Mike Williams to show Captain Susan Blaine was identified as a potential witness who could offer information on internal affairs issues (*id.* ¶ 5***l***; Court File No. 50–3 at 23, 37). Similarly, although Defendants admit they did not disclose Mark Smeltzer's name, they claim he was used as a substitute for Lieutenant Danna Vaughn—another potential witness mentioned in Williams' deposition who could testify about training—because Lieutenant Vaughn was unavailable at the time the affidavits were being prepared (Court File No. 50). Defendants do not contest the fact that their expert disclosure list was submitted late.

In light of the evidence before the Court, the Court will not credit any testimony offered by Defendant with respect to Captain Blaine for purposes of the pending dispositive motions. Defendants submitted this information late to Plaintiffs, there was no substantial justification for their delay, and Plaintiffs were unable to fully conduct discovery with respect to this witness as a result. With respect to Lon Eilders and Mark Smeltzer, the Court recognizes there is some dispute over whether their names were properly disclosed; it appears they were not. However, the Court need not rule on this issue directly. The Court will refrain from relying on any expert testimony offered by these witnesses in light of the fact that neither appeared to offer any. With that said, to the extent any publicly available exhibits offered in support of Captain Blaine, Lon Eilders, or Mark Smeltzer's affidavits, such as CPD policies and procedures, are placed at issue by Plaintiffs, such documents may be used by the Court as sources that contain the full text of those policies and procedures.

Returning to Plaintiffs' § 1983 claims, Plaintiffs have failed to demonstrate a genuine issue of material fact exists with regard to whether a City of Chattanooga policy or custom authorizes officers to violate Plaintiffs' civil rights. First, Plaintiffs have not shown the City of Chattanooga lacks sufficient policies and procedures on the use of force and proper arrest procedures. The CPD has a policy known as ADM–5 that provides officers with guidance on the use of force (ADM–5 at 2–3). Also, the CPD has in place a policy known as OPS–42 to address proper arrest procedures; the policy, among other things, clearly states officers must have probable cause to make a lawful arrest for a felony (OPS–42 at 2).

***11** Plaintiffs, however, assert that even if no official policy is in place that authorized the violation of their civil rights, Defendants are liable under § 1983 because the City of Chattanooga has engaged in a "custom" or widespread practice of violating civil rights. In particular, Plaintiffs claim the City of Chattanooga has failed to adequately train, supervise, and discipline its officers and has, therefore, displayed "deliberate indifference" towards Plaintiffs' rights. Despite making this broad claim, Plaintiffs have in no way demonstrated that the City of Chattanooga's training, supervision, or discipline was actually inadequate, nor have they demonstrated "any inadequacy was the result of the [City of Chattanooga's] deliberate indifference." *See Ellis*, 455 F.3d at 700.

Plaintiffs point to Officer Daves' conduct both in the instant case as well as his past conduct to support their contention that Defendants have failed to adequately train, supervise, and discipline. Notably, Plaintiffs can identify no other officers with the CPD to illustrate Defendants' failure in these areas. Plaintiffs claim the City of Chattanooga tacitly approved Officer Daves' conduct by allowing him to violate its policies in the instant case. As previously noted, however, it is apparent Officer Daves acted pursuant to a valid arrest warrant. Plaintiffs allege other violations were committed though, including a violation of section VII of ADM–42, which requires that night and early morning arrests for felonies be made immediately even without a warrant (ADM–42 at 6). Also, they note Officer Daves was rude and used inappropriate language in violation of general policies of

good police behavior. Even if Officer Daves violated these policies, such conduct alone fails to demonstrate a widespread decision on the part of the City of Chattanooga to allow its officers to violate citizens' civil rights. In fact, presumably, Officer Wright's decision with respect to section VII of ADM–42 to not arrest Mr. Wright immediately was based on consideration of other CPD policies, such as the policy that states it is preferable for officers to obtain a warrant first for less serious offenses, especially when "the offender does not pose a significant threat to the community and when he or she is not likely to flee." ADM–42 at 2. Here, Mr. Wright was at the hospital with his wife and the circumstances likely satisfied these criteria.

Plaintiffs also point to evidence of investigations conducted with respect to Officer Daves to show a pattern on the part of the City of Chattanooga that allows officers to violate citizens' civil rights. Again, however, Plaintiffs fail to demonstrate how these isolated incidents evidence a widespread pattern or show "deliberate indifference" on the part of the City of Chattanooga. Plaintiffs use two investigations sustained against Officer Daves to illustrate their theory. The first incident shows Officer Daves was investigated for improper use of force after spraying a crowd of juveniles with pepper spray and not filling out a use of force form afterwards (Court File No. 47–8). The second incident involved Officer Daves engaging in an improper pursuit by failing to initially turn on his emergency signals (Court File No. 47–9). Only the use of force incident is relevant to the facts of this case. However, besides failing to demonstrate a widespread practice of the violation of citizens' civil rights, these incidents reveal the City of Chattanooga is actively engaged in disciplining its officers. For the aforementioned incidents, Officer Daves received a five-day suspension and verbal counseling, respectively.

***12** Plaintiffs also offer no evidence to show Officer Daves or other officers failed to receive the training offered by the CPD or supervision. Ultimately, they have failed to demonstrate "the existence of a widespread practice that ... is so permanent and well settled as to constitute a custom or usage with the force of law." *See Monell,* 436 U.S. at 691.

Finally, Plaintiffs insist that omissions in the City of Chattanooga's training and policies also support their § 1983 claims. Based on the evidence before this Court, the CPD offers a comprehensive and time-intensive training curriculum for its officers on a number of topics, including use of force and proper arrest procedures (Court File No. 50–3 ("Aff. of Michael Williams"), at 47–65. According to then-Deputy Chief Michael Williams, the curriculum that was in place at the time of the incident involving Plaintiffs covered beyond what was required in most areas by the Tennessee POST, the governing body over Tennessee law enforcement officials (Aff. of Michael Williams at 47). Plaintiffs have focused on some of the topics that are absent from the curriculum, such as the lack of a policy on assessing and dealing with medical emergencies, training on identifying when necessity is a defense, and training on accommodating persons with disabilities. They rely on *Hobart v. City of Stafford,* 784 F.Supp.2d 732 (S.D.Tex.2011), for the proposition that the lack of training in a relevant area can support a § 1983 claim. They also rely on *Hobart* for the "single incident exception," which states a claim can be made out if the plaintiffs "allege facts that, if proven true, would support a finding that [their injury] was the 'highly predictable consequence of [the municipality's] fail[ure] to train its employees."*Id.* at 753.

Here, however, Plaintiffs have failed to show the alleged inadequacies were so severe that their result—the alleged injuries to Plaintiffs—would be "known or obvious" to the City of Chattanooga nor have they shown the result was the "inevitable consequence of those inadequacies." *See id.* Although the City of Chattanooga would ideally have a policy on every issue, none of the policies mentioned by Plaintiffs rise to the level necessary to invoke the "single incident exception" referenced by Plaintiffs. The possibility of Mr. Wright being arrested or Mrs. Wright receiving delayed medical care under the circumstances in this case are not so "known and obvious" that the City of Chattanooga would have anticipated it to create a policy about "medical emergencies" or anticipate such a scenario involving an individual with a disability. Moreover, the injuries alleged by Plaintiffs would not inevitably result from the lack of such policies. Finally, to the extent Plaintiffs are asserting officers need to be trained on the legal justifications or defenses, such as necessity, they are misguided. As noted in the CPD policy manual itself, "in most cases, it is not the role of a police officer to decide whether an offense should be prosecuted; that is the responsibility of the court prosecutor" (OPS–42 at 7). Assessing whether a legal justification or defense applies, such as necessity, is not an essential component of an officer training curriculum.

***13** Ultimately, with regard to training, the Court must consider whether "in light of the duties assigned to specific officers or employees the need for more or different training

is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need .” *City of Canton v. Harris*, 489 U.S. 378, 389, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). Here, Plaintiffs' allegations of inadequate training fail to demonstrate any “deliberate indifference” on the part of the City of Chattanooga and, therefore, must be dismissed along with their other § 1983 claims. Accordingly, the Court will grant summary judgment on Plaintiffs' § 1983 claims against Defendants City of Chattanooga and Officer Daves in his official capacity.

IV. AMERICANS WITH DISABILITIES ACT

Plaintiffs' Complaint alleges violations of the Americans with Disabilities Act, “including but not limited to” Title II and Title III (Complaint at 14). Because Title I of the ADA deals with employment and Title III of the ADA involves public accommodations operated by private entities, the Court will limit its analysis to Title II, which is the only subsection the Court can determine is particularly relevant to the facts of this case. [1] The Court also notes, as a preliminary matter, that the ADA claim brought against Officer Daves in his individual capacity must be dismissed given that “there is no individual liability under Title II of the ADA.” *Sagan v. Sumner Cnty. Bd. of Educ.*, 726 F.Supp.2d 868, 875 (M.D.Tenn.2010) (citing *Carten v. Kent State Univ.*, 282 F.3d 391, 396–97 (6th Cir.2002)).

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. To establish a prima facie case under Title II of the ADA, a plaintiff must show: “(1) she has a disability; (2) she is otherwise qualified; and (3) she is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely because of her disability.” *Dillery v. City of Sandusky*, 398 F.3d 562, 567 (6th Cir.2005) (citing *Jones v. City of Monroe*, 341 F.3d 474, 477 (6th Cir.2003)). To recover compensatory damages, the plaintiff must also prove intentional discrimination. *Tucker v. Tennessee*, 443 F.Supp.2d 971, 973 (W.D.Tenn.2006). The discrimination must have been “*intentionally* directed toward him or her in particular.” *Tucker v. Tennessee*, 539 F.3d 526, 532 (6th Cir.2008).

Failure to supervise or train are not viable theories for recovery of compensatory damages in a Title II ADA claim since such failure is necessarily not directed at a particular disabled individual. *See Dillery*, 398 F.3d at 568 (“Acts and omissions which have a disparate impact on disabled persons in general are not specific acts of intentional discrimination against the plaintiff in particular.”) (quotation omitted); *see also Scozzari v. City of Clare*, 723 F.Supp.2d 945, 973 (E.D.Mich.2010) (recounting how the court earlier “denied Plaintiff leave to amend the complaint to allege a claim based on the City's failure to train its officers under the ADA because pursuing such a claim would be futile”).

***14** Here, assuming Mrs. Wright had a disability and was otherwise qualified, the Court still concludes no reasonable factfinder would find Defendants violated Title II of the ADA based on the record. First, Plaintiffs have failed to demonstrate how Mrs. Wright was excluded from or personally denied the benefit of a service offered by the City of Chattanooga because of her disability. Mrs. Wright ultimately received medical treatment from Erlanger Hospital and was not deprived of treatment by the hospital. Therefore, the public entity at issue is not the hospital nor is the hospital a party to this case. To the extent Plaintiffs are alleging Officer Daves prevented Mrs. Wright from receiving treatment, an officer may be subject to an ADA claim if he arrests an individual and denies her medical care because she is disabled. *See Thompson v. Williamson Cnty.*, 219 F.3d 555, 558 (6th Cir.2000). However, at no point was Mrs. Wright ever under arrest or subject to being arrested. To the extent Plaintiffs are alleging the City of Chattanooga had an obligation to provide a service that would accommodate Mrs. Wright in receiving medical care in light of her medical emergency, Plaintiffs' claim still fails. As noted by Defendants, no facts in this case indicate Plaintiffs contacted the City of Chattanooga or requested any accommodations to drive through red lights without stopping to reach the hospital. Moreover, had Plaintiffs desired such assistance, presumably Mr. Wright might have quickly explained the circumstances to Officer Daves to seek his assistance when he saw Daves' lights flashing behind him on the way to the hospital.

Even if Defendants have in some way violated the third prong, Plaintiffs have offered no evidence of intentional discrimination, which is essential to support a claim under Title II of the ADA. Even viewing the facts in the light most favorable to Plaintiffs, Plaintiffs have not shown Officer Daves prevented Mrs. Wright from receiving medical care

"because" of her disability. If anything, Officer Daves engaged in such conduct because Mr. Wright had possibly committed two felonies in his presence and Mr. Wright had failed to acknowledge his earlier conduct.

Finally, any "failure to train or supervise" claims cannot survive summary judgment. Claims under Title II of the ADA must be brought against a specific individual. *See Dillery*, 398 F.3d at 568. Plaintiffs' allegations regarding the absence of a policy or inadequate training would inevitably be directed at the general populace and would fail to address the primary issue—that is, whether Defendants intentionally discriminated against Mrs. Wright in particular.

Accordingly, the Court will grant summary judgment on Plaintiffs' ADA claims against all Defendants.

V. STATE LAW CLAIMS

Plaintiffs assert several different state law claims against Defendants. The Court finds dismissal without prejudice is proper for these claims. As state law claims brought in a federal-question case, the claims can only be heard by the Court through the exercise of supplemental jurisdiction, pursuant to 28 U.S.C. § 1367. The exercise of federal supplemental jurisdiction is discretionary. District courts may decline to exercise supplemental jurisdiction over a state law claim if:

***15** (1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c).

Here, the Court has dismissed all claims over which it has original jurisdiction, thus the third rationale of § 1367(c) applies. The Sixth Circuit "has expressed a strong policy in favor of dismissing" state law claims when all federal claims over which the district court had original jurisdiction have been dismissed. *Staggs v. Ausdenmoore*, No. 92–3172, 1993 WL 131942, *5 (6th Cir. Apr.27, 1993). Accordingly, the Court will dismiss without prejudice all state law claims against Defendants.

VI. CONCLUSION

For the reasons stated above, the Court will **GRANT IN PART** the motions for summary judgment filed by Defendants City of Chattanooga and Officer James Daves in his official capacity (Court File No. 24) and Officer Daves in his individual capacity (Court File No. 28). The Court will **GRANT** summary judgment for all Defendants on Plaintiffs' § 1983 and ADA claims. The Court will **DISMISS WITHOUT PREJUDICE** all state law claims against Defendants.

Parallel Citations

44 NDLR P 131

Footnotes

1 Plaintiffs fail to provide support for why any other provisions, including those of subsection IV of the ADA.

260 Fed.Appx. 848
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
Sixth Circuit Rule 28. (Find CTA6 Rule 28)
United States Court of Appeals,
Sixth Circuit.

John WYSONG, Plaintiff–Appellee,
v.
CITY OF HEATH, Defendant–Appellant.

No. 06–4433. | Jan. 22, 2008.

Synopsis

Background: Suspect sued officers for excessive force under § 1983. Following affirmance of denial of qualified immunity and remand, 166 Fed.Appx. 835, the United States District Court for the Southern District of Ohio, denied officers' motion for summary judgment based on qualified immunity. Officers appealed.

Holdings: The Court of Appeals, Boggs, Chief Judge, held that:

[1] Court of Appeals was not bound, under law of the case doctrine, by District Court's first denial of qualified immunity;

[2] Court of Appeals had jurisdiction to review district court's second denial of summary judgment; and

[3] officers did not use excessive force.

Reversed.

West Headnotes (3)

[1] Federal Courts
Rulings as law of case

In reviewing district court's second denial of police officers' motion for summary judgment based on qualified immunity in excessive force action, Court of Appeals was not bound, under law of the case doctrine, by result reached in district court's first denial of officers' motion for summary judgment based on qualified immunity, given introduction of substantially new evidence, consisting of suspect's deposition testimony that he had no memory of relevant events. U.S.C.A. Const.Amend. 4; Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

14 Cases that cite this headnote

[2] Federal Courts
Civil rights cases

Court of Appeals had jurisdiction to review district court's denial of summary judgment to police officers on ground of qualified immunity in suspect's excessive force action, notwithstanding rule of *Johnson v. Jones* that court hearing qualified immunity case on interlocutory review does not have jurisdiction to disagree with district court's decision that record contains factual dispute, where suspect himself admitted that no factual dispute existed. U.S.C.A. Const.Amend. 4; Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

14 Cases that cite this headnote

[3] Arrest
Restraints

Officers did not use excessive force in handcuffing suspect as he experienced hypoglycemic attack, where suspect, who could not remember the relevant events, did not deny that he fought with officers, and he admitted that on previous occasions his blood sugar dropped, he acted aggressively, and he later did not remember what he had done. U.S.C.A. Const.Amend. 4.

12 Cases that cite this headnote

***849** On Appeal from the United States District Court for the Southern District of Ohio.

Before: BOGGS, Chief Judge; KENNEDY, Circuit Judge; and JORDAN, District Judge. *

Opinion

BOGGS, Chief Judge.

Officers Bruce Ramage and Jaimee Coulter appeal the district court's denial of their motion for summary judgement based on qualified immunity. John Wysong sued the defendants under § 1983 for using excessive force when they arrested him. This case is on its second interlocutory appeal; the district court previously denied the defendants' motion for summary judgment and a panel of this court affirmed in an unpublished order. After the case returned to the district court, the defendants took additional discovery, renewed their motion for summary judgment, had the motion denied, and appealed again.

We reverse because Wysong cannot raise a genuine issue of material fact. He has no evidence to support his claim, and after the previous interlocutory appeal, has admitted in a deposition that he has no memory of the relevant events. We hold that on the undisputed facts of this case—undisputed because Wysong cannot contradict the version told by the police officers and a disinterested witness—no constitutional violation occurred and that the officers are therefore entitled to summary judgment.

I

A

John Wysong has suffered from diabetes for seventeen years. He takes medication to control his disease, but on several occasions his blood sugar has plunged unexpectedly. Previous sudden drops in blood sugar have caused Wysong to act aggressively and later not remember what happened. During at least one of these episodes, he acted "out of control," "resisted" his wife's attempts to help by giving him orange juice, and yet did not remember struggling once he recovered. Wysong was driving home from work on July 13, 2002, at about 8:45 p.m., when he experienced a hypoglycemic attack. He pulled into a Kroger grocery store intending to buy something to correct his blood sugar imbalance. Wysong's last memory before waking up handcuffed in a police car is pulling his truck into the grocery store parking lot.

At approximately 8:49 p.m. that night, Officer Bruce Ramage of the Heath Police Department was leaving the same parking lot when two young adult females, Trese Whytal and Mary Watring, met him and complained that a man in a white truck was making obscene gestures and comments towards them and was kicking the window in his truck. Officer Ramage radioed the police dispatcher, watched the man leave his truck, noticed that the man was staggering, and then approached the man and asked if the truck was his. The man was John Wysong. Wysong answered "whose truck?," turned, and ran.

Ramage chased Wysong and radioed for help, yelling "Stop!" and "You're under arrest!" until he "was able to strike his shoulder blade with my open hand [and] ***850** cause[ ] him to go to the ground." Meanwhile, Officer Jaimee Coulter arrived. The two officers went over to Wysong, who was lying on his stomach and "screaming," and tried to get Wysong's hands behind his back in order to cuff Wysong.

Up to this point, Wysong does not dispute the officers' testimony or challenge their actions. He admits that they could not have known at this point whether his odd behavior arose from mental illness, intoxication, or criminal intent. After this point, three different stories emerge: the story told by the officers and Ms. Whytal, the story told by Wysong's litigation documents, and the story told by Wysong's deposition.

The officers say that Wysong refused to pull his arms from beneath his body and violently resisted their attempts to handcuff him. During this struggle, Wysong kicked Ramage and Coulter. *Ibid.* Unable to move Wysong's arm, Ramage resorted to "some open-handed strikes" on Wysong's leg, and with Coulter's help was finally able to cuff Wysong's left wrist. Officer Mark Phillips then arrived. Phillips testified that Wysong was "flailing about his arms and legs" and that Phillips put his knee in Wysong's back to help subdue Wysong. The three officers finally managed to cuff Wysong's other wrist and get him into the squad car. Officer Ramage then interviewed Ms. Whytal and Ms. Watring, who had witnessed the event. Whytal later swore in an affidavit that Wysong was "out of control and struggling with the police when they tried to handcuff him. At no time was [he] lying motionless on the ground."

Wysong managed to "come around" and told the officers that he was a diabetic. [1] The officers then called the paramedics, and told them to go to the police station because the station was roughly the same distance from the store as the hospital. Once they arrived at the station, the paramedics gave Wysong emergency treatment and then took him to the hospital. The medical staff reported that Wysong's actions were caused by an uncontrollable medical condition, and opined that he should not be charged or arrested for that reason. Wysong was later charged with one misdemeanor count of disorderly conduct, but the charge was soon dropped.

Wysong tells a different story in his complaint and briefs. In them, he alleges that when he was on the ground, he *was not resisting the officers in any way.* He said that he was "not conscious" when he was on the ground and the police were using force against him. He claims that the police account of his resistance is "completely untrue," but he does not explain how he knows the police are lying when he himself cannot speak to what happened. Wysong presented no other witnesses or physical evidence to confirm his story. The hospital report stated that he denied experiencing body aches and showed no injuries other than a bruised left knee. The district court saw a conflict between Wysong's claim and the police testimony, so it ruled that factual questions precluded granting summary judgment for the defendants.

After the first interlocutory appeal, the defendants took Wysong's deposition. In the deposition, Wysong clarified (or shifted) his position away from an affirmative ***851** claim of what happened to an admission that he did not know what happened. Wysong did not assert that he was "knocked out" when he was on the ground, but that he had *no conscious memory* of what happened and *could not affirm or deny any of his actions while on the ground.*

> Q. Now, when you use the word "unconscious," what you mean is that you have no conscious memory of what occurred.
>
> A. Yes.
>
> Q. *But you are not able to say that you were unconscious in the sense that you were completely motionless, not moving;* is that correct?
>
> A. Yes.
>
> ...
>
> Q. Now, would I be correct in saying that you have no memory as to whether you became combative; is that correct?
>
> A. Yes.
>
> Q. You are not saying you didn't. You just have no memory.
>
> A. Yes.
>
> Q. Now am I correct in saying that you have no memory of scuffling with the police; is that correct?
>
> A. Yes.
>
> Q. *You are not saying that didn't happen. You are saying that you have no memory of it;* is that correct.
>
> A. Yes.

This deposition is also where Wysong admitted to the prior incidents where a drop in blood sugar made him act belligerently but then forget the entire episode.

B

Wysong filed his complaint on March 28, 2004. The defendants moved for summary judgment on August 13, 2004. On January 18, 2005, the district court partially granted the motion, dismissing all of Wysong's claims except his Fourth Amendment claim for excessive force. The court reasoned that "the essential facts—Plaintiff's behavior while he was on the ground—are in dispute" because "[p]laintiff claims he was in an unconscious state, not resisting," when the officers used force. The court construed Wysong's allegation that he was "unconscious" while on the ground to mean that Wysong claimed that he was "lacking consciousness," or "knocked out." This is a legitimate definition. *American Heritage Dictionary of the English Language* 1873 (4th ed. 2000) (defining "unconscious" as "lacking consciousness"). The district court denied qualified immunity based on this perceived fact dispute. The defendants filed an interlocutory appeal on the issue of qualified immunity. A panel of this court issued a three-paragraph order, affirming and adopting the reasoning of the district court. *Wysong v. Ramage,* 166 Fed.Appx. 835 (6th Cir.2006) (per curiam).

On remand, the defendants took additional discovery, including Wysong's above-cited deposition in which he acknowledged his lack of memory, and moved again

for summary judgment based on qualified immunity. The deposition showed that by "unconscious," Wysong meant that his physical actions were taken "without conscious control," or were "involuntary." This is also a reasonable definition. *American Heritage Dictionary of the English Language* 1873 (4th ed. 2000) (giving another definition of "unconscious" as "without conscious control [or] involuntary").

Despite this clarification and Wysong's admission that he could not remember anything he did, the district court perfunctorily dismissed the defendants' renewed motion for summary judgment as a "third attempt to litigate issues already decided." The order relied exclusively on language from its first order stating that Wysong could testify that he was "unconscious" when the officers used force. It did not even acknowledge the difference between ***852** Wysong's deposition and the words of his complaint, and it did not engage the defense contention that Wysong could not say that he was unconscious in the "knocked-out" sense.

The defendants appealed again. Wysong filed a motion to dismiss the appeal for lack of jurisdiction, but a motions panel denied the motion, reasoning that "this appeal contains additional evidence" and raises a new legal question of whether, in light of this evidence, the defendants are entitled to judgment as a matter of law. *Wysong v. City of Heath*, No. 06–4433 (6th Cir. March 14, 2007) (unpublished order). We now answer that question.

II

We review *de novo* a district court's denial of a motion for summary judgment premised on qualified immunity. *Mattox v. City of Forest Park*, 183 F.3d 515, 519 (6th Cir.1999). On an interlocutory appeal such as this one, we consider only abstract issues of law, so we must accept "the facts alleged by the plaintiff and discuss only the legal issues in the case." *Shehee v. Luttrell*, 199 F.3d 295, 299 (6th Cir.1999). To withstand summary judgment, the plaintiff must show a genuine issue of material fact. *Klepper v. First Am. Bank*, 916 F.2d 337, 342 (6th Cir.1990). A mere scintilla of evidence is insufficient; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The evidence must be admissible to create a genuine issue for trial, *id.* at 247, 106 S.Ct. 2505, because if the evidence is not admissible, there is nothing on which a jury could base its decision. Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In qualified immunity cases, the plaintiff bears this burden; he must show that the defendant is not entitled to qualified immunity. *Wegener v. City of Covington*, 933 F.2d 390, 392 (6th Cir.1991).

III

Before considering qualified immunity, we pause to explain our jurisdiction to hear this case. First, the "law of the case" doctrine does not control our decision. Under the law of the case, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Westside Mothers v. Olszewski*, 454 F.3d 532, 538 (6th Cir.2006). Likewise, "findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation." *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir.1994).

[1] Although the first panel to hear this case affirmed the district court's denial of qualified immunity, the motions panel, in denying the motion to dismiss this second interlocutory appeal, held that the law of the case does not bind our panel to the previous result. We agree. The law of the case doctrine does not apply in three "exceptional circumstances." *Westside Mothers*, 454 F.3d at 538. One such "exceptional circumstance" is when "substantially new evidence has been introduced." *Ibid.* This exception applies here, because the facts in this appeal differ from the facts in the first appeal. In the first appeal, the ambiguous use of "unconscious" led the court to decide the issue as if Wysong claimed to have been "knocked out" or motionless. In this appeal, the ambiguity has been eliminated through the new evidence in Wysong's deposition. Despite the assertions in the district court's most recent decision, we now know that ***853** Wysong makes no claim of being "knocked out." Instead, he admits that he has no memory of the relevant events and contends that whatever physical movements he made were not voluntary acts. [2]

While successive interlocutory appeals on qualified immunity may be unusual, they are not unheard of, and they are not subject to any special disfavor. *See Behrens v. Pelletier*, 516 U.S. 299, 306 n. 2, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996) (permitting second interlocutory appeal and observing that

"*Mitchell* [*v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)] itself dealt with the second of two interlocutory appeals on immunity claims"). The Supreme Court observed that in *Mitchell*, "neither the Court of Appeals nor this Court assigned any significance to the successive aspect of the second appeal." *Ibid.* We do likewise and assign no significance to the "successive aspect" of the appeal now before us.

[2] Second, the familiar rule in *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), does not apply. *Johnson* held that a court of appeals, when hearing a qualified immunity case on interlocutory review, does not have jurisdiction to disagree with a district court's decision that the record contains a factual dispute that must be resolved at trial. *Id.* at 320, 115 S.Ct. 2151. A more recent Supreme Court case explains why, despite *Johnson*, we may decide this case before us. In *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007), the district court found a genuine issue of material fact as to the plaintiff's conduct, and the Eleventh Circuit decided that it therefore had no jurisdiction to overturn the district court's decision. *Scott*, 127 S.Ct. at 1773.

But the Supreme Court reversed 8–1, and in the process rejected both the plaintiff's version of the facts and the district court's determination that a genuine factual dispute existed. *Ibid.* The case dealt with a high-speed police chase, and the incident had been caught on video. The Court looked to the video, and said that the plaintiff's version of the events was "so utterly discredited by the record that no reasonable jury could have believed him" and that his story was "blatantly contradicted by the record." *Scott*, 127 S.Ct. at 1776. Furthermore, we agree with the Third Circuit that the Court disagreed with the lower courts "as to what Harris's actions actually were, and not merely whether they could be described as 'dangerous to others.' " *Blaylock v. City of Philadelphia*, 504 F.3d 405, 414 n. 7 (3d Cir.2007). Neither the majority nor Justice Stevens's lone dissent in *Scott* mentioned *Johnson v. Jones*, or addressed the question of jurisdiction, but logic dictates that *Scott* must have modified *Johnson*'s language about jurisdiction in order to reach the result it did.

In *Blaylock*, the Third Circuit reconciled *Scott* and *Johnson* by saying that *Scott* represents "the outer limit of the principle of *Johnson v. Jones*—where the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory review." *Blaylock*, 504 F.3d at 414. We agree with, and follow, the Third Circuit's view as a principled way to read *Johnson* and *Scott* together and to correct the rare "blatan[t] and demonstrabl[e]" error without allowing *Scott* to swallow *Johnson*. Here, Wysong himself admitted in a deposition that no factual dispute exists, so we are comfortable ***854** in saying that any determination to the contrary is "blatantly and demonstrably contradicted by the record," *Scott*, 127 S.Ct. at 1776, and that we have jurisdiction "to say so, even on interlocutory review." *Blaylock*, 504 F.3d at 414.

IV

Courts reviewing § 1983 claims alleging excessive force must first consider whether the officer violated the constitution by using excessive force, then decide whether the officer deserves qualified immunity because he did not violate "clearly established" federal law. The Supreme Court has held that these inquiries are distinct, *Saucier v. Katz*, 533 U.S. 194, 204, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), so we separate the inquiries despite the possibility for confusion this requirement creates. [3]

Both points turn on a question that is simultaneously simple and complex. If Wysong was resisting arrest, even if his resistance arose from involuntary muscle spasms brought on by diabetes, the officers did not use excessive force and certainly would be entitled to qualified immunity if they did. By contrast, if Wysong was lying motionless on the ground —if he was "unconscious" in the sense of being knocked out—the officers used excessive force and are not entitled to qualified immunity. This is an interlocutory appeal, so we must view the facts in the light most favorable to the plaintiff. In most cases, the result would be the result reached by the district court, a decision that factual disputes warrant denying summary judgment. The difference in this case is whether Wysong can present any "facts" to view favorably when he offers no external evidence, identifies no supporting witnesses, and cannot remember the underlying events.

A

The Fourth Amendment's "objective reasonableness" test applies to all claims for excessive force. *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Reasonableness "must be judged from the perspective of a

reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and " 'not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment.' " *Ibid.* (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.1973)). The test is fact specific, not mechanical, and the three most important factors for each case are: (1) the severity of the crime at issue; (2) the threat of immediate danger to the officers or bystanders; and (3) the suspect's attempts to resist arrest or flee. *Id.* at 396. The standard "contains a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case." *Burchett v. Kiefer*, 310 F.3d 937, 944 (6th Cir.2002).

Our cases show that the police may use force on suspects who resist arrest in the manner in which Wysong resisted. When a suspect merely "twisted and turned some," police had the right to use force when arresting him. *Burchett*, 310 F.3d at 940, 943. Likewise, our court granted qualified immunity to police officers who tackled a suspect who had led them on a low-speed chase to the police station. *Goodrich v. Everett*, 193 Fed.Appx. 551, 556 (6th Cir.2006). *Goodrich* held that ***855** even if the officers were "kneeing and kicking" the plaintiff while handcuffing him, the force was not unreasonable in the context of an arrest where a reasonable officer could have concluded that the plaintiff "was capable of violence and intended to flee." *Ibid.* at 557. Our court has even found that a punch resulting in a broken jaw, a much more serious level of force than that used against Wysong, is reasonable when the suspect is moving erratically and apparently attempting to escape:

> While Mr. Schliewe was not charged with a serious crime, it was difficult for the officers to judge his intentions because Mr. Schliewe had behaved erratically during the evening and was apparently intoxicated. Mr. Schliewe was attempting an escape from the holding area of the police station and resisted the officers' attempts to subdue him, thus justifying the use of at least some force. Mr. Schliewe focuses on the blow struck by Officer Toro as unreasonable. While punching someone may not be the best way to prevent his escape, it cannot be said that the blow was objectively unreasonable.

Schliewe v. Toro, 138 Fed.Appx. 715, 721–22 (6th Cir.2005).

All of these cases involve individuals who, like Wysong, were suspected of relatively minor crimes and who put up a similar, or lower, level of resistance, and who were subjected to a similar, or higher, level of force.[4] Therefore, if the officers' story is true, no excessive force was used.

The law is equally clear that force can easily be excessive if the suspect is compliant. *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 902 (6th Cir.2004). There is no government interest in striking someone who is neither resisting nor trying to flee. *Smoak v. Hall*, 460 F.3d 768, 784 (6th Cir.2006) (unreasonable to tackle a cuffed and compliant suspect); *McDowell v. Rogers*, 863 F.2d 1302, 1307 (6th Cir.1988) (holding blow to cuffed, unresisting suspect unreasonable). Therefore, if Wysong was not resisting, the officers' use of force was excessive.

B

Police officers are entitled to qualified immunity unless their conduct violates "clearly established constitutional or statutory rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The doctrine protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). It requires a two-step inquiry. First, the court must determine whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiff show that a constitutional violation occurred. If the answer is yes, then the court asks whether the violation involves "clearly established constitutional rights of which a reasonable person would have known." *Dickerson v. McClellan*, 101 F.3d 1151, 1158 (6th Cir.1996). Qualified immunity is immunity from suit, not just immunity from damages. *Crockett v. Cumberland College*, 316 F.3d 571, 578 (6th Cir.2003).

The Supreme Court emphasized that it is not enough for a right to be "clearly established" as a general proposition; it must be "clearly established" in the "more particularized, relevant sense" of the "specific context of the case." *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151. A plaintiff ***856** need

not offer precedent with "materially similar facts," but the precedent must give "fair warning" that the action in question is unconstitutional. *Hope v. Pelzer,* 536 U.S. 730, 740–41, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002).

Turning to Wysong's case, we hold that if the officers struck him when he was not resisting, they will not receive qualified immunity. The same cases holding that police may not use force on a subdued, non-resisting subject hold that the right to be free from physical force when one is not resisting the police is a clearly established right. *Smoak,* 460 F.3d at 784 (law clearly established that tackling subdued suspect would have been unreasonable); *Champion,* 380 F.3d at 902 (courts have "consistently held that various types of force applied after the subduing of a suspect are unreasonable and a violation of a clearly established right"). Therefore, the qualified immunity question, like the excessive force question, turns on Wysong's conduct while on the ground.

C

The question now becomes whether Wysong can raise a genuine issue of material fact regarding his conduct, given his deposition. The Eighth Circuit faced a similar case and granted summary judgment for the defendant. *Wertish v. Krueger,* 433 F.3d 1062 (8th Cir.2006). In *Wertish,* officers followed a motorist, Wertish, who was driving erratically. Wertish, like Wysong, was suffering a hypoglycemic attack and admitted to being "out of it." *Id.* at 1065. The police said that when they finally pulled Wertish over, he did not respond to their commands and put his hands behind his back. *Ibid.* A scuffle followed, in which the officers "struck" Wertish several times, cuffed him, and "pushed him up against the truck." *Ibid.* This parallels the amount of force the police used on Wysong. Like Wysong, Wertish remembered nothing from the time he heard the police siren to when "they had me slammed up against the truck." *Ibid.* Like Wysong, Wertish denied resisting, but admitted that he could not remember what happened. *Ibid.*

The court pointed to Wertish's lack of memory and said that "[i]f [officer] Krueger's *unrefuted version of the events* establishes that his use of force was reasonable," summary judgment was appropriate. *Ibid.* (emphasis added). The court explained that the use of force was reasonable given Wertish's resistance, and argued that Wertish's minor scrapes and bruises were further evidence that no excessive force was used. *Id.* at 1067. [5] The key point is that the court disregarded the allegations in Wertish's pleadings once Wertish admitted that he could not remember what happened. Another circuit applied the same reasoning in a different context. *See Curley v. Village of Suffern,* 268 F.3d 65, 72 (2d Cir.2001) (granting summary judgment based on qualified immunity when the police testified to their own conduct and the plaintiff admitted that he "could not recall" the critical events). We follow the same path.

District court cases from our circuit confirm our judgment. When a plaintiff admitted that he was too drunk to remember what happened when the police shot at his car, the court granted summary judgment to the officers based on qualified immunity. *Perrien v. Towles,* No. 1–05CV928, 2006 WL 1515663 (N.D.Ohio, May 30, 2006). Despite his lack of memory, the plaintiff asserted that he could not have driven his car towards the officers right ***857** before they fired, and insisted that the wet conditions or a mechanical failure must have been responsible for the car's movement. *Id.* at *5. The court rejected this speculation, and ruled that because the plaintiff could not dispute the testimony of the officers, it would accept the officers' version of the events and grant the officers summary judgment. *Id.* at *7. Another court found for an officer when a suspect claimed that he could not remember any of the events surrounding his flight from, and fight with, the police, but nevertheless insisted that the police used excessive force. *Woods v. Jefferson County Fiscal Court,* No. 3–01CV–210–H, 2003 WL 145213 (W.D.Ky. Jan. 8, 2003). The court accepted the officer's story because the suspect "*has no memory of the events, and therefore his testimony cannot be a factor*." *Id.* at *5 (emphasis added).

[3] Like the plaintiffs in *Woods, Perrien,* and *Wertish,* Wysong cannot remember the relevant events. Contrary to the district court's ruling, Wysong *cannot* testify that he was "unconscious" when the officers were arresting him. Wysong admitted in his deposition that he does not deny that he fought with the officers; he only claims that he does not remember what happened. He even admitted that on previous occasions, his blood sugar dropped, he acted aggressively, and later did not remember what he had done. Like the plaintiffs in the previous cases, Wysong cannot establish a genuine issue of material fact. While we must view the facts in the light most favorable to Wysong, we are not obligated to treat a naked assertion in a litigation document as establishing a "fact" when he admits to having neither personal knowledge nor other evidence to support his claim. *See U.S. Structures v. J.P. Structures,* 130 F.3d 1185, 1189 (6th Cir.1997) (summary judgment appropriate against party

who fails to offer *admissible* evidence in opposition to a motion for summary judgment).

D

Wysong cites several cases, but these cases only highlight the contrast between situations where qualified immunity was properly denied and his own situation. In every one, one or more of the following facts not present in his own case exist: (1) the plaintiff had personal knowledge of the underlying events; (2) the officers knew that the plaintiff had a medical condition before resorting to force; or (3) the plaintiff supported up his claims with other evidence.

In *Bultema v. Benzie County*, 146 Fed.Appx. 28 (6th Cir.2005), Bultema claimed that an arresting officer used excessive force by striking him across the head with a nightstick when Bultema was already cuffed. *Id.* at 36. The court rejected the defense motion for summary judgment even though Bultema could not remember, and no one else actually saw, the blow. However, the court relied on a witness who heard the officer yelling at Bultema, "heard a whack and a thud," and turned around and saw the cuffed Bultema sprawled on the ground. *Ibid.* The court reasoned that one could "reasonably infer" from this evidence that the officer struck Bultema. The case does not help Wysong because Wysong can point to no eyewitness testimony from which reasonable inferences in his favor can be drawn. The only eyewitness agrees with the police.

In *Rivas v. City of Passaic*, 365 F.3d 181 (3d Cir.2004), the court denied summary judgment, holding that a jury could believe the testimony of Rivas's wife that Rivas was simply flailing his arms because of a seizure and not resisting in the way the officers claimed. *Id.* at 199. Rivas could not testify because he later died from his injuries, but *Rivas's wife testified from personal knowledge as to what happened.* Some physical evidence also suggested that the officers shoved a flashlight ***858** into Rivas's mouth. *Ibid.* Once again, Wysong offers no such evidence.

Wysong also relies on *Lolli v. County of Orange*, 351 F.3d 410 (9th Cir.2003), for the proposition that violence against a person suffering a diabetic seizure is excessive. But *Lolli* does not help him, because in *Lolli* the plaintiff told the officers that he had diabetes long before the violence occurred, and he remembered everything that happened. *Id.* at 415–17. Lolli also suffered multiple open wounds and fractured ribs. *Id.* at 417. Wysong did not. Wysong also points to *Frazell v. Flanigan*, 102 F.3d 877 (7th Cir.1996), *abrogation on other grounds recognized by McNair v. Coffey*, 279 F.3d 463 (7th Cir.2002), but the same analysis applies. In *Frazell*, the plaintiff, who claimed that the officers used excessive force when they mistook his epileptic seizure for belligerence, testified from personal knowledge to at least some of the events in question, said that he told the officers of his condition before any violence occurred, offered two witnesses who confirmed his testimony, and suffered severe injuries requiring hospitalization. *Id.* at 880–82.

Before concluding, we highlight the deficiencies in Wysong's case by explaining how a single difference in the record would lead to a different result. If Wysong offered a witness who testified that he was lying motionless, i.e., unconscious in the "knocked out" sense, while the police struck Wysong, he would have created a fact question for the jury. He has not. Wysong could raise a fact question through his own testimony, but he cannot because admits to not remembering the relevant events. He cannot even raise the inference that his lack of memory is the fault of the officers; his memory loss predates the struggle with the officers.

This is a case where the officers and third-party witness tell a story that establishes the officers' right to qualified immunity. In response, Wysong admits that he cannot remember the events, admits that he has no external evidence to back up the story he tells, and even agrees with the hospital report that said he suffered no physical injuries from any of the officers' blows. Wysong cannot beat something with nothing.

The undisputed facts in this case show that no constitutional violation occurred. Therefore, we REVERSE the judgment of the district court.

Parallel Citations

2008 WL 185798 (C.A.6 (Ohio))

Footnotes

* The Honorable R. Leon Jordan, United States District Judge for the Eastern District of Tennessee, sitting by designation.

1 Wysong was wearing a medical alert medallion around his neck that was three-quarters of an inch in diameter and said "insulin" on the back, but the officers had not noticed it. The record does not say whether this medallion was worn outside or inside of Wysong's clothing, and its location does not affect our decision, but the fact that the medallion was only noticed after Wysong partially lost his shirt in the scuffle, suggests to us that it was underneath his clothing and therefore out of sight.

2 Indeed, in his oral argument, Wysong's counsel abandoned the claim that Wysong was knocked out, focused his arguments on Wysong's actions being involuntary, and stated that "all Wysong meant by his original statement was that he had no conscious memory."

3 While they may be conceptually distinct, they also blur easily. Some authorities favor permitting courts to discuss either or both issues as the case warrants. *See, e.g., Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 1780, 167 L.Ed.2d 686 (2007) (Breyer, J., concurring) (agreeing with the "commentators, judges, and in this case, 28 States in an amicus brief" who believe *Saucier*'s inquiry should be simplified).

4 Wysong's resistance may not have been the product of a conscious decision, but the officers did not know this. They were confronted with a man who was on the ground kicking and screaming and were forced to make an "on the spot judgment." *Burchett*, 310 F.3d at 944.

5 Wertish suffered "bruised ribs, a sore shoulder, and multiple abrasions to his face and head." *Wertish*, 433 F.3d at 1066. Notably, Wysong's injuries were even less serious because his hospital report listed only his bruised knee.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13-5199

TERRY WYNN

Plaintiff-Appellee

v.

CHAD ESTES

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
No. 1:11-cv-0025

BRIEF OF PLAINTIFF-APPELLEE TERRY WYNN

COUNSEL FOR PLAINTIFF-APPELLEE:

Michael B. Schwegler
ERNEST B. WILLIAMS IV, PLLC
P.O. Box 159264
Nashville, Tennessee 37215
Telephone: (615) 372-0993

John W. Roberts
THE ROBERTS LAW GROUP, PLLC
1720 West End Avenue
Suite 402
Nashville, Tennessee 37203
Telephone: (615) 242-1001

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This appeal is the second time[1] in recent years that a court in the Sixth Circuit has been called upon to determine whether officer Chad Estes, formerly of the Pulaski Police Department ("PPD"), is entitled to qualified immunity for alleged violations of a plaintiff's Fourth Amendment rights.

This appeal presents novel constitutional questions which affect how physicians must balance the universal duty to follow the rules of the road with ethical, professional and contractual obligations to treat expectant mothers as quickly, or at least as timely, as possible.

[1] *See Hollis v. Estes*, 2011 U.S. Dist. LEXIS 9326, at *30 (M.D. Tenn. Jan. 31, 2011).

JURISDICTIONAL STATEMENT

A. District Court's Jurisdiction.

The United States District Court for the Middle District of Tennessee had subject matter jurisdiction and personal jurisdiction to adjudicate Plaintiff-Appellee's individual-capacity 42 U.S.C. § 1983 claims pursuant to 28 U.S.C §§ 1331, 1343 and 1391.

B. Basis For Court Of Appeals' Jurisdiction And Final Order Requirement.

This Court lacks jurisdiction to hear this appeal because the Defendant-Appellant does not concede Plaintiff-Appellee's reading of the facts.

A district court's denial of qualified immunity to an individual-capacity defendant is immediately appealable under 28 U.S.C. § 1291 as a final order, but only if the appeal is not premised on a factual dispute, and rather on "neat abstract issues of law." *Johnson v. Jones*, 515 U.S. 304, 317 (1995) (citations omitted); *see, e.g., Berryman v. Rieger*, 150 F.3d 561, 564-65 (6th Cir. 1998).

Here, this Court lacks jurisdiction to hear this appeal because the bulk of the individual-capacity Defendant-Appellant's brief and arguments are

premised on factual disputes, and great hay is made about factual determinations made by the trial court. Further, nowhere in his Brief has the Defendant-Appellant conceded a reading of the facts in a light most favorable to Plaintiff-Appellee, much less conceded "the best view of the facts to the [Plaintiff-Appellee]." *Id*. at 64.

C. Timeliness Of Defendant-Appellant's Appeal.

This appeal is timely. On February 11, 2013, the District Court entered an *Order* denying qualified immunity to the individual-capacity Defendant-Appellant. (Order, RE 171, PageID# 1849-1850.) On February 13, 2013, Defendant-Appellant filed his *Notice of Appeal*. (Not. of Appeal, RE 173, PageID# 1854.)

STATEMENT OF THE ISSUES PRESENTED

I. Did the District Court properly conclude that Chad Estes was not entitled to qualified immunity for Terry Wynn, M.D.'s 42 U.S.C. § 1983 claim to be free from unreasonable arrest under the Fourth Amendment to the United States Constitution?

II. Did the District Court properly conclude that Chad Estes was not entitled to qualified immunity for Terry Wynn, M.D.'s 42 U.S.C. § 1983 claim to be free from excessive force under the Fourth Amendment to the United States Constitution?

STATEMENT OF THE CASE

A. Nature Of The Case.

This appeal is a 42 U.S.C. § 1983 civil rights lawsuit brought by Terry Wynn, M.D. ("Dr. Wynn"), against officer Chad Estes ("Officer Estes"), for violations of her Fourth Amendment rights to be free from unreasonable arrest and to be free from excessive force. Dr. Wynn seeks money damages.

B. Course Of Proceedings.

Dr. Wynn filed her *Complaint* on April 21, 2011. (Compl., RE 1, PageID# 1, p. 1.) Dr. Wynn asserted official- and personal-capacity § 1983 claims against the following: Officer Estes; Sergeant Justin Young ("Sergeant Young"); PPD chief John Dickey ("Chief Dickey"); and 20 John Doe members of the PPD. (Compl., RE 1, PageID# 1-24, pp 1-24.) Dr. Wynn also asserted various state law claims against these defendants. (Compl., RE 1, PageID# 1-24, pp 1-24.) Dr. Wynn asserted § 1983 municipal liability claims against the City of Pulaski (the "City"), along with additional state claims under the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101 *et seq*.

All of these defendants filed answers, and after the close of discovery, followed up with Rule 56 motions.

C. Disposition Below.

Dr. Wynn voluntarily dismissed her claims against Chief Dickey. (Not. Volunt. Dismiss., RE 44, PageID# 223, p.1.) Dr. Wynn did not object to the dismissal of her claims against the John Doe Defendants. (Resp. City Mot. Sum. Judg., RE 83 PageID# 1205, p. 3.)

The District Court granted the City's and Sergeant Young's respective *Motions for Summary Judgment*. (Memo. Op., RE 170, PageID# 1841-1847, pp. 20-26.) The District Court denied Officer Estes's *Motion for Summary Judgment*, such that Dr. Wynn's remaining § 1983 claims against him are for (1) wrongful arrest, and (2) excessive force, both in violation of the Fourth Amendment. (Memo. Op., RE 170, PageID#1834-1841, pp. 13-20.) The District Court also allowed Dr. Wynn's state law claims against Officer Estes for battery and false imprisonment to proceed to trial. (*Id.*)

STATEMENT OF THE FACTS[2]

On May 5, 2010, Dr. Wynn, a medical doctor whose specialty is obstetrics/gynecology ("OB/GYN"), maintained a private practice known as Wynn Gynecology and Obstetrics in Pulaski, Tennessee, and worked as an on-call physician for Hillside Hospital, located adjacent to her practice. (Wynn Depo., RE 63-1, PageID# 733-34, 744, 746, pp. 10:25-11:1, 37:5-15, 39:11-25.) In her capacity as the on-call OB/GYN at Hillside Hospital, Dr. Wynn received a call at her home from a nurse at the hospital at approximately 8:50 p.m. on May 5, 2010, advising Dr. Wynn that she was needed at the hospital. (Wynn Depo., RE 63-1, PageID# 745-47, pp. 148:17-150:4.) During this phone call, Dr. Wynn was told that her patient was "complete" for delivery, which meant that she needed to get to the hospital "emergently," as the patient was ready to deliver at any time. (Wynn Depo., RE 63-1, PageID# 746-47, pp. 149:15-150:4.)

[2] The District Court's opinion reads: "While the facts must be construed in Plaintiff's favor for purposes of the pending motions for summary judgment, in reciting the facts the Court sets forth Defendants' version of events so as to give some background to the legal arguments presented." (Memo. Op., RE 170, PageID# 1822-1823, pp. 1-2.) In his brief before this Court, Officer Estes has chosen to forego the generous recitation of facts in his favor set forth by the trial court, and instead of evaluating his qualified immunity appeal using the facts read in the best view of Dr. Wynn, *Berryman*, 150 F.3d at 564, has placed before this Court his best version of the facts. (App. Br., pp. 1-20.)

Dr. Wynn used her own vehicle, which had a Michigan license plate, to drive to the hospital. (Wynn Depo., RE 63-1, PageID# 749, 752-53, 764, pp. 153:2-19, 159:6-9, 160:8-12, 191:6-13; Wynn Depo. Ex. 3, RE 63-2, PageID# 1151, p. 7:12-14.) Dr. Wynn had not gotten a Tennessee driver's license. (Wynn Depo., RE 63-1, PageID# 813, p. 376:20-23.) There was no decal, tag, or other indicator on Dr. Wynn's vehicle that Dr. Wynn was a physician or affiliated with Hillside Hospital. (Wynn Depo, RE 63-1, PageID# 816, p. 473:5-13.) Dr. Wynn activated her vehicle's flashers to notify other motorists that her transit was not an ordinary car trip. (Wynn Depo., RE 82-1, PageID# 1100, p. 153:7-23; Wynn Depo., Ex. 3, RE 82-2, PageID # 1151, p. 7:12-16.)

As Dr. Wynn drove down First Street in Pulaski at approximately 40 miles per hour, she was passed by Officer Estes who was traveling in the opposite direction. (Wynn Depo., RE 82-1, PageID# 1101-1106, pp. 158:20-163:20.) When Dr. Wynn realized that Officer Estes was behind her, she pulled off the road and slowed to a stop. (Wynn Depo., RE 63-1, PageID# 754, p. 180:18-21.) Once the vehicle was stopped, Officer Estes called in to dispatch that he was stopping a vehicle with a Michigan tag; the

time was 9:21 pm. (Estes Depo., RE 64-1, PageID# 878, p. 167:7-18; Estes Depo., Ex. 16, RE 64-2, PageID# 885, p. 1.)

Estes approached Wynn's driver's side window and as he approached the vehicle, Dr. Wynn waved her hand out the window at Officer Estes and motioned with her hand in an obvious effort to encourage Officer Estes to hurry up; Officer Estes then requested to see her driver's license and proof of insurance. (Wynn Depo., RE 63-1, PageID# 756, p. 182:3-11, 18-19.)

At this time, Dr. Wynn was wearing hospital scrubs, and her labcoat was in plain view of anyone looking the passenger cabin of her vehicle. (Wynn Depo., RE 82-1, PageID# 1107-1109, 1133-1137, 181:22-183:20, 440:4-444:7; Wynn Depo., Ex. 3, RE 82-2, PageID# 1151, 1154, pp. 7:17-9:25, 48:6-20.) Dr. Wynn told Officer Estes that she couldn't find her driver's license and handed him a medical I.D. from Detroit, and after either physically possessing or specifically inspecting the medical credentials, Officer Estes said "No, I need your license." (Wynn Depo., RE 63-1, PageID# 756-757, 765-766, pp. 182:25-183:3, 194:25-195:15; Wynn Depo., Ex. 3, RE 63-2, PageID# 830, p. 50:6-11; Wynn Depo., RE 82-1, PageID# 1107-1109, 1133-1137, pp. 181:22-183:20, 440:4-444:7; Wynn Depo. Ex. 3,

RE 82-2, PageID# 1151, pp. 7:17-9:25.)

During this exchange, Dr. Wynn twice told Officer Estes, "I'm in a hurry" and expressed words to the effect of "I'm going to the hospital for a delivery," and specifically told him that she "had a patient who is getting ready to deliver."[3] (Wynn Depo., RE 63-1, PageID# 766, p. 195:21-13; Wynn Depo., RE 82-1, PageID# 1109-1111, 1133-1137, pp. 183:10-185:7, 440:4-444:7; Wynn Depo., Ex. 3, RE 82-2, PageID# 1151, pp. 7:17-9:25.) Dr. Wynn has always taken the position that she informed Officer Estes that she was rushing to the hospital to deliver a baby. (Wynn Depo., RE 82-1, RE 82-1, PageID# 1109-1111, 1133-1137, pp. 183:10-185:7, 440:4-444:7; Wynn Depo., Ex. 3, RE 82-2, PageID# 1151, pp. 7:17-9:25.) Dr. Wynn made it unmistakably clear to Officer Estes at the initial traffic stop that she

[3] The record has never shown that Dr. Wynn actually said, "what else do you deliver? Pizza?" at the traffic stop. This quoted facetious comment was made at her deposition, when asked about what she said to Officer Estes; she reaffirmed the fact that she "mentioned to him a delivery" (i.e. that she "had a patient who is getting ready to deliver"), and—during her deposition but not at the traffic stop itself—jokingly referred to a pizza delivery. (Wynn Depo., RE 82-1, PageID# 1109-1111, 1137-1140, pp. 183:10-185:7; 444:16-447:9; Wynn Depo. Ex. 3, RE 82-2, PageID# 1151-1152 , pp. 7:17-10:24.)

This fact, disputed by Officer Estes in his brief before this Court, is an excellent example of both Defendant-Appellee's willingness to incorrectly cite witness testimony and his unwillingness to concede Dr. Wynn's version of the facts for the purpose of this appeal, as required by *Johnson*, 515 U.S. at 317, *Berryman*, 150 F.3d at 564-65, and their progeny. (App. Br., p. 8.)

"had a patient who is getting ready to deliver." (Wynn Depo., RE 82-1, PageID# 1109-1111, 1133-1137, pp. 183:10-185:7, 440:4-444:7; Wynn Depo., Ex. 3, RE 82-2, PageID# 1151, pp. 7:17-9:25.)

Dr. Wynn found her Michigan driver's license and handed it to Officer Estes; ultimately, upon a search of Dr. Wynn's vehicle, Officer Estes (or Sergeant Young) retrieved her proof of insurance from her purse. (Wynn Depo, RE 63-1, PageID# 767-768, 813, pp. 196:25-197:2, 376:20-23; Estes Depo., 64-1, PageID# 839, p. 35:3-4; Wynn Depo., Ex. 3, RE 82-2, PageID# 1154-1155, pp. 48:21-49:14.)

It is unclear what Officer Estes said next, but there is no dispute about Dr. Wynn's response: she stated "Look, if you don't believe me, why don't you follow me to the hospital, and if necessary, you can arrest me there." (Wynn Depo., RE 63-1, PageID# 758-59, pp. 184:22-185:2; Estes Depo., RE 64-1, PageID# 841-842, pp. 37:15-38:4; Wynn Depo., RE 82-1, PageID# 1109-1111, 1122-1124, 1132, pp. 183:21-185:2, 222:25-224:18; 332:2-16; Wynn Depo., Ex. 3, RE 82-2, PageID# 1151, p. 9:22-25.) Officer Estes replied, "Okay, I will." (Wynn Depo., RE 63-1, PageID# 770, p. 199:6-20.) Dr. Wynn drove off, with Officer Estes still holding her driver's license, and

she understood that Officer Estes had agreed to escort her to the hospital to sort things out there. (Estes Depo., RE 64-1, PageID# 843, 847, pp. 40:17-19,43:9-11; Wynn Depo., RE 82-1, PageID# 1109-1111, 1137-1140, 1147, pp. 183:10-185:7, 444:16-447:9, 479:5-9; Wynn Depo., Ex. 3, RE 82-2, PageID# 1151-1152, pp. 7:17-10:24.)

Dr. Wynn is about 5'8" and 140 pounds, while Officer Estes is 240 pounds, a gifted athlete and can bench press "about 400 pounds." (Estes Depo., RE 53-6, PageID# 600, p. 48:13-20.) Officer Estes agrees that Dr. Wynn was not a threat beyond the threat posed by every other citizen who is pulled over for a traffic stop.

As soon as they arrived at the hospital, at approximately 9:24 p.m., Officer Estes pulled his car behind Dr. Wynn's parked car with his emergency lights on. (Wynn Depo., RE 63-1, PageID# 775, p. 207:6-19; Estes Depo., RE 64-1, PageID# 845-846, 878-879, pp. 41:1-11, 42:4-6, 167:22-168:5; Estes Depo., Ex. 16, RE 64-2, PageID# 885, p. 1.) Officer Estes immediately got out of his car and headed towards Dr. Wynn's car, verbally advising her that she was under arrest as soon as she opened the driver's side door. (Estes Depo., RE 64-1, PageID# 848-849, pp. 45:15-

46:5.) Dr. Wynn jumped out of her car and, without noticing or acknowledging Officer Estes, began "rushing" in the opposite direction towards the hospital entrance. (Wynn Depo., RE 63-1, PageID# 776, p. 209:17-24; Wynn Depo., Ex. 3, RE 82-2, PageID# 1152, pp. 10:24, 12:9.)

Officer Estes grabbed Dr. Wynn's left wrist and "slung" a handcuff on it, cutting her wrist in the process. (Wynn Depo., Ex. 3, RE 82-2, PageID# 1152, p. 10:23-24.) Prior to the handcuffing, Officer Estes did not ask Dr. Wynn to put her right hand or both hands out to be handcuffed; in any event, Dr. Wynn did not voluntarily hold out her hands out to be handcuffed. (Wynn Depo., RE 63-1, PageID# 782-783, pp. 221:24-222:1; Estes Depo., RE 64-1, PageID# 850, p. 52:14-17; Wynn Depo., RE 82-1, PageID# 1119-1120, 1132, pp. 216:18-217:1, 332:17-22.) Dr. Wynn may have attempted to keep her right hand away from Officer Estes, but did not physically try to resist Officer Estes in any way. (Wynn Depo, RE 63-1, PageID# 783, p. 222:6-9; Wynn Depo., RE 82-1, PageID# 1132, p. 332:2-16.) During his arrest of Dr. Wynn in the physician's parking lot at Hillside Hospital, Officer Estes demanded of Dr. Wynn, "You think you can get away with anything just because you're a doctor?" (Wynn Depo., RE 82-1, PageID#

1146-1148, pp. 478:1-480:11.)

Using an escort technique where both his hands were on Dr. Wynn's cuffed left arm, Officer Estes forcibly guided her to the front of his vehicle and slammed Dr. Wynn against the hood of his squadcar, pressing her face, chest and waist onto the hood of the vehicle for, perhaps, several minutes, with his crotch directly touching her bottom, which dredged up bad memories in Dr. Wynn and injured her back, and placed the handcuffs on Dr. Wynn's right wrist. (Estes Depo., RE 64-1, PageID# 851-857, 858, 859, pp. 53:1-59:19, 60:4-8, 61:14-16; Wynn Depo., RE 82-1, PageID# 1115-1121, 1122-1124, 1141-1144, pp. 212:10-218:1, 222:25-224:18, 462:13-465:19; Wynn Depo., Ex. 3, RE 82-2, PageID# 1153, 1155-1156, 13:8-16, 51:14-56:12.) During this time period, Dr. Wynn called out to a hospital security guard and told him to have someone at the obstetrics department make arrangements to deliver a baby. (Braden Depo., RE 67-1, PageID# 915, p. 9:18-24.)

With both of her hands handcuffed, Officer Estes asked Dr. Wynn to get into the rear of his vehicle; although Dr. Wynn did not try to physically resist Officer Estes in any way and did not refuse to get in the vehicle, she

got into the squadcar but just did not get in the vehicle immediately or willingly. (Young Depo., RE 65-1, PageID# 890, 891, pp. 21:16-18, 26:8-21; Wynn Depo., RE 82-1, PageID# 1122-1124, 1132, pp. 222:25-224:18, 332:2-16.) Dr. Wynn did not strike Officer Estes or throw a punch, fight back or kick at him, and merely fidgeted as he grabbed her, threw her against the hood of his squad car, and handcuffed her. (Wynn Depo., RE 82-1, PageID# 1115-1121, 1122-1124, 1132, 1141-1144, pp. 212:10-218:1, 222:25-224:18, 332:2-16, 462:13-465:19; Wynn Depo., Ex. 3, RE 82-2, PageID# 1153, 1155-1156, pp. 13:8-16, 51:14-56:12.)

Sergeant Young confirmed that Dr. Wynn was a physician who had been called to Hillside Hospital to deliver a patient's baby, and instructed hospital staff to summon another OB/GYN to perform the delivery because Dr. Wynn was headed to jail. (Young Depo., RE 65-1, PageID# 894, 895, pp. 33:7-20, 35:15-24; Waybright Depo., RE 66-1, PageID# 904-905, pp. 26:9-27:2.) By the time Dr. Wynn was sitting in the back of Officer Estes's police car, Officer Estes (who already had knowledge of Dr. Wynn's occupation, *supra*.) and Sergeant Young were definitely aware that she was a physician and that she was at the hospital in order to deliver her patient's

baby. (Young Depo., RE 65-1, PageID# 894, p. 33:4-24.)

At this time, Dr. Wynn's patient was "complete" for delivery, which meant that Dr. Wynn needed to get to the hospital "emergently," as the patient was ready to deliver at any time, and at the precise time of the arrest, the patient was likely to need a C-section, was at risk for shoulder dystocia, and was in an unstable condition. (Wynn Depo., RE 82-1, PageID# 1096-1099, pp. 145:9-148:21, 486:3-21.)

Dr. Wynn was transported to the sheriff's office and arrived there at 9:31 p.m. (Estes Depo., RE 64-1, PageID# 880-882, pp. 169:19-171:4; Estes Depo., Ex. 16, RE 64-2, PageID# 885, p. 1.)

Officer Estes began preparing a criminal summons against Wynn for speeding, felony evading arrest, resisting arrest, no insurance, registration violation, and driver's license violation. (Estes Depo., RE 64-1, PageID# 867, 872, 873-874, pp. 92:11–14, 114:7–14, 115:3–116:6.) While Officer Estes did file the speeding charge with the magistrate, he did not end up filing the additional charges, because as he was in process, he received a phone call from Chief Dickey instructing Officer Estes to release Dr. Wynn from custody immediately so that she could deliver her patient's baby.

(Estes Depo., RE 64-1, PageID# 862-863, 875-876, pp. 69:1–70:3, 122:24–123:9.) Officer Estes reacted angrily to Chief Dickey's order, and after receiving the call, took his time doing the paperwork in an obvious effort to delay her release. After 30 minutes to an hour at the jail facility, Dr. Wynn was released on her own recognizance. (Wynn Depo., RE 63-1, PageID# 787, 788, p. 236:22–24, 237:14–19; Wynn Depo., Ex. 3, RE 63-2, PageID# 824, p. 26:20–22; Estes Depo., RE 64-1, PageID# 868-870, pp. 100:24-102:11; Dickey Depo., RE 82-4, PageID# 1180-1186, pp. 6:1-25, Ex. 49.) The only charge that was actually completed by Officer Estes—a Criminal Summons for speeding—was canceled, not dismissed, on May 19, 2010, following a May 11, 2010 motion from the District Attorney General. (Estes Depo., RE 64-1, PageID# 862, p. 69:1–25; Dickey Depo., RE 82-4, PageID# 1180-1186, pp. 6:1-25, Ex. 49; Elliot Depo., RE 82-5, PageID# 1192-1196, 1198-1202, 17:16-21:17, Ex. 47.)

As a consequence of their actions on May 5, 2010, Officer Estes was punitively suspended from the police force for one month and placed on administrative leave for an additional 30 days, and Sergeant Young was suspended for seven days. (Dickey Depo., RE 82-4, PageID# 1180-1186,

pp. 6:1-25, Ex. 49.) In punitively disciplining Officer Estes following the May 5, 2010 incident, PPD Chief Dickey determined that: "It seems to be readily apparent that neither Officer Estes nor Sergeant Young used their better judgment when evaluating the circumstances as it relates to the actions of Dr. Wynn versus the immediate need of medical attention for her patient." (Dickey Depo., RE 82-4, PageID# 1180-1186, pp. 6:1-25, Ex. 49.)

SUMMARY OF THE ARGUMENT

The District Court's ruling should be affirmed.

On May 5, 2010, a City employee, Officer Estes, pulled over an OB/GYN physician who was rushing to the hospital to deliver a baby, and then following her drive to the hospital and invitation to arrest her there, unreasonably arrested her, using excessive force in the process. Recognizing the impropriety of arresting a physician for rushing to the hospital to deliver a baby, charges were dropped and the physician was released from jail, and PPD suspended Officer Estes for 30 days, then placed him on administrative leave for 30 days, as well.

Dr. Wynn alleges that Officer Estes's actions constituted an unlawful arrest, due to lack of probable cause, and excessive use of force in contravention of Dr. Wynn's clearly established Fourth Amendment constitutional rights. Officer Estes responds that he is immune from suit on the Fourth Amendment claims pursuant to the doctrine of qualified immunity, under both prongs of the qualified immunity test. The trial court agreed with Dr. Wynn that genuine issues of disputed material fact existed that precluded qualified immunity on her Fourth Amendment claims.

LAW AND ARGUMENT

I.
INTRODUCTION

A. 42 U.S.C. § 1983.

Dr. Wynn's 42 U.S.C. § 1983 claims allege that Officer Estes violated her Fourth Amendment rights. To state a general claim under § 1983, a plaintiff must set forth "facts that, when construed favorably, establish (1) the deprivation of a right secured by the Constitution or laws of the United States (2) caused by a person acting under the color of state law." *Sigley v. City of Parma Heights*, 437 F.3d 527, 533 (6th Cir. 2006) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988)).

B. Qualified Immunity Framework.

1. Underlying Constitutional Violation.

As the Court is no doubt aware, courts assessing a claim for qualified immunity engage in a two-step analysis: First, taking into account the totality of the circumstances, courts determine if "the facts alleged show the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

2. Clearly Established Law.

Second, the constitutional right must be clearly established.[4] For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "It is important to emphasize that this inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (quoting *Saucier*, 533 U.S. at 201). "The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (citing *Saucier*, 533 U.S. at 201-02). Thus, "[t]he relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202 (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)).

[4] This two prong analysis can be conducted in reverse order, as well, such that the "clearly established" inquiry occurs first. *Pearson v. Callahan*, 555 U.S. 223 (2009).

Courts look first to the decisions of the Supreme Court, and then to the case law of the Sixth Circuit in determining whether the right claimed was clearly established when the action complained of occurred." *Gragg v. Ky. Cabinet for Workforce Dev.*, 289 F.3d 958, 964 (6th Cir. 2002) (citing *Black v. Parke*, 4 F.3d 442, 445 (6th Cir. 1993)). "[T]he case law must 'dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*.'" *Id.* (quoting *Saylor v. Bd. of Educ. of Harlan Cnty.*, 118 F.3d 507, 515 (6th Cir. 1997)). Plaintiffs bear the burden of showing the claimed right was clearly established. *Everson v. Leis*, 556 F.3d 484, 494 (6th Cir. 2009).

II.
STANDARD OF REVIEW

The Sixth Circuit reviews a district court's grant or denial of summary judgment on the basis of qualified immunity *de novo. Simmonds v. Genesee Cnty.*, 682 F.3d 438, 444 (6th Cir. 2012); *Walker v. Davis*, 649 F.3d 502, 503 (6th Cir. 2011). Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed R. Civ. P. 56(a). In considering a motion for summary judgment, the Court construes all evidence and reasonable inferences to be drawn therefrom in favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *see, e.g.*, *Tysinger v. Police Dep't*, 463 F.3d 569, 572 (6th Cir. 2006). A genuine dispute concerns evidence "upon which a reasonable jury could return a verdict in favor of the non-moving party." *Id.* A factual dispute is material only if it could affect the outcome of the suit under the governing law. *Id.*

III.
OFFICER ESTES IS NOT ENTITLED TO QUALIFIED IMMUNITY FOR THE VIOLATION OF DR. WYNN'S CLEARLY ESTABLISHED RIGHT TO BE FREE FROM UNREASONABLE ARREST

A. Disputed Material Facts Exist As To Whether Officer Estes Arrested Dr. Wynn Based On Probable Cause That She Was Evading Arrest.

When viewed in the light most favorable to Dr. Wynn, the facts of this case demonstrate that Officer Estes arrested Dr. Wynn without probable cause. "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1996). The Fourth Amendment prohibits unreasonable arrests, but a "warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). As in other Fourth Amendment situations, the reasonableness of Officer Estes's actions in this case must be judged from the perspective of a reasonable state actor under the circumstances, rather than with the 20/20 vision of hindsight. *See, e.g., Graham v. Connor*, 490 U.S. 386, 396 (1989) (excessive force).

The first gravamina of Officer Estes's argument are, first, that since he had probable cause to pull over Dr. Wynn, it is not possible that he acted unreasonably in arresting her. (App. Br., pp. 27-43.) Second, that Dr. Wynn was arrested "primarily" for felony evading arrest, in violation of Tenn. Code Ann. § 39-16-603(b)(1), and that Officer Estes had probable cause to believe that Dr. Wynn was actually "eluding" him, rather than simply trying to get to the hospital to treat her patient.[5] (App. Br., pp. 27-43.) This argument misses the trial court's threshold—and correct—conclusion that factual disputes exist as to whether Dr. Wynn was subsequently arrested for probable cause. (Memo. Op., RE 170, PageID# 1836, p. 15.) Officer Estes's position also ignores the trial court's summary of the applicable law: namely, that

> The determination of whether probable cause exists is based upon the "totality of the circumstances," [*Illinois v. Gates*, 462 U.S. 213, 232 (1983)], with the critical question being "whether at the time of the arrest, 'the facts and circumstances within the [arresting officer's] knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent person to conclude that an individual had either committed or was committing an offense.'" *United States v. Torres-Ramos*,

[5] Officer Estes also attempts to advance an argument that "fleeing a traffic stop" violates the Tennessee resisting arrest statute, Tenn. Code Ann. § 39-16-602. (App. Br., p. 36.) This argument was not presented in the trial court. (Memo. in Supp. Mot. Sum. Judg., RE 57, PageID# 651-690, pp. 1-40.)

> 536 F.3d 542, 555 (6th Cir. 2008) (quoting, *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

(Memo. Op., RE 170, PageID# 1836, p. 15.)

Here, the trial court identified at least four disputed material facts concerning Officer Estes's knowledge that need to be considered in determining whether he had an objectively reasonable basis to conclude that Dr. Wynn was evading arrest: (a) Dr. Wynn's statement that she made it unmistakably clear why she was going to the hospital; (b) the understanding that Officer Estes was escorting her to the hospital; (c) she was wearing scrubs and had her lab coat with her; and (d) she was not physically arrested until arriving at the hospital. (Wynn. Depo., 82-1, RE 82-1, PageID# 1109-1111, 1133-1137, 1137-1140, pp. 181:22-185:7, 440:4-444:7, 444:16-447:9; Wynn Depo, Ex. 3, RE 82-2, PageID# 1151, 1153-1154, pp. 7:17-10:24, 48:6-49:14; Memo. Op., RE 170, PageID# 1836, p. 15.) In addition, it is undisputed that Dr. Wynn invited him to follow her to the hospital and to arrest her there, which is an act that is completely inconsistent with the notion that she was trying to "elude any law enforcement officer." (App. Br., p. 35; Wynn Depo., RE 63-1, PageID# 758-59, pp. 184:22-185:2; Estes Depo., RE 64-1, PageID# 841-842, pp. 37:15-38:4; Wynn Depo., RE 82-1,

PageID# 1109-1111, 1122-1124, 1132, pp. 183:21-185:2, 222:25-224:18; 332:2-16; Wynn Depo., Ex. 3, RE 82-2, PageID# 1151, p. 9:22-25.) Likewise, Dr. Wynn's testimony, that Officer Estes stated, "you think you can get away with anything just because you're a doctor?" during the arrest at the hospital buttresses the fact that Officer knew that he was arresting a physician who was going to the hospital for a reason. (Wynn Depo., RE 82-1, PageID# 1146-1148, pp. 478:1-480:11.) Further, despite Officer Estes's uncompromising insistence that Dr. Wynn's actions can only be reasonably characterized as "fleeing," when Officer Estes actually completed the arrest in the doctors' parking lot by securing Dr. Wynn in his police car, he was aware that Dr. Wynn was a physician, that she had a patient in labor and that Dr. Wynn was rushing to the hospital to attend to her patient. (Young Depo., RE 65-1, PageID# 894, p. 33:4-24.) That is, an objectively reasonable officer would know, as Officer Estes knew, that Dr. Wynn was not "fleeing" or "eluding" anyone—she was hurrying to the hospital to deliver her patient's baby. Indeed, it is beyond doubt that by the time Dr. Wynn was sitting in the back of Officer Estes's police car, Officer Estes was definitely aware that she was a physician and that she was at the hospital in

order to deliver her patient's baby. (Young Depo., RE 65-1, PageID# 894, p. 33:4-24; Wynn Depo., RE 82-1, PageID# 1112, 1124, pp. 186:1-25, 224:10-18.) These facts also need to be considered by the trier of fact in determining whether Officer Estes acted reasonably, are exactly the kinds of facts that preclude summary judgment, and the denial of qualified immunity was, therefore, proper.

The District Court's decision should be affirmed.

B. Dr. Wynn's Constitutional Rights Were Clearly Established.

Officer Estes complains that the trial court erred by failing to engage in a "particularized" Fourth Amendment inquiry, and argues that the lack of a timely case with similar facts leads to the inevitable conclusion that any deprivation of Dr. Wynn's Fourth Amendment rights is not actionable because such rights were not clearly established. (App. Br., p. 38.)

But Officer Estes's zeal to disallow Dr. Wynn's claim by looking to Tennessee state statutes, *see, e.g.*, Tenn. Code Ann. §§ 55-8-108, 55-4-202, opinions on motor vehicles, *see State v. McCrary*, 45 S.W.3d 36, 42 (Tenn. Crim. App. 2000), and a 2012 opinion form the Eastern District of Tennessee, *Wright v. City of Chattanooga*, 2012 U.S. Dist. LEXIS 1479

(E.D. Tenn. Jan. 5, 2012)[6], ignore the principles that:

> [T]o be "clearly established" there need not be a prior case deciding that "the very action in question has previously been held unlawful[.]" In *McCloud*, we noted that if courts required prior precedent on the specific facts at issue in the pending case, "qualified immunity would be converted into a nearly absolute barrier to recovering damages against an individual government actor …" "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question[.]"

Kennedy v. City of Cincinnati, 595 F.3d 327 (6th Cir. 2010), *cert. denied Zucker v. Kennedy*, 2010 U.S. LEXIS 6380 (U.S. Oct. 4, 2010) (internal citations omitted). "[O]fficials 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). Indeed, in the absence of direct Sixth Circuit case law or similar cases from other courts, a constitutional right can nonetheless be clearly established: "some personal liberties are so fundamental to human dignity as to need no specific explication in our Constitution in order to ensure their protection against government

[6] Officer Estes's reliance on *Wright*, as elsewhere, is misplaced, because that opinion is from 2012, and thus is not appropriate for examination in connection with clearly established law, as of May 5, 2010, because it is "existing," not future, case law that offers guidance to the analysis. *See Hope v. Pelzer,* 536 U.S. 730, 745 (2002).

invasion." *Brannum v. Overton County School Board*, 516 F.3d 489, 497 (6th Cir. 2008).

Here, the District Court held that "'[t]he federal right to be subject only to arrest upon probable cause [i]s clearly established.'" (Memo. Op., RE 170, PageID# 1835, p. 14.) There is nothing in this general statement of the law that renders it inherently incapable of giving fair and clear warning to state actors like Officer Estes. In addition, Officer Estes's efforts to formulate a bright line rule that Dr. Wynn's rights were not clearly established must fail, because his mechanical approach fails to account for all of the relevant circumstances. In particular, Officer Estes fails to take into consideration the needs of Dr. Wynn's patient and Dr. Wynn's Hippocratic obligations to her patient. Quite simply, arresting a physician motorist for rushing to the hospital to provide medical attention to a patient in active labor demonstrates a lack of probable cause and is precisely the type of conduct that is so egregious as to clearly violate the Fourth Amendment on its face, even in the absence of case law.

Therefore, Officer Estes is not entitled to qualified immunity, and the District Court's decision should be affirmed.

IV.
OFFICER ESTES IS NOT ENTITLED TO QUALIFIED IMMUNITY FOR THE VIOLATION OF DR. WYNN'S CLEARLY ESTABLISHED RIGHT TO BE FREE FROM THE USE OF EXCESSIVE FORCE

A. Disputed Material Facts Exist As To Whether Officer Estes Applied Excessive Force When He Arrested Dr. Wynn.

"Claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness standard.'" *Jones v. City of Cincinnati*, 521 F.3d 555, (6th Cir. 2008) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)); *Sample v. Bailey*, 409 F.3d 689, 697 (6th Cir. 2005). That reasonableness standard, however, must be considered in the context of a police officer, who has a greater degree of training to deal with situations involving the use of lethal force than the average reasonable citizen would possess. The amount of force used by a police officer must be commensurate with a *reasonable* officer's perception of a serious threat of physical harm to the officer or others in the area. *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985) (deadly force not reasonable when suspect is unarmed, non-violent, non-dangerous and non-confrontational); *see Boyd v. Baeppler*, 215 F.3d 594, 604 (6th Cir.

2000) (use of deadly force) (emphasis added); *Rhodes v. McDannel*, 945 F.2d 117, 120 (6th Cir. 1991). In applying the reasonableness calculus, the Court should consider three factors: "(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight." *Sigley v. City of Parma Heights*, 437 F.3d 527, 534 (6th Cir. 2006) (quoting *Dunigan v. Noble*, 390 F.3d 486, 492 (6th Cir. 2004)); *Graham*, 490 U.S. at 395; *Wise v. Bravo*, 666 F.2d 1328, 1333-35 (10th Cir. 1981) (additional relevant factors include "the amount of force used in relationship to the need presented, the extent of the injury inflicted and the motives of the state officer"); *see Ingram v. City of Columbus*, 185 F.3d 579, 597 (6th Cir. 1999) (use of force by throwing a suspect on a couch and striking her once is actionable); *Holmes v. City of Massillon*, 78 F.3d 1041, 1048 (6th Cir. 1996) (use of force by wrenching a suspect's finger is actionable); *Blosser v. Gilbert*, 2009 U.S. Dist. LEXIS 89647, at *2, *22-*23 (E.D. Mich. Aug. 21, 2009) (police officers not entitled to qualified immunity when they dragged a suspect through his vehicle window despite knowing that his legs were caught under the steering

wheel, injured his arm, and then "forcefully twisted" his injured arm behind his back and handcuffed him); *Massey v. Hess*, 2007 U.S. Dist. LEXIS 68786, at *10 (E.D. Tenn. Sept. 17, 2007) (Sixth Circuit "does not require that excessive force claims allege excessive marks or extensive physical damage" or, indeed, any injury at all); *see also Harley v. Suffolk County Police Department*, 2012 U.S. Dist. LEXIS 25708, at *17 (E.D. N.Y. Feb 28, 2012) (police officers not entitled to qualified immunity when they pulled fleeing suspect through window following high speed chase).

Here, the facts, evaluated in the light most favorable to Dr. Wynn, demonstrate that Officer Estes unreasonably used excessive force in his arrest of Dr. Wynn, a much smaller, unarmed, non-violent, non-threatening medical doctor with no history of dangerous behavior. First, as the District Court recognized, Dr. Wynn disputes whether she was "evading" anything. Indeed, the simple fact that she invited Officer Estes to arrest her at the hospital suggests that she was not attempting to "elude any law enforcement officer," within the meaning of Tenn. Code Ann. § 39-16-603(b)(1). (Wynn Depo., RE 63-1, PageID# 758-59, pp. 184:22-185:2; Estes Depo., RE 64-1, PageID# 841-842, pp. 37:15-38:4; Wynn Depo., RE 82-1, PageID# 1109-

1111, 1122-1124, 1132, pp. 183:21-185:2, 222:25-224:18; 332:2-16; Wynn Depo., Ex. 3, RE 82-2, PageID# 1151, p. 9:22-25.) Similarly, if Officer Estes arrested Dr. Wynn for speeding, the crime at issue is a minor misdemeanor. (Estes Depo., RE 64-1, PageID# 836, pp. 25:2-19.)

Second, Dr. Wynn is a doctor, not a criminal or even a bad actor, and was not and is not a threat to the safety of Officer Estes or others. As the trial court recognized, a jury may be inclined to believe that Dr. Wynn did not pose an immediate threat of harm to Officer Estes, because of his physical advantage over her: Dr. Wynn—he outweighs her by 100 pounds, is a gifted athlete and can bench press "about 400 pounds." (Memo Ord., RE 170, PageID# 1837, p. 16; Estes Depo., RE 53-6, PageID# 600, p. 48:13-20.) Likewise, even Officer Estes inherently confirmed that it would be objectively unreasonable to consider Dr. Wynn a particular threat since he testified that she was not a threat beyond the threat posed by every other citizen.

Third, although Officer Estes consistently characterizes Dr. Wynn's actions as "resisting," she did not strike him or throw a punch, fight back or kick at him, and merely fidgeted as he grabbed her, threw her against the

hood of his squad car, and handcuffed her. (Young Depo., RE 65-1, PageID# 890, 891, pp. 21:16-18, 26:8-21; Wynn Depo., RE 82-1, PageID# 1115-1121, 1122-1124, 1132, 1141-1144, pp. 212:10-218:1, 222:25-224:18, 332:2-16, 462:13-465:19; Wynn Depo., Ex. 3, RE 82-2, PageID# 1153, 1155-1156, pp. 13:8-16, 51:14-56:12.) Indeed, characterizing her conduct as "resisting arrest" is a factual impossibility because Dr. Wynn, herself, instructed Officer Estes that if he wanted to arrest her, he could do so at the hospital, and at least one district court has held that a criminal suspect does not "actively resist[]" arrest when a police officer twists the suspect's arm behind his back and the suspect "pull[s] his arm forward and away from" the officer. *Estate of Gilliam v. City of Prattville*, 667 F. Supp. 2d 1276, 1298 (N.D. Al. 2009); (Wynn Depo., RE 82-1, PageID# 1115-1121, 1122-1124, 1132, 1141-1144, pp. 212:10-218:1, 222:25-224:18, 332:2-16, 462:13-465:19; Wynn Depo., Ex. 3, RE 82-2, PageID# 1153, 1155-1156, pp. 13:8-16, 51:14-56:12.) This is exactly the "resistance" cited by Officer Estes, and is legally insufficient to demonstrate "resistance" that would justify the amount of force used against Dr. Wynn.

Under these circumstances, Officer Estes used excessive force when he threw Dr. Wynn against the hood of his car and thrust his crotch into her backside, causing injuries to her back, arm and thighs. (Estes Depo., RE 64-1, PageID# 851-857, 858, 859, pp. 53:1-59:19, 60:4-8, 61:14-16; Wynn Depo., RE 82-1, PageID# 1115-1121, 1122-1124, 1141-1144, pp. 212:10-218:1, 222:25-224:18, 462:13-465:19; Wynn Depo., Ex. 3, RE 82-2, PageID# 1153, 1155-1156, 13:8-16, 51:14-56:12.) At a minimum, the question of whether the amount of force employed by Officer Estes was commensurate with what the situation called for should be resolved by a jury.

Accordingly, the District Court's decision should be affirmed.

B. Dr. Wynn's Constitutional Rights Were Clearly Established.

Dr. Wynn's right to be free from excessive force was clearly established on May 5, 2010, and none of the cases cited by Officer Estes indicate otherwise.

Officer Estes's reliance on *McColman v. St. Clair County*, 2012 U.S. App. LEXIS 7499 (6th Cir. Apr. 12, 2012), for the supposition that Dr. Wynn's right to be free from excessive force was unclear is misplaced.

(App. Br., pp. 52-53.) That case is factually distinguishable, because the plaintiff in that case—unlike Dr. Wynn—was arrested for drunk driving and—also unlike Dr. Wynn—was known to have previously set a fire in her husband's home and had been driving while intoxicated. *McColman*, 2012 U.S. App. LEXIS 7499.

Likewise, Officer Estes misapplies the holding in *Dunn v. Matatall*, 549 F.3d 348, 354-55 (6th Cir. 2008). (App. Br., p. 52.) In that case, the officers were entitled to qualified immunity because they had a reason to fear that the suspect might act violently after the suspect fled when the officers attempted to pull him over—whereas Dr. Wynn did pull over, and then invited Officer Estes to follow her to the hospital. 549 F.3d at 354-55. Here, Dr. Wynn did not constitute a threat and no reasonable police officer would fear that she, a medical doctor, would act violently.

Officer Estes's reliance on *Bozung v. Rawson* is similarly misplaced. 439 F.App'x 513 (6th Cir 2011); (App. Br., pp. 53-54.) In *Bozung*, the officer was entitled to qualified immunity when—unlike the instant case—the plaintiff had been drinking, fled the scene on foot without explanation, and the police were aware of a warrant for the plaintiff's arrest. *Bozung*, 439

F.App'x at 515, 519-20.

Wright[7] is also unavailing, because it is factually distinguishable: in *Wright*, the only physical contact the officer had with the plaintiff was that he grabbed the plaintiff's arm, whereas here, Officer Estes threw Dr. Wynn against the hood of his car and thrust his crotch into her backside, causing injuries to her back, arm and thighs. 2012 U.S. Dist. LEXIS 1479 at *23-24; (Estes Depo., RE 64-1, PageID# 851-857, 858, 859, pp. 53:1-59:19, 60:4-8, 61:14-16; Wynn Depo., RE 82-1, PageID# 1115-1121, 1122-1124, 1141-1144, pp. 212:10-218:1, 222:25-224:18, 462:13-465:19; Wynn Depo., Ex. 3, RE 82-2, PageID# 1153, 1155-1156, 13:8-16, 51:14-56:12.)

Instead, this Court should rule, like the trial court before it, that "the right to be free from physical force when one is not resisting" is a right that was clearly established under Sixth Circuit law before May 5, 2010. (Memo. Op., RE 170, PageID# 1837, p. 16); *see Hollis*, 2011 U.S. Dist. LEXIS 9326 at *24-*25 (citing *Wysong v. City of Heath*, 260 Fed. Appx. 848, 856 (6th Cir. 2008); *Baker v. City of Hamilton*, 471 F.3d 601, 608 (6th Cir. 2006)).

[7] *See* n. 6, *supra*.

Therefore, Officer Estes is not entitled to qualified immunity, and the District Court's decision should be affirmed.

CONCLUSION

For the foregoing reasons, the District Court's decision should be affirmed, and Dr. Wynn's Fourth Amendment claims against Officer Estes should be returned to the trial court for resolution by a jury.

Respectfully submitted,

ERNEST B. WILLIAMS IV, PLLC

/s/Michael B. Schwegler
MICHAEL B. SCHWEGLER, BPR #22563
P.O. Box 159264
Nashville, Tennessee 37215
Telephone: (615) 372-0993
Facsimile: 615) 371-1572
Email:mikeschwegler@ewivlaw.com

THE ROBERTS LAW GROUP, PLLC

/s/John W. Roberts
JOHN W. ROBERTS, BPR # 24679
1720 West End Avenue
Suite 402
Nashville, Tennessee 37203
Telephone: (615) 242-1001
Email:jroberts@johnwrobertslaw.com

Attorneys for Terry Wynn, M.D.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Fed. R. App. P. 32(a)(7)(C)(1) and 6th Cir. R. 32(a), I hereby certify that:

I. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,216 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

II. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately-spaced typeface using Microsoft Word 2010 in Times New Roman at 14 point font.

Respectfully submitted,

ERNEST B. WILLIAMS IV, PLLC

/s/Michael B. Schwegler
MICHAEL B. SCHWEGLER, BPR #22563
P.O. Box 159264
Nashville, Tennessee 37215
Telephone: (615) 372-0993
Facsimile: 615) 371-1572
Email: mikeschwegler@ewivlaw.com

THE ROBERTS LAW GROUP, PLLC

/s/John W. Roberts
JOHN W. ROBERTS, BPR # 24679
1720 West End Avenue
Suite 402
Nashville, Tennessee 37203
Telephone: (615) 242-1001
Email:jroberts@johnwrobertslaw.com

Attorneys for Terry Wynn, M.D.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, via the United States Court of Appeals for the Sixth Circuit's Electronic Case Filing/Case Management system to all parties indicated on the electronic filing receipt, as set forth below:

Teresa Reall Ricks
Farrar & Bates, LLP
211 Seventh Avenue
Suite 500
Nashville, Tennessee 37219

John W. Roberts
1720 West End Avenue
Suite 402
Nashville, Tennessee 37203

On this, the 22nd day of May, 2013.

/s/Michael B. Schwegler
MICHAEL B. SCHWEGLER

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to 6th Cir. R. 30(b) and 30(f), Plaintiff-Appellee designates the following entries from the docket of the District Court below as relevant to this appeal:

Record Entry No.	PageID#	Description of Document
1	1	Complaint
53-6	580-615	Estes Deposition Excerpts
57	651-691	Memo. in Supp. Estes MSJ
63-1	732-817	Wynn Deposition Excerpts
63-2	818-832	Wynn Interview Excerpts
64-1	835-884	Estes Deposition Excerpts
64-2	885-886	Estes Deposition Exhibit 16 Call Log
65-1	889-899	Young Deposition Exhibits
66-1	902-909	Waybright Deposition Excerpts
67-1	912-920	Braden Deposition Excerpts
80	1046-1067	Response to Estes MSJ
82	1075-1089	Response to Estes SUMF
82-1	1090-1149	Wynn Deposition Excerpts
82-2	1150-1157	Wynn Interview Excerpts
82-4	1161-1186	Dickey Deposition Excerpts With Exhibit
82-5	1187-1202	Elliot Deposition Excerpts With Exhibits
84	1216-1229	Response to City SUMF
85	1275-1298	Statement of Additional UMF
88	1275-1298	Response to Estes SUMF
170	1822-1848	Memorandum Opinion
171	1849-1850	Order

CASE NO. 13-5199

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TERRY WYNN

Plaintiff — Appellee

v.

CHAD ESTES

Defendant — Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

REPLY BRIEF OF APPELLANT

Teresa Reall Ricks
FARRAR & BATES, L.L.P.
211 Seventh Avenue, N., Suite 500
Nashville, TN 37219
(615) 254-3060
Attorney for Appellant Chad Estes

ORAL ARGUMENT REQUESTED

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ARGUMENT

Though the parties are agreed in their request for oral argument, the Plaintiff's Statement in Support of Oral Argument is a perfect microcosm of her arguments in this case and reflects the reasons why her case is poorly conceived. She states, "This appeal presents novel constitutional questions which affect how physicians must balance the universal duty to follow the rules of the road with ethical, professional and contractual obligations to treat expectant mothers as quickly, or at least as timely, as possible." (Wynn Br. at xi.)

There is, however, no such "balance" to strike in this case. As explained in Appellant's principal brief, because Wynn was not driving an "authorized emergency vehicle," she was not exempt from the rules of the road in any respect and was therefore bound to follow them regardless of reasons, rationalizations, or extenuating circumstances. She may have felt entitled to special dispensation, but there is no *legal* basis for this sense of entitlement.

And the reference in this same Statement in Support of Oral Argument to previous litigation involving Defendant also reveals the degree to which Plaintiff will cite legally irrelevant factors to impugn Defendant. This case no longer involves a municipality—the City of Pulaski was granted summary judgment—such that "custom, policy, or practice" would be relevant, as Plaintiff surely

knows, and this reference to previous litigation (much like the entire instant action) is purely for specious, inflammatory effect.

Defendant-Appellant Estes would further reply to specific points in Plaintiff-Appellee Wynn's Response Brief as follows.

I. Jurisdiction

Plaintiff Wynn asserts that this Court lacks jurisdiction, alleging that Defendant's interlocutory appeal is improperly based on factual disputes only. (Wynn Br. at 1–2.) Plaintiff's characterization of the issues raised in this appeal is, however, in incorrect. To quote from Chappell v. City of Cleveland, 585 F.3d 901 (6th Cir. 2009):

> [I]t is well-established that an order denying qualified immunity to a public official is immediately appealable pursuant to the "collateral order" doctrine. This exception is narrow, however. Appellate jurisdiction exists only to the extent that a summary judgment order denies qualified immunity based on a pure issue of law.
>
> Plaintiff Chappell correctly points out that the district court's denial of qualified immunity is not based on a pure question of law, but on two clearly identified factual issues. Yet, the district court's characterization of the basis for its ruling does not necessarily dictate the availability of appellate review. If, apart from impermissible arguments regarding disputes of fact, defendants raise purely legal issues bearing on their entitlement to qualified immunity, then there are issues properly subject to appellate review. Hence, the district court's determination that there is a factual dispute does not necessarily preclude appellate review where, as defendants here contend, the ruling also hinges on legal errors as to whether the factual disputes (a) are genuine and (b) concern material facts.

Id.)at 905–06 (citations omitted). Defendant Estes would respectfully submit that this Court does have jurisdiction, both because Defendant has raised substantial legal issues entirely distinct from the facts and also because Defendant has raised legal questions addressing the issue of whether any factual disputes identified by the district court are (a) genuine or (b) material.

II. Reply to Plaintiff's statement of facts

Plaintiff alleges that Defendant has failed to adequately adopt the version of the facts most favorable to the Plaintiff. (Wynn Br. at 6 n.2.) This assertion is undermined, however, by even a cursory comparison of the factual statements contained in the party's respective appellate briefs, which are virtually identical.

Plaintiff also criticizes Defendant for not sufficiently deferring to the trial court's recitation of facts. (Wynn Br. at 6 n.2.) As Chappell v. City Of Cleveland) makes clear, however, deferring to a trial court's facts does not extend to deferring to a trial court's inferences which are not supported by the record. It also does not extend to deferring to a trial court's denial of summary judgment based on a determination of the existence of "factual disputes" in cases where there exist independent legal reasons for granting summary judgment.

Specifically, the trial court in Chappell had adopted various "plausible" interpretative assumptions put forward by the plaintiff which, it stated, were consistent with the evidence. The appellate court reversed, finding that only those

inferences actually based on the factual record itself—and not simply based on the plaintiff's "spin" of the factual record not otherwise contradicted by the record—were appropriately drawn by a trial court ruling on a summary judgment motion. See Chappell), 585 F.3d at 910–12.

Similarly, in the instant action, the version of events put forward by Estes in his principal appellate brief was based on Wynn's testimony and, where not refuted by Wynn, various other witnesses' testimony including the Defendant. But where Wynn had no recollection at her deposition but persists in asserting conclusions which contradict the other witnesses' sworn statements, such conclusions are not properly adopted by a court, even at the summary judgment stage. And as in Chappell,) any such conclusions adopted by the trial court should be rejected by this Court on appeal.

In her brief, Plaintiff Wynn states that Defendant has misleadingly represented that she made a statement during the traffic stop which she did not. (Wynn Br. at 9 n.3.) Defendant resents the allegation of misrepresenting the record, as it seems Plaintiff's counsel is intentionally misreading that line of the brief and taking it out of context. To be clear, Defendant agrees that Wynn's remark, "What else do you deliver, pizza?" was not made at the traffic stop but rather later at her deposition.

This statement was cited by Defendant in his principal brief, however, as evidence of Wynn's myopic perspective regarding the meaning of her words. To her—a doctor who delivers babies in a "delivery" room as a matter of course, in a hospital where only doctors wear scrubs—her words and appearance had unequivocal meaning, as evidenced by her jesting comment made to defense counsel during her deposition, "What else do you deliver, pizza?"—the same way that she testified that someone who did not understand that using the word "delivery" alone by itself necessarily implies that what is being delivered is a baby would have to be naïve or stupid. (Estes Br. at 8 (citing Wynn Dep., RE 82-1, PageID# 1135, p. 442:13–14).) But of course, the word "delivery" used by itself does not always imply the delivery of a baby for people outside the medical profession, especially in the context of an out-of-state speeder acting in an agitated manner during a traffic stop at 9:00 at night.

Defendant does not contest that Plaintiff has consistently throughout this litigation believed that Officer Estes should have understood from her statements at the traffic stop that she was a doctor on her way to the hospital to perform the delivery of a baby. (Wynn Br. at 9.) This belief of Wynn's, however, is undermined by Wynn's own deposition testimony regarding the actual words she stated and by the substantial gap between what she actually said and what she thinks Estes should have guessed or understood.

She expected him to notice that she what she was wearing, scrubs, and infer from this and the words "delivery" and "hospital" that she was a doctor without her ever saying so (Estes Br. at 8 (citing Wynn Dep., RE 82-1, PageID# 1136, p. 443:3–9), and she cannot even say if she ever used the words "baby" or "emergency." (Estes Br. at 6–8 (citing Wynn Dep., RE 63-1, PageID# 758, 761–62, pp. 184:2–20, 187:18–188:19).) In short, Wynn places the blame on Estes for her own failure to communicate clearly, and even that is beside the point, because even if she said all those things, propriety aside, she had no legal right to leave the traffic stop, and no constitutional provision was violated by arresting her when she did so.

It is not "unclear," as Wynn states in her brief, "what Officer Estes said next," (Wynn Br. at 10), and this statement in Plaintiff's brief provides an example of Plaintiff's attempts to label something a "factual dispute" when it is actually uncontradicted evidence which undermines her case. In fact, Officer Estes testified that he specifically told Wynn "that she wasn't free to go and . . . told her that she would be arrested if she did pull off." (Estes Br. at 9 (citing Estes Dep., RE 64-1, PageID# 841-42, pp. 37:15–38:4).) And Wynn *does not contest this statement*, explicitly stating at her deposition, "I don't remember what he said." (Estes Dep. at 9 (citing Wynn Dep., RE 63-1, PageID# 758, p. 184:22).) Wynn's lack of memory, however, does not create a "factual dispute." See Burdine v. Sandusky

Cnty., Ohio, Case No. 12-3672, 2013 WL 1606906 (6th Cir. Apr. 16, 2013) (slip op.) (plaintiff cannot survive summary judgment by attempting to create a "factual dispute" where, according to the evidence, there is none).

Defendant does not contest, for the purposes of this appeal, that in response to Wynn's invitation to the officer that he arrest her at the hospital, he stated, "Okay, I will." But it is actually unclear what the officer meant by these three words, and even allowing them the interpretation the Plaintiff puts forward, Wynn reacted at the hospital in a contradictory manner. When Officer Estes approached her car door at the hospital and immediately advised her that she was under arrest, she "jump[ed] out of her car and, without noticing or acknowledging Officer Estes, . . . 'rush[ed]' in the opposite direction." (Wynn Br. at 11–12.) It is worth noting that Plaintiff has not adduced any evidence of an intent by Estes to trick or deceive her into thinking she could leave, nor does she make any such allegation; the evidence only supports the conclusion that there was a miscommunication, at which point the question turns to whether Estes' actions were objectively unreasonable such that every other reasonable officer would understand that what happened was illegal. The unrefuted expert testimony submitted in this case establishes that they were not.

Defendant would point out that Wynn has made conflicting statements about when she heard Estes say the line, "You think you can get away with anything just

because you're a doctor?" Wynn first stated that Estes made this remark at the sheriff's department after being informed that the police chief had ordered charges be dropped against Wynn and that she be immediately released. Wynn changed this later, saying Estes said it to her upon arresting her at the hospital. (Compare Estes Br. at 17 (citing Wynn Dep. Ex. 3, RE 63-2, PageID# 823, 825, pp. 24:9–11, 29:8–13 (recorded May 2010 interview with investigator later affirmed under oath)) with Wynn Br. at 12–13 (citing Wynn Dep., RE 82-1, PageID# 1146-1148, pp. 478:1-480:11 (deposition taken December 19, 2011)).)

Plaintiff's counsel has consistently (and incorrectly) used the suggestive word "crotch" as inflammatory innuendo (Wynn Br. at 13, 37) when describing the physical process of the officer holding Wynn against the car while he placed her in handcuffs, improperly implying there was some type of sexual misconduct, even though this is *directly contradicted* by Wynn's own sworn testimony. In fact, Wynn testified that when the officer forced her to lean over the car while he placed her in handcuffs, it triggered understandably traumatic memories of having been sexually assaulted when she was a teenager. Nonetheless, she stated that there was nothing sexual about Officer Estes' actions and described the actual contact as "leg to leg." (Estes Reply in Supp. of Mot. Summ. J., RE 95, PageID# 1443–1448, pp. 6–11 (citing Wynn Dep. Ex. 3, RE 63-2, PageID# 821, 831, pp. 13:7–23, 53:10–54:14; Wynn Dep., RE 82-1, PageID# 1141–1144, pp. 462:13–463:1, 463:12–

464:6, 465:1–25; Wynn Dep., RE 97-1, PageID # 1466–1468, pp. 466:1–468:4).) In response to Plaintiff's counsel's continued use of inflammatory innuendo on this matter, the trial court granted a motion in limine specifically prohibiting the Plaintiff from "characterizing [what occurred] as a sexual assault or using any innuendo to that effect." (Order, RE 172, PageID# 1852, p. 2, ¶ 8.)

III. Reply to Defendant's argument regarding probable cause

In her brief, Plaintiff Wynn states:

> [T]he trial court identified at least four disputed material facts concerning Officer Estes's knowledge that need to be considered in determining whether he had an objectively reasonable basis to conclude that Dr. Wynn was evading arrest: (a) Dr. Wynn's statement that she made it unmistakably clear why she was going to the hospital; (b) the understanding that Officer Estes was escorting her to the hospital; (c) she was wearing scrubs and had her lab coat with her; and (d) she was not physically arrested until arriving at the hospital.

(Wynn Br. at 25.) However, as noted above, a trial court's finding that a fact is "disputed" which is not properly grounded in the record is not accorded deference on appeal. As explained above, Wynn did not state she was a "doctor" or that the delivery was for a "baby," and thus her statements to the officer were excited and ambiguous. Estes does not contest that Dr. Wynn had the understanding that Estes was escorting her to the hospital, or that she had scrubs on and may have had a lab coat in her lap under her purse, or that she was not physically arrested until she arrived at the hospital. What Defendant contests, properly so, is the legal significance of these facts, for Wynn has been able to identify no authority for the

proposition that she had a legal right to leave the traffic stop without authorization from the officer. Further, she herself admitted in her brief that Officer Estes told her she was under arrest at the hospital before she even got out of her car and that she nonetheless ignored him and "rushed" in the opposite direction.

Throughout her brief, Wynn creates a false dichotomy, arguing that there was no way that she was "'fleeing' or 'eluding' anyone—[because] she was hurrying to the hospital to deliver her patient's baby." (Wynn Br. at 26.) In fact, Wynn may very well have been doing both, and more to the point, whether she was doing the latter is legally irrelevant to whether Estes reasonably believed her to be doing the former.

Wynn speaks dismissively of "Officer Estes's zeal to disallow Dr. Wynn's claim by looking to Tennessee state statutes" (Wynn Br. at 27)—precisely the same way Wynn dismissively treated Officer Estes when he attempted to enforce said statutes on the evening of May 5, 2010—as if they were no more relevant to the instant action than building code restrictions on another planet. But in fact they are laws, binding on Wynn at the time of the incident and to which she had no legal defense. And as noted in Defendant's principal brief, under the "Atwater rule," if there was *any* valid reason to arrest the Plaintiff, there can be *no* violation of the Fourth Amendment. (Estes Br. at 33.)

Wynn argues that Defendant's reliance on Wright v. City of Chattanooga, Case No. 1:10-CV-291, 2012 WL 28744 (E.D. Tenn. Jan. 5, 2012) (unpublished), is misplaced as that decision was not decided until after the events underlying this action (Wynn Br. at 28 n.6; see Estes Br. at 24, 40, 54–55), but this argument fails to understand the nature of a qualified immunity analysis. Defendant was not arguing that Wright clearly established any particular contour of the relevant law, but rather that what the Wright court held was *not* clearly established *after* the events in this case could not have been clearly established prior to them.

Wynn's statement that her "Hippocratic obligations to her patient" somehow negate the officer's probable cause to arrest her for driving away from a traffic stop or for running away from the officer upon reaching the hospital (Wynn Br. at 29) is unsupported by the case law, and Wynn cites none. As noted by the hospital supervisor that night, there was "adequate medical care" at the hospital to care for the patient even without Dr. Wynn there (Estes Br. at 15 (citing Waybright Dep. RE 66-1, PageID# 906-07, p. 30:5–31:3)), but even *that* is beside the point. Contrary to Wynn's implicit assumption, "Hippocratic obligations" do not have constitutional protection, and there is no general constitutional right to administer medical care, nor is there a specific constitutional right for a doctor to speed to the hospital because the doctor went home instead of waiting at the hospital when a "high-risk" patient was near delivery.

If there was anyone who endangered Wynn's patient that night, it was Wynn—when she sped down the road in her personal vehicle risking the delay that would accompany a traffic stop. But not content with this mistake of judgment, Wynn chose to compound it by driving off from the traffic stop when she had been warned she would be arrested if she did so, and then running away from the officer when she reached the hospital.

Lastly, Defendant would note that Plaintiff Wynn has not even attempted to meaningfully distinguish Wright v. City of Chattanooga)Case No. 1:10-CV-291, 2012 WL 28744 (E.D. Tenn. Jan. 5, 2012) (unpublished), in the context of qualified immunity for the arrest, other than to incorrectly argue it is not apposite based on its date. There, a district court granted summary judgment in a similar case involving a plaintiff's arrest for driving-related charges allegedly committed during plaintiff's "emergency" transport of his wife to the hospital in their private vehicle. (See Estes Br. at 40.) And as noted above, if a right was not clearly established on January 5, 2012, it cannot be said to have been clearly established on May 5, 2010.

IV. Reply to Defendant's argument regarding use of force

In short, Plaintiff objects to the manner of her forced handcuffing, but while she has able to identify previous cases involving more gratuitous uses of force where qualified immunity was denied (Wynn Br. at 30–31 (citing cases involving,

e.g., deadly force, striking the suspect, wrenching a suspect's finger, pulling a suspect through a vehicle window)), she has pointed to no comparable use of force in comparable circumstances where an officer was denied qualified immunity.

The one case Wynn does quote (Wynn Br. at 34), an overruled district court case from Alabama, Gilliam ex rel. Waldroup v. City of Prattville, 667 F. Supp. 2d 1276 (M.D. Ala. 2009) rev'd on other grounds, Gilliam ex rel. Waldroup v. City of Prattville, 639 F.3d 1041 (11th Cir. 2011), involved two officers using their tasers on a suspect a combined 27 times and "kneeing him repeatedly," resulting in the suspect's death later that night from heart failure. Id. at 1285. Moreover, the *only* act of resistance the suspect in Gilliam did to prompt the use of force was to pull his arm away, while the instant action involves a suspect who kept her arm away *after* driving away from an ongoing traffic stop and, upon "inviting" the officer to arrest her at her next destination, ran in the opposite direction when she got there when he told her she was under arrest—hardly comparable circumstances. Furthermore, the suspected violation in Gilliam) was marijuana possession, whereas in the instant action the officer believed he had probable cause for felony fleeing a police officer.

As Wynn correctly states, two of the three factors in weighing the appropriateness of force are the severity of the crime and whether the suspect is resisting or attempting to evade arrest by flight. (Wynn Br. at 31.) For the

purposes of justifying the amount of force Estes used in placing her in handcuffs, it is clear these factors in the instant action were sufficient, at the very least, to allow the officer qualified immunity. See, e.g., Burchett v. Kiefer, 310 F.3d 937, 944 (6th Cir. 2002) (holding that the officers' use of force to handcuff a suspect was necessary because the suspect "acknowledged that he 'twisted and turned some' when they tried to handcuff him and that the officers had difficulty restraining him").

It is true, as Plaintiff points out (Wynn Br. at 32), that a particular degree of injury is not a requisite of an excessive use claim. But a *gratuitous* aspect to the force used *is*, see Miller v. Sanilac Cnty., 606 F.3d 240, 252 (6th Cir. 2010), and it is precisely that gratuitousness which, among other requisites, is lacking in the instant action. That is, in the instant action, there was no physical contact other than the minimum to quickly place her in handcuffs and into the back of the police car.

Plaintiff attempts to distinguish several cases relied on by Defendant (Wynn Br. at 35–37); Defendant would submit that Plaintiff has not successfully done so in any meaningful way. For example, Plaintiff says Dunn v. Matatall, 549 F.3d 348 (6th Cir. 2008), is inapposite because there "the suspect fled when the officers attempted to pull him over" (Wynn Br. at 36) without acknowledging that the

Plaintiff herself pulled off from a traffic stop after being told by the officer that if she did so she would be arrested.

Similarly, if there is any salient difference between the facts of Bozung v. Rawson, 439 F. App'x 513 (6th Cir. 2011), and instant action, it is that the suspect in Bozung was only wanted for a misdemeanor warrant, while the officer in the instant action had probable cause that Plaintiff had committed a felony.

Thus, these cases still illustrate that it not "clearly established" that the contours of the Fourth Amendment preclude Defendant Estes' conduct in the instant action. And the Plaintiff does not even attempt to distinguish Stricker v. Twp. of Cambridge, 710 F.3d 350, 364 (6th Cir. 2013) (cited at Estes Br. at 51), where the court upheld the use of handcuffs, stating, "Since [plaintiff] was headed away from the point of the officers' entry, it was objectively reasonable for her to believe that he was attempting to flee from the police."

Plaintiff essentially disputes the need to place her in handcuffs and into the police car, but assuming the validity of the decision to do these things, there was no more force used than necessary to accomplish them, and there was absolutely no force used after the Plaintiff was secured. It may have been, to use a word from Plaintiff's brief, an "impropriety" to arrest Doctor Wynn and place her in handcuffs (Wynn Br. at 18), but it was not gratuitous, and it was not unconstitutional.

V. Conclusion

In closing, the Defendant would simply remind the Court of several legal points. First, the burden in this case is on the Plaintiff to establish that the Defendant is not entitled to qualified immunity; it is not his burden to establish that he is. Second, the probable cause determination is from the officer's perspective, and qualified immunity must be granted "if officers of reasonable competence could disagree" on the legality of the action. Wright v. City of Chattanooga,) Case No. 1:10-CV-291, 2012 WL 28744 (E.D. Tenn. Jan. 5, 2012) (unpublished) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)). Third, qualified immunity against excessive use of force claims means that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chamber," violates the Fourth Amendment. Graham v. Connor, 490 U.S. 386, 396–97 (1989), (quoting Johnson v.Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

Thus, for all the foregoing reasons, the Defendant respectfully requests this Court to allow his claim of qualified immunity and dismiss all claims against him.

Respectfully submitted,
FARRAR & BATES, L.L.P.

/s/ *Teresa Reall Ricks*
Teresa Reall Ricks (BPR #014459)
211 Seventh Avenue North, Suite 500
Nashville, TN 37219
(615) 254-3060
Attorney for Chad Estes

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Fed. R. App. P. 32(a)(7)(C)(I) and 6th Cir. R. 32(a), I hereby certify that:

I. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,959 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

II. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in Times New Roman at 14 point.

Respectfully submitted,
FARRAR & BATES, L.L.P.

/s/ *Teresa Reall Ricks*
Teresa Reall Ricks (BPR #014459)
211 Seventh Avenue North, Suite 500
Nashville, TN 37219
(615) 254-3060
Attorney for Chad Estes

Certificate of Service

The undersigned hereby certifies that on this the 7th day of June, 2013 a true and correct copy of the foregoing has been forwarded via the Court's electronic filing system to:

W. Joseph Werner, Esquire
John W. Roberts, Esquire
ROBERTS & WERNER, PLLC
1720 West End Avenue, Suite 402
Nashville 37203

Michael B. Schwegler, Esquire
Law Office of Ernest B. Williams, IV
P.O. Box 159264
Nashville, TN 37215
Attorneys for Wynn

/s/ Teresa Reall Ricks
Teresa Reall Ricks

ADDITIONAL DESIGNATION
OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to 6th Cir. R. 30(b) and 30(f), Defendant-Appellant, designates the following additional entries from the docket of the district court below as relevant to this appeal.

Record Entry No.	PageID#	Description of Document
95	1443–1448	Estes Reply in Supp. of Mot. Summ. J.
97-1	1466–1468	Excerpts of Wynn Dep.
172	1852	Order on Pretrial Mots.

APPENDIX OF UNREPORTED CASE LAW
NOT PREVIOUSLY FILED WITH THE COURT

Burdine v. Sandusky Cnty., Ohio, Case No. 12-3672, 2013 WL 1606906 (6th Cir. Apr. 16, 2013) (slip op.)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: August 14, 2013

Notice of Oral Argument at 9:00 AM Friday, October 4, 2013

Ms. Teresa Reall Ricks
Farrar & Bates
211 Seventh Avenue, N.
Suite 500
Nashville, TN 37219

Mr. Michael Byrne Schwegler
Law Office
P.O. Box 159264
Nashville, TN 37215

Re: No. 13-5199, *Terry Wynn v. Chad Estes*

Dear Counsel,

Your case is scheduled for oral argument at **9:00 AM Friday, October 4, 2013** before a three-judge panel of the Sixth Circuit Court of Appeals in Cincinnati, Ohio. You may learn the names of the judges sitting on the panel by checking the Court's calendar when it is posted on www.ca6.uscourts.gov two weeks prior to argument.

If you are the attorney who will argue this case, download the Oral Argument Acknowledgment form from the web site and file it electronically with the Clerk's office by August 28, 2013. If you have been granted a waiver from ECF filing, you may mail the acknowledgment form to the Clerk's office or send it by fax, tel. (513) 564-7099. This acknowledgment form should be filed only by the attorneys who are arguing the case.

You should be aware that in preparing for the case the panel may conclude that, although the matter has been scheduled for oral argument, it will not be necessary to go forward with argument. In that event the panel will decide the appeal on the basis of the briefs and the record and a written decision will issue. Counsel will be notified that argument has been cancelled as soon as the panel has made that determination. The possibility that argument will not be held as

originally scheduled should be taken into account in making your travel arrangements, particularly in deciding whether to purchase refundable or non-refundable tickets for air travel.

An attorney who has been appointed under the Criminal Justice Act should make travel arrangements directly with National Travel, tel. (800) 445-0668. The Clerk's office has provided National Travel with the required Travel Authorization which pays for CJA travel the day before and day of oral argument. If you are a CJA appointed attorney and choose to make alternative arrangements, reimbursement will be limited to the lesser of the government rate for airfare or actual expenses.

On the day of oral argument, report to the Clerk's Office, Room 540 in the Potter Stewart United States Courthouse, at the corner of 5th and Walnut Streets in Cincinnati no later than **8:30 a.m.** if argument is scheduled for 9:00 a.m. and **1:00 p.m.** if argument is scheduled for 1:30 p.m. All times are Eastern Time. Once you enter the courthouse, you must use the elevators on the Main Street (east) side to take you to the entrance to the Clerk's office on the 5th floor.

Continuances of oral argument will be granted only in exceptional circumstances, upon the motion of counsel. Counsel is strongly discouraged from seeking continuances and, where such a request is to be made, the motion should be filed as soon as possible.

If you had previously requested oral argument but now wish to waive it, a motion to that effect should be filed with the court as soon as possible.

Please bear in mind that neither the filing of a motion seeking a continuance of oral argument nor a motion to waive argument is self-effecting. The Court may wish to have the case argued as scheduled, and you should not assume that the filing of such a motion, absent the express approval of the court, relieves you of the obligation to appear for argument as called for.

Sincerely yours,

s/Diane T. Sievering
Calendar Deputy

cc: Mr. John William Roberts

United States Court of Appeals
For the Sixth Circuit

Oral Argument Acknowledgment

Sixth Circuit Case No.: 13-5199

Case Name: Terry Wynn vs. Chad Estes

I will be presenting oral argument for:

☑ Appellant ☐ Petitioner ☐ Amicus Curiae

☐ Appellee ☐ Respondent ☐ Intervenor ☐ Other

Party Name/s:

Chad Estes

Attorney's Name: Teresa Reall Ricks

Argument Date: October 4, 2013

If you have not previously registered as an ECF filer and filed an appearance form in this case, you must do both.

Docketing Instructions:
First, select the *Event Category* of **Argument**.
Second, choose **argument acknowledgment.**

United States Court of Appeals
For the Sixth Circuit

Oral Argument Acknowledgment

Sixth Circuit Case No.: 13-5199

Case Name: Wynn vs. Estes

I will be presenting oral argument for:

- ☐ Appellant
- ☐ Petitioner
- ☐ Amicus Curiae
- ☑ Appellee
- ☐ Respondent
- ☐ Intervenor
- ☐ Other

Party Name/s:
Terry Wynn, M.D.

Attorney's Name: Michael B. Schwegler

Argument Date: October 4, 2013

If you have not previously registered as an ECF filer and filed an appearance form in this case, you must do both.

Docketing Instructions:
First, select the *Event Category* of **Argument**.
Second, choose **argument acknowledgment.**

United States Court of Appeals
For the Sixth Circuit

Oral Argument Acknowledgment

Sixth Circuit Case No.: 13-5199

Case Name: Terry Wynn vs. City of Pulaski, Tennessee et al.

I will be presenting oral argument for:

- ☐ Appellant
- ☐ Petitioner
- ☐ Amicus Curiae
- ☑ Appellee
- ☐ Respondent
- ☐ Intervenor
- ☐ Other

Party Name/s:

Terry Wynn

Attorney's Name: John W. Roberts

Argument Date: October 4, 2013

If you have not previously registered as an ECF filer and filed an appearance form in this case, you must do both.

Docketing Instructions:
First, select the *Event Category* of **Argument**.
Second, choose **argument acknowledgment.**

Rev. 8/12

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Appearance of Counsel

Sixth Circuit
Case No.: 13-5199

Case Name: Terry Wynn vs. Chad Estes

Client's or
Clients' Name(s): (List all clients on this form, do not file a separate appearance form for each client.)

Chad Estes

☑ Appellant ☐ Petitioner ☐ Amicus Curiae ☐ Criminal Justice Act (Appointed)
☐ Appellee ☐ Respondent ☐ Intervenor

Lead counsel must be designated if a party is represented by more than one attorney or law firm. Check if you are lead counsel. ☑

Name: John E. Carter Admitted: May 18, 1998
(Sixth Circuit admission date only)

Signature: John E. Carter

Firm Name: Farrar & Bates, LLP

Business Address: 211 7th Ave. North

Suite: 500 City/State/Zip: Nashville, TN 37219

Telephone Number (Area Code): (615) 254-3060

Email Address: john.carter@farrar-bates.com

CERTIFICATE OF SERVICE

I certify that on September 24, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ John E. Carter

6ca-68
6/12

United States Court of Appeals
For the Sixth Circuit

Oral Argument Acknowledgment

Sixth Circuit Case No.: 13-5199

Case Name: Terry Wynn vs. Chad Estes

I will be presenting oral argument for:

- [x] Appellant
- [ ] Petitioner
- [ ] Amicus Curiae
- [ ] Appellee
- [ ] Respondent
- [ ] Intervenor
- [ ] Other

Party Name/s:

Chad Estes

Attorney's Name: John E. Carter

Argument Date: October 4, 2013

If you have not previously registered as an ECF filer and filed an appearance form in this case, you must do both.

Docketing Instructions:
First, select the *Event Category* of **Argument**.
Second, choose **argument acknowledgment.**

Rev. 8/12

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: November 04, 2013

Mr. John Engelhardt Carter
Ms. Teresa Reall Ricks
Farrar & Bates
211 Seventh Avenue, N., Suite 500
Nashville, TN 37219

Mr. John William Roberts
Roberts & Werner
1105 Sixteenth Avenue, S., Suite D
Nashville, TN 37212

Mr. Michael Byrne Schwegler
Law Office
P.O. Box 159264
Nashville, TN 37215

Re: Case No. 13-5199, *Terry Wynn v. Chad Estes*
Originating Case No. : 1:11-cv-00025

Dear Counsel:

The Court issued the enclosed Opinion today in this case.

Sincerely yours,

s/Robin L. Johnson
Case Manager
Direct Dial No. 513-564-7039

cc: Mr. Keith Throckmorton

Enclosure

Mandate to issue

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 13a0945n.06

No. 13-5199

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TERRY WYNN, Plaintiff-Appellee, v. CHAD ESTES, Officer, in his individual and official capacities, Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BEFORE: ROGERS, GRIFFIN, and DONALD, Circuit Judges.

ROGERS, Circuit Judge. This case arose from a traffic stop and the subsequent arrest of plaintiff Terry Wynn, an on-call physician who was speeding on her way to deliver a patient's baby at a local hospital. Wynn drove away from the scene of the stop while Defendant Officer Chad Estes still had her driver's license. Estes arrested Wynn in the hospital parking lot, for evading arrest, TENN.CODE.ANN. § 39-16-603(b)(1), which is a class E felony and an arrestable offense in Tennessee. Wynn contends that she had Estes's permission to continue driving from the scene of the traffic stop to the hospital. Wynn filed a § 1983 suit claiming that Estes violated her constitutional rights and committed several intentional torts.[1] The district court denied Estes's

[1] Wynn also sued Estes's supervisor, Sergeant Justin Young, Chief of Police John Dickey, twenty unidentified "John Doe" defendants, and their employer, the City of Pulaski. On February 11, 2013, the district court granted summary judgment for all defendants except Estes, and granted qualified immunity to Estes on all claims except for Wynn's federal claims of false arrest and

qualified-immunity motion for summary judgment, finding among other things that a jury could believe Wynn's claim that Estes gave her permission to continue driving to the hospital. On the facts as to which the district court found a genuine dispute of material fact, the district court properly denied qualified immunity. *See Romo v. Largen*, 723 F.3d 670, 671 (6th Cir. 2013). The district court also properly permitted Wynn's state law false imprisonment and battery claims to proceed.

We review a denial of qualified immunity de novo. *Sample v. Bailey*, 409 F.3d 689, 695 (6th Cir. 2005). Under *Johnson v. Jones*, 515 U.S. 304 (1995), on this interlocutory appeal, we are required to assume the material facts as to which the district court found a genuine issue. As we read the district court opinion, those facts are as follows. At approximately 8:50 p.m., on May 5, 2010, Terry Wynn, an obstetrician/gynecologist working as an on-call physician for Hillside Hospital in Pulaski, Tennessee, received a call alerting her that a patient was ready to deliver a baby and thus Wynn was needed at the hospital. Officer Estes observed Wynn speeding on her way to the hospital and initiated a traffic stop. The parties dispute the degree to which Wynn effectively communicated to Estes the fact that she was a physician responding to a medical emergency, but it is undisputed that Wynn was wearing hospital scrubs and a lab coat was lying next to her in the passenger seat. Estes asked for Wynn's driver's license, registration, and proof of insurance, and Wynn provided her out-of-state medical I.D. and driver's license. Wynn claims that, while searching for her license, she told Estes, "I'm really in a hurry," "my patient is going to deliver" or words to that effect, and "if you don't believe me, why don't you follow me to the hospital, and if

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excessive force and state law claims of false imprisonment and battery.

necessary you can arrest me there." In response, Estes said "Okay, I will." Thereafter, Wynn left the scene of the traffic stop, Estes tailed her to the hospital, and he immediately arrested her in the physician's parking lot. Wynn claims that Estes grabbed her wrist, cut her arm while placing a handcuff on it, slammed her against the hood of his car, injuring her back, and pressed her body against the vehicle for "maybe several minutes." After she was handcuffed, Wynn did not get in Estes's squad car willingly; instead, Estes applied pressure to Wynn's shoulder to get her to comply with his instructions to get in the police car.

Wynn filed suit under 42 U.S.C. § 1983 and Tennessee tort law. The district court concluded that a reasonable jury could find that Wynn made it unmistakably clear to Estes that she was going to the hospital to deliver a baby, that Wynn believed Estes was escorting her to the hospital, and that a reasonable police officer would have concluded that Wynn was a medical professional and reasonably effecting an arrest of her would not require as much force as Estes used.

Estes's alleged statement—"Okay, I will"—makes it unclear whether Wynn fled the traffic stop or Estes gave her permission to continue driving to the hospital. If Estes gave permission, then there arguably was no basis for Wynn's arrest in the hospital parking lot. No reasonable officer would believe that he could constitutionally arrest a person who left the scene of a traffic stop with the officer's permission.[2] Moreover, whether or not Wynn evaded arrest affects the inquiry to

[2] Estes argues, in the alternative, that he had probable cause to arrest Wynn under two exceptions to the cite-and-release requirement that applies to Tennessee's statutory prohibitions on speeding and not having a valid Tennessee driver's license after having resided in Tennessee for longer than 30 days. *See* Tenn. Code Ann. §§ 55-10-207(a)(1), 55-8-152, 55-50-301(a)(1). However, this incident does not fall within either exception Estes raises, because Estes never issued

determine whether the force used to arrest her was excessive. In evaluating whether excessive force has been used, courts look not only to whether the suspect is a safety threat and whether the suspect is resisting arrest, but also to the "severity of the crime at issue." *Lyons v. City of Xenia*, 417 F.3d 565, 575 (6th Cir. 2005); *Graham v. Connor*, 490 U.S. 386, 396 (1989).

The district court also properly permitted Wynn's state law claims of false imprisonment and battery to proceed. When a battery claim under Tennessee law arises out of the same use of force as plaintiff's § 1983 excessive-force claim, the analysis is the same for both causes of action. *Griffin v. Hardrick*, 604 F.3d 949, 956 (6th Cir. 2010). Moreover, "[t]he elements of the tort of false imprisonment are (1) the detention or restraint of one against his will and (2) the unlawfulness of such detention or restraint." *Roberts v. Essex Microtel Assocs., II, L.P.*, 46 S.W.3d 205, 213 (Tenn. Ct. App. 2000). Because genuine issues of material fact exist as to whether there was probable cause to arrest Wynn, summary judgment on this claim is not appropriate.

AFFIRMED.

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a citation to Wynn and, alternatively, if Estes gave Wynn permission to proceed to the hospital, he may have intentionally held on to her license. Estes did not have probable cause to arrest Wynn under any exception to the cite-and-release requirement.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: November 05, 2013

Mr. John Engelhardt Carter
Ms. Teresa Reall Ricks
Farrar & Bates
211 Seventh Avenue, N., Suite 500
Nashville, TN 37219

Mr. John William Roberts
Roberts & Werner
1105 Sixteenth Avenue, S., Suite D
Nashville, TN 37212

Mr. Michael Byrne Schwegler
Law Office
P.O. Box 159264
Nashville, TN 37215

Re: Case No. 13-5199, *Terry Wynn v. Chad Estes*
Originating Case No. : 1:11-cv-00025

Dear Counsel:

Enclosed is a copy of a corrected decision originally sent to you on November 4, 2013.

Thank you for your cooperation in this matter.

Yours very truly,
Deborah S. Hunt, Clerk

Robin L. Johnson
Deputy Clerk

cc: Mr. Keith Throckmorton

Enclosures

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 13a0945n.06

No. 13-5199

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TERRY WYNN, Plaintiff-Appellee, v. CHAD ESTES, Officer, in his individual and official capacities, Defendant-Appellant.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BEFORE: ROGERS, GRIFFIN, and DONALD, Circuit Judges.

ROGERS, Circuit Judge. This case arose from a traffic stop and the subsequent arrest of plaintiff Terry Wynn, an on-call physician who was speeding on her way to deliver a patient's baby at a local hospital. Wynn drove away from the scene of the stop while Defendant Officer Chad Estes still had her driver's license. Estes arrested Wynn in the hospital parking lot, for evading arrest, TENN.CODE.ANN. § 39-16-603(b)(1), which is a class E felony and an arrestable offense in Tennessee. Wynn contends that she had Estes's permission to continue driving from the scene of the traffic stop to the hospital. Wynn filed a § 1983 suit claiming that Estes violated her constitutional rights and committed several intentional torts.[1] The district court denied Estes's

[1] Wynn also sued Estes's supervisor, Sergeant Justin Young, Chief of Police John Dickey, twenty unidentified "John Doe" defendants, and their employer, the City of Pulaski. On February 11, 2013, the district court granted summary judgment for all defendants except Estes, and granted qualified immunity to Estes on all claims except for Wynn's federal claims of false arrest and

qualified-immunity motion for summary judgment, finding among other things that a jury could believe Wynn's claim that Estes gave her permission to continue driving to the hospital. On the facts as to which the district court found a genuine dispute of material fact, the district court properly denied qualified immunity. *See Romo v. Largen*, 723 F.3d 670, 671 (6th Cir. 2013). The district court also properly permitted Wynn's state law false imprisonment and battery claims to proceed.

We review a denial of qualified immunity de novo. *Sample v. Bailey*, 409 F.3d 689, 695 (6th Cir. 2005). Under *Johnson v. Jones*, 515 U.S. 304 (1995), on this interlocutory appeal, we are required to assume the material facts as to which the district court found a genuine issue. As we read the district court opinion, those facts are as follows. At approximately 8:50 p.m., on May 5, 2010, Terry Wynn, an obstetrician/gynecologist working as an on-call physician for Hillside Hospital in Pulaski, Tennessee, received a call alerting her that a patient was ready to deliver a baby and thus Wynn was needed at the hospital. Officer Estes observed Wynn speeding on her way to the hospital and initiated a traffic stop. The parties dispute the degree to which Wynn effectively communicated to Estes the fact that she was a physician responding to a medical emergency, but it is undisputed that Wynn was wearing hospital scrubs and a lab coat was lying next to her in the passenger seat. Estes asked for Wynn's driver's license, registration, and proof of insurance, and Wynn provided her out-of-state medical I.D. and driver's license. Wynn claims that, while searching for her license, she told Estes, "I'm really in a hurry," "my patient is going to deliver" or words to that effect, and "if you don't believe me, why don't you follow me to the hospital, and if

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excessive force and state law claims of false imprisonment and battery.

necessary you can arrest me there." In response, Estes said "Okay, I will." Thereafter, Wynn left the scene of the traffic stop, Estes tailed her to the hospital, and he immediately arrested her in the physician's parking lot. Wynn claims that Estes grabbed her wrist, cut her arm while placing a handcuff on it, slammed her against the hood of his car, injuring her back, and pressed her body against the vehicle for "maybe several minutes." After she was handcuffed, Wynn did not get in Estes's squad car willingly; instead, Estes applied pressure to Wynn's shoulder to get her to comply with his instructions to get in the police car.

Wynn filed suit under 42 U.S.C. § 1983 and Tennessee tort law. The district court concluded that a reasonable jury could find that Wynn made it unmistakably clear to Estes that she was going to the hospital to deliver a baby, that Wynn believed Estes was escorting her to the hospital, and that a reasonable police officer would have concluded that Wynn was a medical professional and reasonably effecting an arrest of her would not require as much force as Estes used.

Estes's alleged statement—"Okay, I will"—makes it unclear whether Wynn fled the traffic stop or Estes gave her permission to continue driving to the hospital. If Estes gave permission, then there arguably was no basis for Wynn's arrest in the hospital parking lot. No reasonable officer would believe that he could constitutionally arrest a person who left the scene of a traffic stop with the officer's permission.[2] Moreover, whether or not Wynn evaded arrest affects the inquiry to

[2] Estes argues, in the alternative, that he had probable cause to arrest Wynn under two exceptions to the cite-and-release requirement that applies to Tennessee's statutory prohibitions on speeding and not having a valid Tennessee driver's license after having resided in Tennessee for longer than 30 days. *See* Tenn. Code Ann. §§ 55-10-207(a)(1), 55-8-152, 55-50-301(a)(1). However, this incident does not fall within either exception Estes raises, because Estes never issued

determine whether the force used to arrest her was excessive. In evaluating whether excessive force has been used, courts look not only to whether the suspect is a safety threat and whether the suspect is resisting arrest, but also to the "severity of the crime at issue." *Lyons v. City of Xenia*, 417 F.3d 565, 575 (6th Cir. 2005); *Graham v. Connor*, 490 U.S. 386, 396 (1989).

The district court also properly permitted Wynn's state law claims of false imprisonment and battery to proceed. When a battery claim under Tennessee law arises out of the same use of force as plaintiff's § 1983 excessive-force claim, the analysis is the same for both causes of action. *Griffin v. Hardrick*, 604 F.3d 949, 956 (6th Cir. 2010). Moreover, "[t]he elements of the tort of false imprisonment are (1) the detention or restraint of one against his will and (2) the unlawfulness of such detention or restraint." *Roberts v. Essex Microtel Assocs., II, L.P.*, 46 S.W.3d 205, 213 (Tenn. Ct. App. 2000). Because genuine issues of material fact exist as to whether there was probable cause to arrest Wynn, summary judgment on this claim is not appropriate.

AFFIRMED.

---

a citation to Wynn and, alternatively, if Estes gave Wynn permission to proceed to the hospital, he may have intentionally held on to her license. Estes did not have probable cause to arrest Wynn under any exception to the cite-and-release requirement.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
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Filed: November 27, 2013

Mr. Keith Throckmorton
Middle District of Tennessee at Columbia
801 Broadway
Suite 800 U.S. Courthouse
Nashville, TN 37203

Re: Case No. 13-5199, *Terry Wynn v. Chad Estes*
Originating Case No. : 1:11-cv-00025

Dear Clerk:

Enclosed is a copy of the mandate filed in this case.

Sincerely yours,

s/Robin L. Johnson
Case Manager
Direct Dial No. 513-564-7039

cc: Mr. John Engelhardt Carter
Ms. Teresa Reall Ricks
Mr. John William Roberts
Mr. Michael Byrne Schwegler

Enclosure

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 13-5199

Filed: November 27, 2013

TERRY WYNN

Plaintiff - Appellee

v.

CHAD ESTES, Officer,
in his individual and official capacities

Defendant - Appellant

MANDATE

Pursuant to the court's disposition that was filed 11/04/2013 the mandate for this case hereby issues today.

COSTS: None