CASE NO. 15-2306

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEBBIE JEAN LATITS,
Plaintiff/Appellant,

v.

LOWELL PHILLIPS
Defendants/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
Case No. 2:12-cv-14306-JAC-MAR
Hon. Stephen Murphy

PLAINTIFF/APPELLANT'S BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

CERTIFICATE OF SERVICE

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CORPORATE DISCLOSURE

Pursuant to Sixth Circuit Rule 26.1, Plaintiff-Appellee makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

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Date: February 25, 2016

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES **PAGE(S)**

COURT RULES AND OTHER STATUTES

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Sixth Circuit Rule 34(a), Plaintiff Latits requests that oral argument be heard by this Court as it may aid the Court in clarifying the factual and legal matters upon which it shall render its decision.

JURISDICTIONAL STATEMENT

I. SUBJECT MATTER JURISDICTION

The United States District Court for the Eastern District of Michigan had jurisdiction to adjudicate Plaintiff's federal claims brought pursuant to the Constitution and laws of the United States as conferred by 28 U.S.C. § 1331. Specifically, Plaintiff alleged violations of his Fourth Amendment rights.

II. APPELLATE JURISDICTION

This appeal is from an Opinion and Order rendered by the United States District Court for the Eastern District of Michigan Judge Stephen Murphy which granted Defendant Phillip's Motion for Summary Judgment. (R. 44 Opinion and Order, ID # 1709.) The Order was entered on September 30, 2015. Defendant Davis filed a timely notice of appeal on October 26, 2015. Therefore, this Court is vested with appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF QUESTIONS PRESENTED

I. Whether Defendant is entitled to qualified immunity.

Trial Court answered, "Yes".

Plaintiff-Appellant answers, "No".

II. Whether Plaintiff is entitled to discovery.

Trial Court answered, "No".

Plaintiff-Appellant answers, "Yes".

III. Whether punitive damages are barred by law of the case.

Trial Court did not answer.

Plaintiff-Appellant answers, "No".

STATEMENT OF THE CASE

A. Proceedings.

Plaintiff filed a complaint in state court alleging assault and battery and gross negligence. Defendant filed a motion for summary disposition claiming state law immunity. The trial court denied the motion and Defendant appealed. On August 21, 2012, the state court of appeals reversed, finding that Defendant was entitled to immunity because he acted in "good faith" and remanded the matter to the trial court to enter an order of summary disposition on Plaintiff's state law claim.

Plaintiff filed a motion for leave to amend to allow her to file a Fourth Amendment excessive force claim. Defendant responded claiming that the court of appeals opinion precluded the amendment. On September 19, 2012, the trial court entered an order allowing plaintiff to amend and add a Fourth Amendment claim and dismissing the state law claim based on immunity. Plaintiff then filed her amended complaint and Defendant filed a motion in the court of appeals requesting that the Court summarily reverse the trial court's order allowing amendment because it was "not consistent with the determination of this Court that this litigation be concluded by summary disposition". On September 27, 2012, the court of appeals issued a letter stating it would not entertain the motion

for lack of jurisdiction.

On September 27, 2012, Defendant removed the case to the federal district court. (R. 1, Notice of removal, ID # 1.) On January 30, 2013, Defendant filed a motion for "judgment on the pleadings" which did not contain a single, substantive reference to the complaint or answer, but is based on supposed "facts" from an exhibit outside of the pleadings, the state court of appeals opinion. (R. 4, Motion, ID # 29.) On September 30, 2013, the Court denied Defendants motion for judgment on the pleadings. (R. 15, Opinion and Order, ID # 456.) Thereafter, Defendant filed a timely appeal. (R. 17, ID# 470.) On August 13, 2014, the Sixth Circuit dismissed the appeal for lack of jurisdiction and found that the appeal was frivolous. (R. 19, Opinion, ID # 473.)

Thereafter, the case was remanded to the district court where it was reassigned to the Hon. Stephen Murphy. Judge Murphy allowed the parties 21 days of discovery. (R 24, Order, ID # 494.) During this time, Plaintiff discovered that almost all of the police witnesses in this case had been deposed in a state law wrongful discharge case Phillips filed against the City of Ferndale. This testimony is not only reasonably calculated to lead to the discovery of admissible evidence, it is admissible evidence. These depositions took place while the initial appeal was pending in the Sixth Circuit. Judge Murphy refused to hold a hearing on

Plaintiff's motion to compel production of these documents. Instead on September 30, 2015, without allowing Plaintiff to discover this new evidence the lower court dismissed Plaintiff's Fourth Amendment claim finding that Phillips was entitled to qualified immunity. (R. 44, ID# 1709.)

B. Statement of Material Facts.

Phillips had problems controlling his conduct during high stress situations and had engaged in an inordinate amount of misconduct in his short tenure (approximately 6 years.) (R. 38-2, Ex. 1, Collins Dep. pp. 76, 78 ID # 1385; R. 38-3, Ex 2. Employment Brief p. 2 Id # 1421.) On August 27, 2007, Phillips chased a car at high speeds through Downtown Ferndale on a summer day, intentionally rammed the car onto a residential yard, flipping it over and putting numerous pedestrians and bicyclists at-risk. Phillips was disciplined and ordered never to ram another car again under any circumstances. (R. 38-3, Ex. 2, pp. 3-4 citing exhibits[1], ID # 1422, 1423; R. 32-10, Ex. 9, Phillips p. 48, ID # 1116; R-38-2, Ex. 1, Collins pp 123-124, ID # 1406, 1407 .)

On June 18, 2008, Phillips attacked a detainee in his cell and broke his nose because the detainee was verbally belligerent. He was disciplined again. (R-38-3, Ex. 2, brief p. 4, ID # 1423.)

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[1]Obtaining these materials is the subject of Plaintiff's pending discovery motions.

On June 28, 2009, Phillips got into a physical altercation with other officers on Livernois during an arrest. He then disobeyed direct orders to discontinue the hostilities and posted a flyer accusing his fellow officers of being homosexual cowards. (R. 38-2, Ex. 1 pp. 158-159, ID #1412, 1413; R. 38-4, Ex 3, Spellman Dep. pp 38-39, ID # 1454, 1459.)

At 1:00 am on June 24, 2010 (a Wednesday), Plaintiff's decedent Lazlo Latits was stopped by Ferndale Officer Jaklic for driving the wrong way on Livernois (a divided boulevard) near Eight Mile Road. Latits immediately pulled off Livernois and onto an unlit empty lot between two buildings. Jaklic approached Latits who handed him his drivers license. When Latits opened his glove box to retrieve registration documents (R. 32-2, Ex. 1 at 54:17-55:20, Jacklic Video), Jaklic saw a bag of suspected marijuana and a pill bottle. (Id; R. 32-8, Ex. 7, Jaklic dep. p. 22, ID # 1045.) Jacklic then pointed his gun directly at Latits head from point blank range and Latits drove away; Jaklic returned to his car and pursued. (R. 32-2, Jacklic Video 55.38.)

Ferndale police officers Wurm, Schalk, and Phillips responded to Jaklic's broadcast and headed towards Woodward and Eight Mile from various locations in Ferndale. (R. 32-6, Ex. 5, Phillip's Synched video.) Latits went south on Livernois, a commercial zone, turned east onto Eight Mile, a commercial zone,

and pulled into Stanley's restaurant parking lot, located at the southwest quadrant of Woodward and Eight Mile. Jacklic pulled into the parking lot and drove at Latits's car. Latits turned to the right to avoid Jacklic and proceeded towards southbound Woodward, which is bounded by cemeteries and the Michigan State fairgrounds which have been vacant for almost a decade. (R. 32-2, Jacklic Video 57.25.) As Latits headed south on Woodward, Jaklic **falsely** reported that Latits attempted to ram his car. (R. 32-4, Ex. 3, Phillips Video 59:32; R. 32-2, R. Jacklic Video 57:26) Jaklic admitted that Latits did not try to ram him and tried to avoid him. (R. 32-8, Ex. 7, Jaklic p. 39, ID # 1049.)

Phillips was traveling westbound on eastbound Eight Mile in the southernmost lane, closest to Stanley's parking lot with an unobstructed view of these events. There was a single car stopped in the middle lane on Eight Mile which Phillips had driven past four seconds before Jacklic made the false radio broadcast. Phillips had already pulled into the parking lot and was facing directly at Jacklic when the false broadcast occurred. Phillips' video demonstrates he was in a position to clearly observe what happened in the parking lot and know that no attempted ramming occurred. (Phillips claims he was 150 feet away.) (R. 38-5, Ex. 4, Phillips Emp. dep. P. 142, ID # 1496; R-32-3, Phillips Video; 59:25.)

When Latits headed south on Woodward, Wurm was the first

in pursuit, Jacklic followed Latits across the grass and was second in pursuit. (R. 32-2, Jacklic Video 57:34.) Contrary to Ferndale's policy of "caravanning" which prohibits more than two cars in active pursuit, Phillips joined the pursuit as the third chase car. (R. 38-2, Ex. 1, Collins pp. 81-88, ID # 1390-1397.) Officer Schalk did not join the active pursuit but instead followed from a distance per the pursuit policy. (R. 32-5, Ex. 4, Schalk Video.)

During the pursuit, Latits did not weave through traffic. There were no other pedestrians or civilian cars anywhere on the road or in the vicinity except for one car on southbound Woodward which was stopped in the far right hand lane when Latits drove by in the far left lane. (R. 32-2, Jacklic Video 58:12.) In the area of the pursuit, Woodward is a ten lane divided highway bounded by Woodlawn Cemetery on the east side and a commercial zone and the vacant fairgrounds on the east. Jaklic reported driving at 60 MPH, and gaining on Latits, catching up to him at State Fair, the half-mile point between Eight and Seven Mile roads. (Id; R. 32-8, Ex. 7, Jaklic Dep p. 42, ID # 1050.) Latits proceeded south to the authorized u-turn lane just past State Fair. As Latits turned north, Wurm accelerated and violently rammed Latits car broadside, striking the drivers door and then pushed Latits across the entire width of Woodward. (R. 32-2, Jacklic Video 58:24; R. 32-3, Wurm Video 57:37.) Wurm was disciplined for this

unjustified use of deadly force. (R-38-2,Exhibit 1, Collins p. 89, ID # 1398.)

Upon colliding with Latits, Wurm broadcast on the radio **he hit Latits** which can be heard on the video in Phillips' car. (R. 32-4, Phillips Video 00:23.) Phillips was traveling southbound when this occurred, was in the turn lane and had a clear and unobstructed view of Wurm ramming Latits which occurred to his left. Id. Latits lost control of the car as a result of being rammed and avoided the officers by heading north. Wurm, who was **behind** Latits, pushed his car twice more, causing Latits car to fishtail and swerve. Latits was traveling at a low speed when this occurred. (Id; R. 32-2, Jacklic Video 58:27; R. 32-3, Wurm Video 57:40.)

Based on Phillips' own video, Phillips, who was on northbound Woodward, had an unobstructed view of these actions and was in close proximity. Phillips video clearly demonstrated that Latits was in front of Wurm this entire time and never rammed Wurm but instead tried to avoid him. (R. 32-4, Phillips Video 00:23.) Wurm then falsely broadcast that Latits hit **him** several times. (Id at 00:33.) The Ferndale Police Department, when terminating Phillips, rejected his claim that he relied on the radio broadcasts because he was in a position to see that Latits never rammed any police cars. (R. 38-5, Ex. 4, Phillips p. 141, ID # 1495.) Phillips then rapidly accelerated past Wurm and Jaklic thereby increasing the

danger to everybody. (R. 38-6, Ex. 5, Arbitration Opinion p. 11 ID # 1587, R 32-2-5, Ex. 1-5.)

In violation of police procedure and the direct order from Chief Collins, Phillips then broadsided Latits in a so-called PIT maneuver, staying engaged as he pushed Latits east approximately 75 feet north and across multiple lanes of travel, forcing Latits broadside over the curb, and onto the sidewalk. Latits's car knocked over a pedestrian crossing signal and barely missed hitting a transformer box. (R. 32-4, Phillips Video; 00:40; R. 8-2, Ex. 1, Phillips Slow Motion video 00:40; R-38-6, Ex. 5, Opinion pp 11-12, ID # 1587-1588; R. 38-2, R. 38-2, Ex. 1 Collins pp 123-124, ID # 1406-1407.) The collision broke the driver's side front wheel axle of Latits' car. (R. 38-7, Ex. 6, Photo of Latit's car, ID # 1590; Exhibit 7 diagram, ID # 1591.) (Latits car, a 1999 Cougar, is front wheel drive.) Latits's car ended up on the sidewalk facing southbound towards State Fair. (R. 32-5, Ex. 4, Schalk Video.) Phillips and Wurm then flanked Latits's car in their police cruisers. Phillips stopped his cruiser on the sidewalk, facing north, several feet to the west and south of Latits. Wurm stopped some 30 feet east of Latits. This left a large opening between them. (R. 38-8, Ex. 7 diagram and photos, ID # 1591-1593.)

Latits moved southbound approximately one car length towards the opening between Phillips and Wurm on a broken axle. While this was occurring,

Jacklic, who was heading northbound on Woodward, and slowing down as he approached State Fair, nearly coming to a stop. He then accelerated across the intersection and cut off Latits's escape route by ramming Latits's car. (R. 32-5, Schalk Video 57:58.)

The low speed collision caused only very minor damage to both cars and no injuries. Jacklic's car stopped and remained on State Fair street to the south of Latits and in between Phillips and Wurm's cars. (R. 32-7, Ex. 6, Jacklic dep. p. 53, ID # 1053; R. 38-8, Ex. 7 diagram, ID # 1591.) Latits car stopped with his back wheels still on the curb and its front wheels on State Fair. (R. 32-4, Schalk Video.)

Although Phillips was trained to take a tactical position behind his vehicle, wait for other officers to take tactical positions, and then order the driver out of the car, although Latits's car was stopped, and although Phillips claims that Latits's car posed a danger to him, Phillips inexplicably left the safety of his position behind his car and charged at Latits. He ran to the passenger side, pulled his gun and stopped at the side-view mirror. (R. 8, Ex. 1, Schalk Slow Motion Video 58:00-58:02; R. 32-9, Wurm p. 68, ID # 1081; R. 38-2 Collins p. 87, ID # 1396.) When Phillips stopped at the side of Latits car, Latits began to back away from Phillips. (Id, R. 8, Ex. 1, Schalk Slow Motion 58:02; R. 32-5, Ex. 4, Schalk

58:02; R-32-4, Ex. 3, Phillips Video 00:56; R. 38-8, Ex. 7 diagram., ID # 1591.) Phillips, trying to explain how he could be in danger from a car backing away from him when he was on the side of the car, testified at his deposition that he stopped at the rear wheel the car and that Latits looked back over his shoulder at him and backed the car up in his direction. (R. 32-10, Ex. 9, Phillips p. 95, ID # 1128.) Phillips also claimed that Latits turned the wheel and backed up so that the front of his car would run him over and that he jumped out of the way to avoid it. (R. 38-9, Ex. 8, COA Brief, p. 17, ID # 1617.)

The scene diagram and scene photos show scrape marks from the broken axle. These same marks demonstrate that Latits backed in a northeast direction away from Phillips, and that his car arced in a direction that would have caused the front end to swing away from, not toward, Phillips who was standing on the passenger side. (R. 38-8, Ex. 7, Diagram and Photos, ID #1591-1593.) Latits car reversed a total of only two to three car lengths at a slow rate of speed before coming to a stop. (R. 8-2, Ex. 1, Schalk Slow Motion 58:02.)

After Latits' car backed past him, Phillips turned from facing east to facing north (towards Latits's backing car) and shot four times. He then pursued the car on foot. From Jaklic's video, Phillips face and head can be seen heading south approaching Jaklics car, then turning to the east, then turning north

immediately before the four shell casings are seen ejecting into the air. (R. 8-2, Ex. 1, Schalk/Jaklic video, Jacklic Slow.)

During the employment termination arbitration Ferndale Police Lt. Wilson testified that Phillip's actions in running up to the car were reckless. (R. 38-6, Ex 5, p. 155, ID # 1499.) Jaklic's video shows Phillips's out of his car at 58:54, and beginning his advance towards Latits's car at 58:56, an instant before Jacklic rams Latits. Five seconds after Phillips exited his car, four shell casings are seen ejecting into the air beginning at 58:59 and ending at 59:00. (R. 32-2, Jaklic Video 58:27.)

Schalk's video recorded the time Phillips began running toward Latits's car at 58:02. At that time, Latits's car is in view of Schalk's camera. When Phillips gets to the side of the car, Latits begins backing up and continues until he backs all the way past Phillips. At 58:05, three seconds after Phillips began charging Latits's car, when Phillips begins shooting, latits car has already backed past him and out of view of the Schalk video. Phillips then proceeds north after Latits and goes out of view of Schalk's camera at 58:05. (R. 32-2-5, Ex. 1-4.)

Initially Phillips claimed that he fired to protect "himself and other officers". (R. 38-9, Ex. 8, p. 17, ID # 1617; R. 32-10, Ex. 9, p. 141, ID # 1140.) However, Latits was backing in a northeastly direction away from officers Jaklic

and Wurm, who were still in their cars when Phillips began firing, and, Officer Schalk was still on Woodward, slightly south and some 30 to 40 feet in front of Latits's car. (R 8-2, Ex. 1, Schalk Slow Video 58:02.) The Phillips and Schalk videos show unequivocally that no one was behind Latits as he slowly backed up in his disabled car. There were no officers, civilians, or patrol cars even in the frame. *Id.*

Phillips testified he fired only four shots and that he fired them with no pause in between, and began shooting as soon as Latits began backing up. (R. 32-10, Ex. 9, Phillips pp. 102, 115-116, ID # 1130, 1133.) The Jacklic video demonstrates that the four shots were fired in less than a second. (R. 8-2, Ex. 1, Jaklic slow video 59:00, R. 32-, Ex. 1 Jaklic video 59:00.) Phillips claimed he stopped shooting after only four shots , even though he did not know whether he hit Latits and even though he still had ammunition. He admitted that once Latits backed past him, he was no longer in danger and there was no longer any reason to shoot:

Q. Okay. And so why didn't you empty your gun?
A. Wasn't necessary.
Q. But you said you didn't see the bullets take effect on Mr. Latits, right? Correct?
A. I didn't know -- wait. Say that -- could you say that question again?

* * *

Q. You said you didn't see the bullets take effect on Mr. Latits, correct?

* * *

A. That's correct.
Q. Okay. And so you didn't even know at that point if you had hit him, correct?
A. Correct.
Q. Okay. So why didn't you empty your gun?

* * *

A. I didn't need to.
Q. Why didn't you need to?

* * *

A. I was no longer in danger.
Q. At what point did you stop being in danger?
A. After he had passed me.
Q. Okay. So you would agree then, once Mr. Latits' car cleared you, you were no longer in danger, and there was no longer any reason to fire then, correct?
A. Yes.

(R. 32-10, Ex. 9, Phillips pp. 107-108, ID # 1131; emphasis supplied.)

Phillips claimed in the district court that he shot to protect pedestrians and other drivers that would potentially be in danger if he allowed Latits to escape. However, in addition to admitting he had no reason to shoot after Latits backed past him, Phillips testified at his arbitration that Latits did not pose a danger to the community if left at large, (R. 38-6, Ex. 5, Opinion p.12, ID # 1588.) He also testified:

Q. Did you know, when you decided to do the PIT maneuver with the last vehicle, whether there were pedestrians on the sidewalk?
A. I saw no pedestrians, and as to whether -- is there the potential that there may have been some in the area that I didn't see, there's that potential.
Q. Did you testify at the arbitration that your reason for being

> concerned about safety of others, if you allowed the Latits vehicle to continue, was that he might go into the business district in Ferndale and harm someone?
> A. That wasn't my statement. That was my attorney's statement.
> Q. So to you, that was not -- it would not be what you would say was a reason why you did it?
> A. That didn't enter my mind, but I do recall Mr. Porter mentioning or stating that.
> Q. So he made a statement that was not accurate, regarding what you were actually thinking, is that correct?
> A. It was clearly a potentiality that I didn't consider.

(R. 38-5, Ex. 4, Phillips Emp. Dep. pp. 243-244, ID # 1521.)

The forensic evidence demonstrates that Phillips fired at Latits a second time, after Latits backed all the way past him and after Phillips admitted Latits posed no danger and there was no reason to shoot. Phillips testified that the four shots depicted in the Jaklic video were the **only** shots he fired at Latits, and that he fired when Latits began to back up. (R. 32-10, Ex. 9, Phillips pp. 127-128, ID # 1136.) However, seven shell casing were recovered from the scene, all .45 caliber matching Phillips's gun. (R. 38-10, Ex. 9, Et Report, ID # 1631-1633.) Moreover, Phillips started his shift with nine bullets. (R. 32-10, Ex. 9, Phillips p. 30, ID # 1112.) When Phillips gun was confiscated following he shooting, it had only two bullets left. (R. 38-11, Ex. 10, Simon police report, ID # 1634.) No one else fired a shot. (R. 32-8, Ex. 7, Jaklic, p. 57, ID # 1054.) When asked if he had any idea why seven shell casings were found on the ground if he only fired four shots and

no one else fired their weapon, he testified he had none. (R. 32-10, Ex. 9, Phillips p. 127, ID # 1136.)

In his police report, Officer Jaklic wrote that Latits rammed another patrol car and was heading backwards towards a fourth officer when Phillips opened fire. (R. 38-11, Ex. 10, Jaklic report, ID # 1634, 1635.) At his deposition, Jaklic claimed he did not see the shooting at all, despite the fact that Latits vehicle was nose to nose with his car and there was nothing blocking his view when Phillips, who was just a few feet away, began firing. (R. 32-8, Ex. 7, Jaklic p. 55, ID # 1053.) Jaklic also specifically denied seeing anyone or any vehicle behind Latits at any time before Latits was shot. (Id at pp. 57-59, ID # 1054.) Jaklic also admitted that Latits never attempted to ram him at Stanley's, but instead attempted to avoid him. (Id at p. 39, ID # 1049.)

Officer Wurm told an EMT at the scene that Phillips shot Latits from a position in front of Latits's car. (R. 32-13, Ex.12, Report, ID # 1198-1203; R. 32-16, Ex. 15 Schwall dep. pp. 20-21, ID # 1245-1246.) However, in his police report, Wurm claimed that after Latits stopped, he and Phillips "exited their cars and approached" Latits. (R. 38-11, Ex. 10, Wurm report, ID # 1634, 1635.) He claimed Latits drove **forward** at the officers "recklessly and gaining speed" and that his "wheels were spinning and he was gaining speed as he crossed the

sidewalk headed directly at the officers"at which point Phillips shot. Id. Latits vehicle then "stopped the assault on the officers and rolled backward". Id.

At his deposition, Wurm testified that prior to the shooting, he never exited his car, much less approached Latits's car. Instead, he claimed that after he stopped his car, he put one foot maybe two feet on the ground but did not get out. He also testified that he was lying on the floorboards of his car when Phillips fired, out of fear he would be shot by Phillips. (R. 32-9, Ex. 8, Wurm pp. 47-57, ID # 1076-1079.)

In her police report, Officer Schalk claimed that she was attempting to block Latits's car from the rear when he began to accelerate backwards. (R. 38-11, Ex. 10, Schalk report ID # 1636, 1637.) However, at her deposition, Schalk admitted she was not attempting to block Latits when he was backing up when Phillips shot him. She admitted she never pulled behind Latits's car until after Latits was shot and his car came to a stop. (R. 32-8, Ex. 7, Schalk pp. 33, 44-45, ID # 1048, 1050, 1051.)

The autopsy showed that Latits was shot three times. The path of the bullets was right to left, front to back, and slightly downward. (R. 32-17, Ex. 16, Autopsy, ID # 1260-1270.) Latits underwent emergency surgery but his massive internal bleeding could not be contained and he died at 540 am. (R. 38-12, Ex. 11,

Medical records, ID 1640-1659.)

Chief Collins testified that Philips did not follow proper procedure: "Phillips never should have been standing where he was when that incident occurred. And thus, a person's life was taken because he didn't follow the policies and rules that he was responsible for knowing". He also testified Phillips did things he "had been told not to do". He testified he believed there was no justification for using lethal force against Latits based on what happened during the pursuit, the collision with Jaklic, or the possibility that Latits could escape. He testified that the speeds during the pursuit "were not really at any point real, real fast", and that Wurm was also disciplined for ramming Latits. (R. 38-2, Collins pp. 77, 89-90, 122, ID # 1386, 1398-1399, 1405.) Although Collins testified Phillips was justified in shooting Latits, that conclusion was based on his presumption that phillips was at risk of being hit by Latit's car at the time Phillips began shooting.

STANDARD OF REVIEW

This court reviews de novo a grant of summary judgment, including one based on qualified immunity. *Wallace v. Midwest Fin. & Mortg. Servs., Inc.*, 714 F.3d 414, 418 (6th Cir. 2013); *Dickerson v. McClellan*, 101 F.3d 1151, 1157 (6th Cir. 1996).

Under F.R.Civ.P. 56, summary judgment may be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Cellotex Corp. v Catrett*, 477 U.S. 317, 322-323; *Adams v Metiva*, 31 F.3d 375, 378 (CA6 1994). Whenever the non-moving party presents direct evidence refuting a moving party's motion for summary judgment, the court must accept that evidence as true. *Adams* 312 F.3d at 382. While the court may inquire into the plausibility of inferences from circumstantial evidence, it may not inquire into credibility of direct evidence for purposes of review. *Id.* The court must consider all Rule 56 materials on file, and draw all justifiable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Sec. Exch. Comm'nv Blavin*, 760 F.2d 706, 710 (CA6 1985) (*per curiam*). With regard to the video evidence, "[f]acts that are not blatantly contradicted by recording remain entitled to an interpretation most favorable to the non-moving party." *Cordell v. McKinney* 759 F.3d 573, 580

(C.A.6 2014).

> As to the standard of review in deadly force cases:
>
> [T]he witness most likely to contradict [the police officer's] story-the person shot dead-is unable to testify". Accordingly, "the court may not simply accept what may be a self-serving account by the police officer .... [T]he court must also consider circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably. *Id.* (citing *Scott v. Henrich,*39 F.3d 912, 914 (CA9 1994).

O'Bert v. Vargo, 331 F.3d 29, 37 (CA 2 2003

In this case the police videos, the testimony of Phillips, and the testimony of other police officers provides direct evidence that deadly force was not justified.

SUMMARY OF THE ARGUMENT

Defendant is not entitled to qualified immunity. The evidence, when taken in a light most favorable to Plaintiff, establishes a violation of a clearly established right, namely the right to be free from the use of deadly force when deadly force is not justified. Plaintiff did not present an imminent threat of death or serious bodily injury to any person prior to or at the time he was shot and killed.

Upon remand Plaintiff discovered that many of the witnesses, including Defendant had been deposed in Phillip's state court employment discrimination lawsuit. Plaintiff subpoenaed the evidence and Phillips objected. Plaintiff filed a motion to compel but the district court refused to even schedule a hearing. Further, the district court only allowed Plaintiff 21 days to conduct discovery. Plaintiff is entitled to conduct discovery and obtain the new information from Phillip's employment discrimination case as it is reasonably calculated to lead to the discovery of admissible evidence.

ARGUMENT

I. BASED ON ANY OBJECTIVE VIEW OF THE VIDEO EVIDENCE, AS WELL AS THE TESTIMONY OF VARIOUS DEFENDANTS AND WITNESSES, DEFENDANT IS NOT ENTITLED TO QUALIFIED IMMUNITY.

Defendant asserts he is entitled to qualified immunity on Plaintiff's claim. He is not. Qualified immunity involves a two-step inquiry: (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 the right was clearly established." *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

A. Defendant Violated Plaintiff's Constitutional Rights.

The Supreme Court stated in *Tennessee v. Garner*, 471 U.S. 1, 9-10 (1985):

> Where the suspect **poses no immediate threat** to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. (Emphasis supplied.)

When analyzing Fourth Amendment claims, the Supreme Court has directed courts to assess, "the reasonableness of a seizure in distinct stages. . . . whether the use of deadly force at a particular moment is reasonable depends primarily on **objective assessment** of the danger a suspect poses **at that moment**." *Brosseau v. Haugen,* 543 U.S. 194, 197 (2004) (emphasis supplied).

As to the use of deadly force during a police chase, the Sixth Circuit stated:

> Fourth Amendment law provides that an officer may shoot at a driver that appears to pose an immediate threat to the officer's safety or the safety of others, for example, a driver who objectively appears ready to drive into an officer or bystander with his car. *See Brosseau v. Haugen,* 543 U.S. 194, 197200, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (citations omitted). But an officer may not continue to fire his weapon at a driver once the car moves away, leaving the officer and bystanders in a position of safety, see, e.g., *Estate of Kirby*, 530 F.3d at 479-80, 482-83, unless the officer's prior interactions with the driver suggest that the driver will continue to endanger others with his car.

Hermiz v. City of Southfield 484 Fed. Appx. 13, 16, (CA 6, 2012). See also *Cass v. City of Dayton*, 770 F.3d 368, 375-76 (6th Cir. 2014).

In *Scott v. Harris*, 550 U.S. 372,381 (2007), the court cautioned: there must be "an **actual and imminent** threat to the lives of [ ] pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase." As multiple courts have observed, *Scott* did not declare "open season on suspects fleeing in motor vehicles." See *e.g.Lytle v. Bexar County Tex.*, 560 F.3d 404, 415 (CA 5 2009):

> Nearly any suspect fleeing in a motor vehicle poses some threat of harm to the public. As the cases addressing this all-too-common scenario evince, the real inquiry is whether the fleeing suspect posed such a threat that the use of deadly force was justifiable.

And see *Cardova v. Aragon*, 569 F3d 1183, 1190 (CA 10 2009), noting a "hypothetical risk" of future harm to the public is not enough to justify the use of

deadly force:

> The threat must have been more than a mere possibility. The facts show that Mr. Cordova was driving recklessly down the wrong side of the highway. The facts do not, however, show that any other motorists were in the vicinity, or that other motorists would not be able to spot Mr. Cordova and avoid an accident themselves. Mr. Cordova's behavior did, of course, create risks for other motorists who might come along, but that risk of future harm was not enough to justify the near certainty of Mr. Cordova's death.

1. There Was No Threat To The Public That Justified Deadly Force.

In *Lytle*, 560 F.3d at 415-416, the court surveyed scenarios from police chase cases from several circuits, including the Sixth, where the courts found no justification for deadly force from any threat to the public at large: see *Adams v. Speers*, 473 F.3d 989, 991-92 (CA 9 Cir. 2007) (suspect fled police "largely within the speed limit," for over an hour after police rammed him twice and then, without warning, shot suspect as his car rolled away); *Smith v. Cupp*, 430 F.3d 766, 770, 774 (CA 6 2005) (defendant shot suspect after he stole a police cruiser and drove away but there were no bystanders "whose physical safety could have been endangered by [the suspect's] actions"); and *Vaughan v. Cox*, 343 F.3d 1323, 1326-27 (CA 11 2003), (defendant shot passenger during highway chase exceeding eighty miles per hour after collision with police cruiser because suspect did little more than evade arrest and exceed speed limit to avoid capture and potential escape did not present immediate threat of serious harm to [the police

officer] or others on the road.)

In this case, the decedent was pulled over for a minor traffic violation at approximately 1:00 a.m. on a Wednesday morning. He possessed no weapon and had no warrants. He drove away only after Jaklic pointed a gun at his head from point blank range. Latits drove away through an empty commercial district. When he got to Eight Mile and Woodward, Latits pulled into an empty restaurant parking lot on the south side of 8 Mile. Jaklic, pulled into the same parking lot toward Latits. Latits turned away from Jaklic and headed onto southbound Woodward. Jaklic then falsely reported that Latits attempted to ram him. When he did so, he was some two car lengths behind Latits and Phillips was heading south through the same parking lot with an unobstructed view. (Jaklic admitted that Latits attempted to avoid hitting him.) Phillips was driving the wrong way down east bound 8 Mile in the lane closest to the parking lot when Jaklic pulled in. He had an unobstructed view and was just several feet away. There was no oncoming traffic distracting Phillips at the time of the events in the parking lot or at the time of Jaklic's broadcast. A reasonable juror could conclude Phillips knew the broadcast was false as did the factfinders in the internal investigation and employment termination arbitration.

Once southbound on Woodward, a ten lane divided highway, Wurm, Jaklic

and Phillips, in that order, actively engaged in the pursuit while Schalk followed from a distance. The pursuit continued approximately one half mile. Latits never drove at a dangerously high rate of speed. Latits never weaved through traffic; there was only one other car on the road and it was in no danger. There were no pedestrians anywhere in the vicinity. It was not residential area, there is a half mile long cemetery on the west side of Woodward, a wide long elevated grassy median and mostly vacant commercial property, including the long deserted State Fair Grounds on the east side. This was no Hollywood style chase. The pursuit speeds were not exceedingly fast. There was no justification for the use of lethal force.

As Latits turned northbound from a legal U-turn lane on Woodward at the first turnaround south of State Fair, Wurm used lethal force, violently ramming Latits on the driver's side, pushing Latits's car across multiple lanes. When this occurred Phillips was following on southbound Woodward with an unobstructed view of the collision which occurred at an angle to his left. Moreover, Wurm broadcast that he just hit Latits, which can clearly be heard on the recording from Phillips' car.

As Latits resumed heading northbound, he was **in front of Wurm** and Phillips was already heading north on Woodward, again with an unobstructed

view. Wurm then pushed the back of Latits's car two more times causing Latits's car to fishtail. This can be seen on Phillips video. Wurm then broadcast that Latits just hit **him**. However, no reasonable officer in Phillips position could possibly believe or rely on the broadcast since he could clearly see Latits did not ram Wurm (as the internal investigation and arbitration found), and because Wurm was behind Latits the entire time, a fact readily observable by Phillips. The fact that Latits fishtailed and temporarily lost control on a five lane highway devoid of any cars save the pursuit vehicles, which were behind him, and only after Wurm unlawfully rammed him, also did not justify the use of lethal force. The total northbound pursuit lasted one tenth of a mile.

After Wurm caused Latits to fishtail, Phillips, who was the third car in the pursuit, accelerated around the two other police cars in violation of the pursuit policy and crashed into the passenger side of Latits's car in a PIT maneuver that he had been expressly ordered never to do and which was a further violation of pursuit policy.[2]

Phillips then pushed Latits across multiple lanes and onto the sidewalk at State Fair and Woodward knocking down a crosswalk pole and narrowly missing a

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[2]Although a police department's policies and procedures do not set the constitutional standard, can be considered by the factfinder in determining whether the use of force was reasonable. *Alvarado v. Oakland County*, 809 F. Supp. 2d 680, 689 (E.D. Mich. 2011). See also *Champion v. Outlook Nashville, Inc.*, 380 F. 3d 893 (2004)

transformer box. When Phillips used this lethal force, there was no justification based on any alleged danger to the public, the only danger to the public was caused by the reckless conduct of Phillips and Wurm; both of whom were disciplined. Latits came to stop facing southbound with Phillips to his west and Wurm to his east, flanking him. Latits, whose car was crippled by a broken left front axle, began to move slowly forward (southbound) in between Phillips and Wurm, who were still in their vehicles. The Schalk video clearly shows that Latits traveled approximately less than two car lengths before Jacklic, who was still heading northbound on Woodward and had just entered the intersection at State Fair, accelerated and turned into Latits head-on resulting in a low speed collision. Phillips witnessed this. His claim that Latits rammed Jaklic is incredible. He had the same angle of sight as the Schalk video.

Moreover, this type of low speed collision would not justify the use of lethal force, even if Latits rammed Phillips, which he clearly did not. Phillips's own supervisor, testified, if "a bad guy's driving toward me at 5 miles an hour or is accelerating from 10 feet away and I'm in my car. I wouldn't use – I wouldn't use deadly force because he's not going to be able to hurt me. (R. 38-13, Ex. 12, Brown dep p. 38, ID # 1671.) The type of low speed collision put no one at risk of serious injury and the use of lethal force would be a grossly disproportionate

response.

Immediately after Jaklic rammed Latits, Phillips charged up to the passenger side of Latits's car and stopped near the sideview mirror. When Latits backed away, Phillips fired four times then pursued Latits's car. Latits's car traveled approximately two to three car lengths and came to a stop. There was no one behind Latits. Any future danger that Latits posed if allowed to drive away was purely speculative and no more dangerous than the generic danger attendant in every police chase. He did nothing but try to avoid capture and never put any motorist or pedestrian in imminent peril. Latits posed no imminent threat to anyone when defendant used deadly force.

Similar to *Adams*, the chase was largely within the speed limit, but in this case lasted closer to **one minute** than to one hour. Similar to *Adams and Vaughn*, the fact that Latits continued to drive after the police rammed him, standing alone, did not justify deadly force, because he did not endanger other motorists, And like *Adams*, Phillips suddenly and without warning shot Latits as his car rolled away. As in *Cupp*, the chase did not endanger any bystanders, and flight in a car by itself, while creating some risk, does not justify the use of deadly force . Like the plaintiff in *Vaughn*, Latits was only evading arrest. Notably in *Vaughn*, the suspect rammed the police car on a highway while traveling at a high rate of

speed, then kept going.[3] Latits never rammed a police car; he was the one getting rammed.

Phillips's current claim that he was acting to protect the public from the harm that could potentially occur if Latits escaped is nothing more than post hoc fabrication and is undermined by his own actions and words. Phillips testified that although he did not know if any of his shots hit Latits, he stopped firing at four shots (of the nine his gun held) once Latits backed past him because at that point he was no longer in danger and there was no other reason to shoot. If Phillips was shooting to protect the public because he believed Latits posed a danger if allowed to drive away, he would not stop shooting if he did not know whether Latits had been shot and disabled from driving away.

Further, at his arbitration, Phillips never claimed that he rammed Latits because Latits posed a threat to the safety of other officers or to the community; he claimed he did so solely to end the chase. Moreover, Phillips initially claimed that he shot Latits because Latits nearly ran him over by swinging the front of his car toward him, and when that did not pan out, has switched his story to claim he shot to protect the public. Since that does not pan out either, the use of deadly force

[3]Notably, in *Adams, Cupp,* and *Vaughn,* the underlying crimes before the flight were much more serious than the traffic stop and suspected marijuana possession in this case.

was not justified.

2. Phillips Fired Two Volleys Of Shots, Both Of Which Were An Unreasonable Use Of Deadly Force.

Phillips testified that he ran up to the car and fired four times when Latits backed up. He did not fire before this. He admits he had no reason to shoot once Latits backed past him. Defendant's Exhibit 5, which synchronizes the time of the four police videos, demonstrates that when the first four shots were fired, Latits had already backed past Phillips. (R. 32-6, ID # 1038.) Therefore, based on Phillip's own testimony, he was not justified in firing the first four shots.

Moreover, the forensic evidence from the scene and the police reports demonstrate that Phillips fired seven shots, not four. Phillips had no explanation for the additional three shots. The video demonstrates that Phillips fired four shots as soon as he ran to the side of Latits's car. After firing these four shots, he pursued Latits's vehicle on foot out of camera view. Since Phillips did not fire before he got to the side of Latits's vehicle, the additional three shots must have been fired subsequently, when Phillips pursued Latits out of camera view. Because Phillips testified that he stopped firing after the first four shots because there was no more reason to shoot, these additional three shots were fired when there was no more reason to shot. Latits was shot a total of three times. Since Phillips testified that he did not see the first four shots take effect, a reasonable

factfinder could also conclude that the additional three shots were the ones that struck and killed Latits. **Notably, Phillips has never accounted for the additional three shots but instead continually ignores them apparently in the hope that the Court will too.**

3. The Threat To Defendant And Other Officers Did Not Justify The Use Of Deadly Force.

In *Cupp, supra*, the court stated that the autopsy supported the Plaintiff's claim that the shooting was unconstitutional:

> [T]he plaintiffs point to the autopsy report as proof that **all of the shots were fired either after the cruiser had passed Dunn or, at the very earliest, while the cruiser was passing Dunn with the officer on the driver-side of the vehicle.**(emphasis added).

Relying in part on this evidence, the court concluded,

> Although Smith had possession of a dangerous "weapon", he was not threatening the lives of those around him with it when he was fatally shot. This type of situation does not present "a perceived serious threat of physical harm to the officer or others in the area from the perspective of a reasonable officer."

430 F.3d at 775

Cupp demonstrates that a police officer cannot shoot a fleeing suspect because the vehicle passes close to him as it drives away. That is exactly what happened here. The autopsy in this case demonstrates that the path of the bullets was front to back, right to left, and slightly downward, proving that the shots were

fired either after the car had passed Phillips, or, at the very earliest, while the car was passing him. The scene diagrams and photos depicting the scrape marks from the broken wheel demonstrate that Latits was backing away from, not toward Phillips. Thus, as in *Cupp*, Latits was not threatening the lives of those around him when he was shot.

Finally, an officer cannot create a risk then use it to justify his use of deadly force. In *Estate of Starks v. Enyart,* 5 F.3d 230, 235 (CA 7 1993) the court held that deadly force is not justified when the officer who uses the deadly force is the one who "creates the encounter that ostensibly permits its use". The court reasoned that "the threat of danger must be **willful** in order to warrant deadly force in response. . . ." *Id.* at 235. In *Starks,* the officer stepped in front of a fleeing suspect's car leaving the suspect no time to brake, shot him and claimed he was justified in doing so because he was at risk of being hit by the suspect's car. The *Starks* Court refused to grant qualified immunity, stating that determining whether the officer placed himself in danger is normally a factual inquiry that should be resolved by the factfinder.

During this case, Phillips previously claimed that he was justified in shooting Latits given his close proximity to Latits's car when Latits began to back away. However, to the extent Phillips was in any danger from this encounter,

Phillips created it. As the City of Ferndale stated:

> [T]he situation was contained because the suspect was "boxed-in" by the several patrol cars on the scene. [Phillips] however, was not satisfied. He exited his vehicle, charged at the suspect's car with his gun-drawn, and fatally shot the driver. [Phillip's] actions defied common sense - much less his own training on the widely-accepted practice that officers are to make a tactical approach, from cover and under control. (R. 38-3, Exhibit 2, Ferndale SD motion p. 7, ID # 1426.)

As Chief Collins explained, Phillips should have positioned "himself between his car and the suspect until everybody was able to tactically approach that vehicle ... Then you would have order him out of the vehicle and have him come to you." (R. 38-2, Ex. 1, Collins p. 124-125.)

Instead of acting in conformance with his training and reason, Phillips recklessly ran up to Latits's car when there was no reason to do so and common sense dictated otherwise, then turned toward Latits as Latits backed away and began shooting. He cannot use his proximity to Latits's vehicle, a situation that he needlessly and recklessly created, as an excuse to kill Latits. Notably, the lower court stated:

> At the time of the shooting, there was no way to know if Latits was going to switch gears and drive forward through the gap between Jaklic's and Phillips's vehicles, where Phillips was standing. And if Latits returned to Woodward Avenue, he would be a threat to pursuing officers and the public. He was driving a partially-disabled vehicle that he was unable to safely steer. The only other way the chase was going to end was with Latits fully disabling his car, either

> through a wreck with a stationary object, a pursuing cruiser, or a member of the public. In short, Latits put the lives of the pursuing officers and the public in danger by continuing to flee, and Phillips acted reasonably by using deadly force to terminate the chase.

(R. 34, Opinion and Order p. 8, ID # 1716.)

However, Phillips ran after Latits, demonstrating how much "fear" he had that Latits would drive towards him.

4. Defendant's Response To The Threat Was Unreasonable.

Phillips actions were beyond unreasonable, they were outright reckless. He endangered everybody in the pursuit by passing two other police vehicles, cutting in front of them and broadsiding Latits causing it to crash. He endangered everyone by leaving tactical position of safety and charging Latits's car. He endangered officer Wurm by shooting towards him, forcing him to take cover to avoid getting shot. Phillips' actions were an unreasonable response to any danger posed by Latits.

B. Plaintiff's Fourth Amendment Rights Were Clearly Established.

In *Solomon v. Auburn Hills Police Dept.* 389 F.3d 167, 173(C.A. 6 2004), the Sixth Circuit stated:

> Once a potential violation of a plaintiff's constitutional right has been established, we next decide whether that right was clearly established. In so deciding, we must ask "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation confronted.

To determine if the law is "clearly established", the district court can look to (1) the United States Supreme Court, (2) the circuit court in which it sits, (3) other courts within its circuit, and (4) decisions of other circuits. *Cameron v Seitz*, 38 F. 3d 264, 272 (CA 6. 1994). An action's unlawfulness can be apparent from direct holdings, from specific examples described as prohibited, or from the general reasoning that a court employs. *Hope v. Pelzer*, 536 U.S. 730 (2002). In *Cummings v. City of Akron,* 418 F.3d 676, 687 (CA 6 2005), the court stated "There need not be a case with the exact same fact pattern, or even fundamentally similar or materially similar facts; rather, the question is whether the defendants had fair warning that their actions were unconstitutional. "The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court'" *Hope* at 740.

In *Hermiz*, supra, the Sixth Circuit stated that for purposes of qualified immunity, it was "clearly established" in 2007 that Fourth Amendment law prohibited shooting at the driver of a fleeing car from the side, absent indications of an ongoing imminent threat. Citing *Cupp, supra* and *Sigley v. City of Parma Heights*, 437 F.3d 527, (CA 6 2006.) Thus, on June 24, 2010, the constitutional rights which Phillips violated were clearly established.

In the lower court, Defendant relied on *Plumhoff v. Rickard* 134 S.Ct. 2012

(2014), *Hocker v. Pikeville City Police Police Dep't.*, 783 F.3d 150, (CA 6 2013) and *Smith v. Freeland*, 954 F. 2d 343 (CA 6 1992), claiming they are "virtually indistinguishable. *Plumhoff* involved a dangerous high-speed chase which exceeded 100 miles per hour, lasted over five minutes, endangered dozens of civilian motorists, several of whom were forced to alter course. In *Plumhoff* , the suspect also rammed a police car twice and accelerated rapidly, spinning his tires when officers shot.

Hocker involved a heavily intoxicated, possibly suicidal suspect who led two police cruisers on a nighttime, lights-off, high-speed chase for seven miles before pulling onto a darkened gravel road. The two officers then exited their cruisers with guns drawn and ordered Hocker to show his hands and turn off his car. Hocker put his vehicle in reverse, accelerating quickly enough to spin his tires and rammed one of the cruisers, trapping an officers arm, moving it thirty feet and causing him to backpedal with the moving car. His partner got an angle and shot to protect his partner. Once arm was freed from the car, that officer also shot.

Smith involved a chase through a residential neighborhood where the suspect traveled in excess of 90 miles per hour, ran a stop sign, attempted to ram one officer, proceeded into another residential area and drove down a dead end street. When an officer boxed him in nose to nose, and got out of his car, the

suspect rammed the police car, pushed it forward, then drove over a lawn, hit a fence and sped towards a police roadblock that had been set up at the end of street when the officer fired.

Obviously the facts in these case are more than a little distinguishable. Among many distinctions, all of these chases were high speed, this case did not; All these chases involved suspects ramming police cars; In this case officers rammed Latits; Those cases all involved imminent risks of serious harm to the public and/or police; This case involved a non-imminent, hypothetical risk only.

II. PLAINTIFF IS ENTITLED TO DISCOVERY

On January 7, 2014, while this case was pending before this Court on Defendant's first appeal of the lower court's denial of Defendant's Rule 12 motion, Defendant Phillips filed a state law discrimination complaint against the Ferndale Police Department claiming that the Latits incident was a pretext for firing him and that he was really fired because he was Jewish. (Notably, Phillips did not raise any religious discrimination claim during arbitration hearing.) (R. 38-6, Ex. 5, Arbitration award, ID #1577.) Thus, Phillip's conduct during the Latits incident was at the center of his state law employment discrimination proceedings. Multiple witnesses, including Defendant Phillips, testified about the Latits incident and Phillips's history with the Ferndale Police Department.

On August 13, 2014, this Court dismissed Defendant's first qualified immunity appeal, finding that it was frivolous and that it appeared "to have been interposed for the purpose of delay." (R. 19, ID # 1473.) Thereafter, the Court issued its mandate and remanded the case back to the district court. (R. 20, ID # 1480.)

The case languished for the next several months despite multiple attempts by Plaintiff's counsel to get the case back on track and get a Rule 26 conference so Plaintiff could begin discovery on her federal claim. After several months, the lower court ordered the parties to submit a joint discovery plan and ordered the parties to mediation. Defendant argued no further discovery was necessary. Plaintiff stated:

> Discovery was conducted on Plaintiff's state law claims only.... Plaintiff needs 120 days to conduct discovery with regard to issues unique to the federal law claim, **including** punitive damages, which are not available under state law and with regard to subsequent statements Defendant made concerning the shooting in his wrongful discharge suit against the City of Ferndale. (Emphasis supplied.)

On March 24, 2015, the Court issued an order stating:

> [Latits] will have twenty-one (21) days beginning on the date of the mediation to conduct discovery. The Court will limit fact discovery pursuant to Civil Rule 26(b)(2) to the following:
> • Officer Phillips's record with the Ferndale Police Department
> • A deposition of Officer Phillips related *only* to events occurring since Officer Phillips's previous deposition in 2011.

> The Court finds this evidence "appears reasonably calculated to lead to the discovery of admissible evidence," Fed. R. Civ. P. 26(b)(1), and is not unreasonably cumulative or burdensome, *see* Fed. R. Civ. P. 26(b)(2). (R 24, Order, ID # 494.)

Since an opposing party has 30 days to respond to discovery, Plaintiff was effectively barred from conducting discovery. Nonetheless, Plaintiff made her best efforts to conduct discovery in the truncated time allotted. On April 14, 2015, the first day the Court permitted discovery, Plaintiff issued subpoenas to Defendant and the City of Ferndale. The subpoenas commanded production of documents related to Defendant's state law employment case, his termination proceedings, and his personnel file. (R. 25-2, Ex. 1, ID # 517-524.)

Defendant and Ferndale filed a motion to quash the subpoena and for a protective order. Defendant and Ferndale refused to produce any documents related to Defendant's employment case other than his deposition transcript. They indicated that they would produce documents pursuant to the other requests in redacted form because the documents responsive to those requests were subject to a "privilege or protection". They did not identify any alleged privilege or protection by name. Other than the deposition transcript of Defendant Phillips in his employment case, which did not include the exhibits referred to in the deposition, neither Defendant nor Ferndale produced any documents. When responding to the subpoena, Defendant included a copy of a stipulated, state court,

protective order sealing the state court file. On May 5, 2015 Plaintiff filed a motion to enlarge discovery. (R. 28, Motion, ID# 573

On May 6, 2015, the lower court *sua sponte* issued an order staying discovery. Although Plaintiff never indicated she was seeking discovery on punitive damages only, and although the lower court's discovery order never once mentioned the phrase "punitive damages" the lower court's stay order provided, "The Court found the deposition and police records were relevant only to establish the appropriateness of punitive damages". (R. 29, Order, p. 2, ID # 762.) And although Defendant already had a pre-discovery motion based on qualified immunity, the lower court indicated that it would again deprive Plaintiff of discovery before resolution of Defendant's qualified immunity defense.

Plaintiff's subsequent investigation of public records revealed that on March 30, 2015, the City of Ferndale filed a motion to dismiss Defendant Phillip's state law employment discrimination claim. In the state court action, the City of Ferndale attached partial deposition transcripts of Ferndale Police Chief Collins, Sgt. Spellman (Phillips's supervisor, Lowell Phillips, Sgt. Simon, Lt. Emmi, Sgt. Brown, and Officer Proulx. These redacted transcripts were not sealed. However, none of the redacted depositions filed included exhibits. Ferndale also attached the arbitrators opinion. Under seal, Ferndale filed a copy of its internal

investigation, termination letter from the Chief, a video in which Phillips rammed and flipped over another car during a police chase, Ferndale pursuit policy, video of Phillips attacking a detainee in the Ferndale lockup, and internal investigation records of the Latits pursuit.

In the publically filed portion of the Chief Collins deposition, the chief testified that Phillips was terminated as a result of his actions during the Latits case including: violating the pursuit policy and procedures by engaging as the third car in a pursuit without permission, passing the secondary and primary police vehicles, and ramming Latits's vehicle during the pursuit. The Chief also testified that Phillips disregarded a direct order not to use a PIT maneuver and violated the use of force and felony arrest procedures by not taking a tactical position after Latits's car came to a stop, but instead leaving the safety of the police car and running up to the side of Latits's vehicle and shooting him. (R. 38-2, Ex. 1, Collins dep. pp 81-88, ID # 1390-1398.) Lt. Wilson, testified that Phillips acted recklessly by running up to the car immediately prior to shooting Latits. (R. 38-5, Ex. 4, Phillips p. 155, ID # 1499.)

Chief Collins also testified that Phillips, "had issues with his ability to control himself under high stress situations". (R. 38-2, Ex. 1, p. 76, ID # 1385.) Finally, Chief Collins testified further that he also disciplined Officer Wurm for

ramming Latits. (Id at 89, ID # 1398.)

A. Plaintiff's Requested Discovery Was Directly Relevant to Plaintiff's Fourth Amendment Claim and Thus to the Issue of Immunity.

It is improper to circumscribe discovery based on qualified immunity when the discovery concerns factual issues on which the question of immunity turns and when the Defendant has already filed and lost a qualified immunity motion based on the pleadings. In *English v. Dyke* 23 F.3d 1086 (C.A.6,1994) the court outlined the procedures for raising qualified immunity:

> [A] qualified immunity defense can be raised at various stages of the litigation including at the pleading stage in a motion to dismiss, **after discovery in a motion for summary judgment**, or as an affirmative defense at trial.

(Id at 1089; Emphasis supplied.)

In this case, Judge Cook found that qualified immunity was not available based on the facts alleged in Plaintiff's complaint. This decision was affirmed on appeal. Plaintiff never was allowed discovery on her Fourth Amendment claim. The bulk of Plaintiff's discovery concerns witness testimony including eyewitness testimony, witness statements, policies, and documents, all of which concern liability and impact immunity. The district court issued an order staying discovery without even the benefit of Defendant's Rule 56 motion. Thus, at that juncture, the lower court could not possibly know what material facts were even in dispute.

Plaintiff specifically mentioned punitive damages in the joint discovery plan to preempt Defendant's objections because Plaintiff intended to submit discovery requests regarding Defendants' past acts of misconduct, in additional to the evidence regarding liability. Plaintiff has never had discovery on her federal claim and was not able to complete discovery on her state law claim before the case was removed as various discovery motions were pending at the time of removal. Plaintiff's state law discovery requests were effectively stayed for approximately four years while Defendant pursued a state law appeal and a federal appeal. Over that time, multiple witnesses have made multiple statements concerning the pursuit and shooting itself and about whether Phillip's actions complied with Ferndale's police procedures. This discovery is directly relevant to the issues of whether the Defendant is entitled to qualified immunity and whether Defendant violated the Fourth Amendment. Through its own investigation Plaintiff was only able to obtain excerpts of some of these multiple statements. Furthermore, as previously noted, both Wurm and Phillips were disciplined for their misconduct during the Latits pursuit and shooting. Thus, all this information would be highly probative of whether Defendant acted reasonably when he shot and killed Mr. Latits.

B. Plaintiff Has a Right to Conduct Discovery on Her Federal Law Claim.

Although the district court has broad discretion regarding discovery, it does not have discretion to prevent a civil rights plaintiff from discovering information relevant to liability on her civil rights claim to oppose Defendant's qualified immunity defense. Generally parties have a right to discover any matter that is not privileged and not work product, so long as it is reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1). The only recognized exception to this is set forth in Fed. R. Civ. P. 26(b)(2)(C) and provides that discovery may be circumscribed if:

> (I) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

None of the discovery Plaintiff sought is protected by any recognized federal privilege or work product, or to the extent that it was, it has been waived. Further, all of the documents requested are reasonably calculated to lead to the discovery of admissible evidence.

The requested information regarding the new witness statements is not

duplicative or cumulative. To the extent a witness makes more than one statement about the same incident, all statements are discoverable because they may offer additional or different information and/or may lead to impeachment evidence. Plaintiff tried to obtain this information from other sources and is unable to. Defendant and Ferndale are the only sources who have the information.

Plaintiff has not had opportunity to obtain the sought after discovery in the action. The witness statements were made after this case was stayed in state court and there has effectively been a stay in place ever since. Much of this information only recently came to Plaintiff's attention. Plaintiff was aware that Defendant filed a state employment discrimination claim, but the proceeding were subject to a protective order. The protective order did not result from an adversary proceeding but was nothing more than an agreement between Phillips and Ferndale not to turn information over to third parties which was rubber stamped by the state court

Notably, Defendant testified in his deposition in this case that he was fired because he did not attend the Chief's hearing regarding the Latits incident. Defendant's testified in his employment case that he was fired for violating numerous policies during the chase and the shooting. Plaintiff has never had an opportunity to obtain any of this information which is directly relevant to liability

on her federal law claim. The district court's granting Plaintiff 21 days of discovery is not even enough time to receive answers to interrogatories and document production requests, much less do any follow up discovery. Furthermore, the lower court's stay order denied stay prevented Plaintiff from even completing the 21 days of discovery that the district court previously granted.

This case involves the ultimate loss, the loss of life, and the amount in controversy is great. The burden of producing the requested discovery is de minimus. The documents requested are electronically stored and can be produced with several clicks of a mouse (just as when Defendant attached his deposition transcript to an email). Deposition transcripts are delivered in e-trans or PDFs by court reporters, documents and videos are stored electronically and deposition exhibits are generally scanned by the court reporters. As previously demonstrated, the sought after discovery has the utmost importance in resolving the issues in this case.

Finally, Defendant has maintained that he acted reasonably at all times during the Latits incident. Plaintiff's review of the limited documents available demonstrate that the police witnesses testified that the Defendants actions were improper at virtually every stage of his involvement in the Latits incident.

The arbitration and employment discrimination proceedings are focused on

the lawfulness of Phillips activities during the chase. Ferndale's defense to Phillip's discrimination case is it terminated Phillips due to his misconduct in the Latits incident. This discovery is relevant to much more than punitive damages only. The documents are probative of whether Phillips violated the Fourth Amendment when he killed Latits.

C. A Factfinder May Consider a Police Department's Policies and Procedures When Determining Whether a Police Officer's Use of Force Was Reasonable under the Circumstances.

In Smith v. Freland, 954 F.2d 343, 347 (6th Cir.1992), the Court held, "[W]e must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene." Consistent with this pronouncement, Courts in the Sixth Circuit have repeatedly held that evidence of proper police procedure is relevant for consideration by the factfinder. Although a police departments policies and procedures do not set the constitutional standard, they can be considered by the factfinder in determining whether the use of force was reasonable. *Alvarado v. Oakland County,* 809 F. Supp.2d 680, 689 (E.D. Mich. 2011). See also *Champion v. Outlook Nashville, Inc.*, 380 F. 3d 893, 908-909 (C.A. 6, 2004) (permitting testimony regarding discrete police practice issues.) See also *Norman v. City of Lorain, Ohio*, No. 04–cv–913, 2006 WL 5249725 at *3 (N.D. Ohio Nov. 27, 2006) (concluding that plaintiff's expert could

testify regarding proper police procedures to be followed in the situation that faced the defendant but could not testify that the force used was unreasonable or unnecessary.)

In this case, Plaintiff is seeking evidence regarding Defendant's conduct during the Latits incident and whether it complied with proper police procedures. In fact, the bulk of the testimony in the arbitration and in the employment case was focused precisely on these issues. Moreover, Defendant has consistently maintained that he acted reasonably and in conformity with proper police procedure. Therefore, Plaintiff should be entitled to discovery on these issues.

D. Plaintiff Is Entitled to Obtain All Witness Statements Including Those Made During the Arbitration Proceedings and in Defendant's Employment Case.

F. R. Civ. P. 32(a)(8) provides:

> A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

Thus, Plaintiff should be entitled to all of the deposition transcripts

The rules of evidence allow myriad uses of prior witness statements. They can be used to refresh memory under FRE 612. They can be used to impeach under FRE 613(a). An inconsistent statement is even admissible under FRE

613(b). FRE 801(d)(1)(A) allows a witnesses prior inconsistent statements to be admitted if it was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition. Further, parties can introduce consistent statements under certain circumstances under FRE 801(d)(1)(B). Finally, any statements by a party are admissible for any purpose under FRE 801(d)(2).

Thus, not only are the deposition transcripts and arbitration testimony reasonably calculated to lead to the discovery of admissible evidence, this evidence would itself be admissible. Accordingly, there was no legitimate basis for the district court to deny Plaintiff discovery.

E. State Court Protective Orders Should Not Bar Federal Discovery under These Circumstances.

In its order staying discovery, the district court opined that it would be loathe to give Plaintiff discovery given the state court protective order. While some deference is owed to protective orders issued by another court, "... courts asked to issue discovery orders in litigation pending before them also have not shied away from doing so, even when it would modify or circumvent a discovery order by another court, if under the circumstances, such a result was considered justified. *Tucker v. Ohtsu Tire & Rubber Co., Ltd.* 191 F.R.D. 495, 499 -500 (D. Md., 2000). Courts have repeatedly deemed circumvention justified when the protective order is "more akin to a private contract between counsel than an order

issued by the court, following a fair briefing of the issues, and a deliberate consideration by the court." *Leblanc v. Broyhill*, 123 FRD 527, 531 (1988). See also *Tucker* 191 FRD at 500-501:

> In this case, as in the *LeBlanc* case, supra, the order was more in the nature of an agreement between counsel that, once completed and signed, was presented to the court for its approval. Thus, the Texas court's role was after the fact, as an instrument to implement what the parties already had agreed to. This is quite a different situation than that presented when a discovery dispute is raised before a court and, after a full hearing, it issues an order reflecting its deliberative process and decision. There is less need for deference and comity when the order involved is really an agreement by counsel approved, almost as a ministerial act, by the court, than an action directed by the court after a full consideration of the merits of a fully briefed dispute.

In this case, the protective order is nothing more than a contract between the parties that was rubber stamped by the judge after the fact. There was never an adversary proceeding where a privilege or protection was considered and determined by a court. Moreover, Plaintiff Latits never had an opportunity to litigate the validity of any claim of privilege or protection by challenging the existence of privilege in the first instance. Notably, Defendant and Ferndale have claimed in the instant litigation that the sought-after information is subject to a protective order while at the same time uploading much of the information into the Oakland County Circuit Court Website which can be accessed by the general public. Moreover, the protective order itself acknowledges that it, "must not

construed in any way as an admission or agreement by any party that the designated disclosure actually constitutes or contains any privileged, confidential, or proprietary information under applicable law." (R. 26-3, Ex. 3, Protective order pp 3-4, ID # 558, 559.) Instead it is for the purpose of protecting, "the confidentiality of the information and to facilitate the preparation and trial of the action". Id. Further, the protective order contemplates that the subject documents can be subpoenaed by third parties and implements a procedure for the parties in the event they receive a subpoena for "confidential" documents. (Id at p. 4 ¶ 10, ID #559.)

Courts have also considered whether the discovery request was directed to the recipient of the information, under the protective order or the source of the information because the recipient is subject to the protective order but the source generally is not. Id at 501. As the *Tucker* court pointed out, "[T]here is something unsettling about the notion that [a party] might forever be insulated from producing discovery in this, or other actions, by virtue of having once produced it in a "protected fashion". Id.

In this case Plaintiff requested documents directly from the sources of the information and both sources have refused to provide it, claiming they were subject to the protective order. It is highly unsettling in this case that a civil rights

defendant and the local government that employs him can forever insulate themselves from producing discovery having once produced it to each other in a "protected fashion" in litigation that was initiated subsequent to the civil rights claim. This is all the more true when the protective order was no more than an agreement between Ferndale and Defendant that no one else could have access to the discovery, an agreement made when Latits's civil rights claim was pending. It is all the more unsettling, given that these are government actors, subject to public sunshine laws. Finally, courts consider the hardship visited on the party seeking the information who would be forced to go to another court to obtain discovery and the burden on the other court "of having to rule on a matter of significance only to collateral litigation" and "to second guess the impact of its ruling on collateral litigation." Id at 501.

Finally, as Judge Cleland noted in *Lower Town Project, LLC v. Lawyers Title Ins. Corp.* WL 666574, 4 (E.D.Mich.,2012), there is no federal rule or case law that precludes admissibility of documents solely because they are subject to a protective order in another case. After noting that witness statements are generally admissible under the Federal Rule of Evidence and Federal Rules of Civil Procedure, Judge Cleland ruled: "Quite simply, the court could discern no exception to these general rules when the prior deposition was covered by a

protective order issued by a state court." Id.

III. PUNITIVE DAMAGES ARE NOT BARRED BY LAW OF THE CASE.

In the case below, Defendant argued below in its Rule 56 motion that Plaintiff was not entitled to punitive damages based on the law of the case doctrine because the state appellate court found that he was entitled to state law, good faith immunity. Although the trial court did not rule on this issue because it wrongfully dismissed Plaintiff's claim, this Court should rule on this purely legal question in the interest of judicial economy.

Defendant previously appealed this matter and this Court previously ruled that the state appellate court decision that Phillips was entitled to state law immunity did not bar Plaintiff's Fourth Amendment claim. "The law of the case doctrine does not apply because the Michigan Court of Appeals decided a state-law issue distinct from the Fourth Amendment issue presented to the federal court." *Latitts v. Phillips*, Case No. 13-2432, (8/13/14) p. 4. Since this Court ruled that the state court decision did not bar plaintiff's Fourth Amendment claim, it cannot not bar any damages, including punitive damages, available if Plaintiff proves her Fourth Amendment claim.

The law of the case doctrine applies to issues that have been "explicitly decided or decided by necessary implication". *United States v. Graham*, 327 F. 3d

460, 464 (CA 6 2003). The conduct necessary to support an award of punitive damages under § 1983 is the same conduct necessary to prevail on a claim under § 1983. *Hill v. Marshall*, 962 F.2d 1209, 1217 (CA 6 1992), is the controlling law in the Sixth Circuit on the punitive damages standard in § 1983 cases. It provides:

> The Supreme Court has stated that punitive damages are appropriate under 42 U.S.C. 1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade,* 461 U.S. 30, 56, 75 L. Ed. 2d 632, 103 S. Ct. 1625 (1983). This circuit has phrased the standard for defendant's conduct to warrant punitive damages as grossly negligent, intentional, or malicious. *Lewis v. Downs*, 774 F.2d 711, 715 (6th Cir. 1985).

As *Wade* makes clear, in §1983 claims, the same conduct that supports a claim for liability and the right to compensatory damages, recklessness or intentional conduct, is sufficient to support a punitive damage award. *See also White v. Burlington Northern & Santa Fe Ry.*, 364 F.3d 789, 806 (6th Cir. Tenn. 2004). In this case, since this Court has already ruled that the state court decision that found Defendant had "good faith" state law immunity did not bar Plaintiff's Fourth Amendment claim, which requires proof of reckless or intentional conduct, by necessary implication, this Court has ruled that the state court decision does not bar recovery of punitive damages, which likewise requires reckless or intentional conduct.

CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiff respectfully requests that the Court reverse the district court order granting qualified immunity to Defendant and dismissing the case, order the district court to allow discovery, find that punitive damages are not barred by the law of the case, remand the case further proceedings, and award costs.

Respectfully Submitted,

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Dated: February 25, 2016

CERTIFICATE OF COMPLIANCE

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

Dean Elliott, being first duly sworn, certifies and states the following:

1. The brief on appeal prepared by counsel's offices complies with the type volume limitation;
3. Our offices rely on the word count of their word processing system used to prepare the brief, using Times New Roman size 14 font; and
4. The word processing system counts the number of words in the brief as 12,6871.

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Date: February 25, 2016

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2016, I electronically filed the foregoing paper **PLAINTIFF/APPELLANT'S BRIEF ON APPEAL** with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Kevin Ernst, T. Joseph Seward, Lindsey Kaczmarek.

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Date: February 25, 2016

ADDENDUM
DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

DESCRIPTION	RECORD ENTRY NO.	PAGE ID #
Complaint	1	# 1 - 15
Plaintiff's Response to Defendant's Motion for Judgment on the Pleadings	8	# 109 - 414
Discovery Order	24	# 493 - 494
Motion for Protective Order	25	# 495 - 524
Response to Motion for Protective Order	26	# 525 - 560
Plaintiff's Motion to Enlarge Discovery	28	# 573 - 760
Defendants' Motion for Summary Judgment	32	# 988 - 1289
Plaintiff's Response to Defendants' Motion for Summary Judgment	38	# 1315 - 1675
Order Granting Motion for Summary Judgment	44	# 1709 - 1723
Judgment	45	# 1724
Notice of Appeal	46	# 1725