15-2306

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEBBIE JEAN LATITS, Personal Representative of the Estate of Laszlo John Latits, Deceased,

Plaintiff-Appellant,

-v-

LOWELL PHILLIPS, Police Officer for the City of Ferndale

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

No. 12-cv-14306 (Murphy, J., presiding)

DEFENDANT-APPELLEE'S BRIEF

*** * * Oral Argument Requested * * ***

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendant requests that the Court entertain oral argument to afford counsel for the respective parties an opportunity to address any outstanding issues regarding the facts or the applicable legal principles.

COUNTER-STATEMENT OF JURISDICTION

Plaintiff, not "Defendant Davis," filed the notice of appeal. Defendant is otherwise satisfied with Plaintiff's jurisdictional statement.

COUNTER-STATEMENT OF CASE

This action arises out of a routine traffic stop that escalated to a chase and culminated in a fatal shooting. Plaintiff, Debbie Latits ("Plaintiff"), is the personal representative of the estate of Laszlo Latits ("Latits"). Defendant, Officer Lowell Phillips ("Defendant"), is a former member of the Ferndale Police Department ("the Department").

I. FACTUAL BACKGROUND

While on patrol in the early morning hours on June 24, 2010, Officer Kenneth Jaklic ("Jaklic") saw Latits turn the wrong way on a one-way street near the intersection of Livernois and West Marshall in Ferndale. (***Recording-61***, R. 32-2, 00:54:02-00:55:45; ***Jaklic***, R. 32-8, Pg. ID 1041, 1044). As Latits headed toward him, Jaklic activated his lights and initiated a traffic stop. (***Recording-61***, R. 32-2, 00:54:02-00:55:45; ***Jaklic***, R. 32-8, Pg. ID 1044). Latits turned left, drove over a curb, and stopped on the grass between two buildings. (***Recording-61***, R. 32-2, 00:54:02-00:55:45; ***Jaklic***, R. 32-8, Pg. ID 1044).

Jaklic asked Latits for his driver's license, registration, and proof of insurance. (***Recording-61***, R. 32-2, 00:54:02-00:55:45; ***Jaklic***, R. 32-8, Pg. ID 1045). Latits produced his driver's license and then opened his glove box, presumably to retrieve his registration and proof of insurance. (***Recording-61***, R. 32-2, 00:54:02-00:55:45; ***Jaklic***, R. 32-8, Pg. ID 1045). Jaklic shined his flashlight

on the glove box and observed several bags of marijuana, accompanied by a bottle of pills. (***Recording-61***, R. 32-2, 00:54:02-00:55:45; ***Jaklic***, R. 32-8, Pg. ID 1045). Latits leaned forward and attempted to conceal his efforts to stuff the bags of marijuana and the bottle of pills under the passenger seat; Jaklic moved forward and continued to aim his flashlight at the glove box. (***Recording-61***, R. 32-2, 00:54:02-00:55:45; ***Jaklic***, R. 32-8, Pg. ID 1045). Jaklic ordered Latits to quit shoving items under the passenger seat, turn his vehicle off, and step outside. (***Jaklic***, R. 32-8, Pg. ID 1046). Latits denied that he shoved or attempted to shove anything under the passenger seat, after which he accelerated and fled westbound into a parking lot. (***Recording-61***, R. 32-2, 00:54:02-00:55:45; ***Jaklic***, R. 32-8, Pg. ID 1046-1047).

Jaklic observed Latits turn southbound onto Livernois from West Marshall, at which point he gave chase. (***Recording-61***, R. 32-2, 00:55:55-00:57:23; ***Jaklic***, R. 32-8, Pg. ID 1047-1048). Jaklic called in the chase and reported that the chase arose out of a traffic violation, as well as a possible public health code violation. (***Recording-61***, R. 32-2, 00:55:55-00:57:23; ***Radio***, R. 32-7, Tracks 3-4; ***Jaklic***, R. 32-8, Pg. ID 1047; ***Wurm***, R. 32-9, Pg. ID 1073; ***Phillips***, R. 32-10, Pg. ID 1122-1123). Defendant, as well as Officer Andrew Wurm ("Wurm") and Officer Janessa Danielson ("Danielson"), headed in the

direction of the chase. (***Radio***, R. 32-7, Track 3; ***Wurm***, R. 32-9, Pg. ID 1073-1074; ***Phillips***, R. 32-10, Pg. ID 1122-1123; ***Danielson***, R. 32-11, Pg. ID 1158).

Jaklic broadcast that the chase was approaching Woodward. (***Recording-61***, R. 32-2, 00:55:55-00:57:23; ***Radio***, R. 32-7, Track 4). Latits slowed down and turned right into the parking lot of a restaurant at the corner of Woodward and Eight Mile. (***Recording-61***, R. 32-2, 00:57:24-00:57:45; ***Jaklic***, R. 32-8, Pg. ID 1048-1049). Jaklic turned into the parking lot, at which time Latits began to turn around and head toward him. (***Recording-61***, R. 32-2, 00:57:24-00:57:45; ***Jaklic***, R. 32-8, Pg. ID 1049). Jaklic reported that Latits attempted to ram his cruiser. (***Radio***, R. 32-7, Track 4; ***Wurm***, R. 32-9, Pg. ID 1073; ***Phillips***, R. 32-10, Pg. ID 1123; ***Danielson***, R. 32-11, Pg. ID 1160-1161).

When Defendant heard that Latits attempted to ram Jaklic's cruiser, he was driving westbound on Eight Mile and trying to avoid an oncoming vehicle. (***Recording-67***, R. 32-4, 00:59:23-00:59:30; ***Phillips***, R. 32-10, Pg. ID 1123). After Defendant passed the oncoming vehicle, he observed Jaklic in the parking lot. (***Phillips***, R. 32-10, Pg. ID 1124). As Defendant pulled into the parking lot, Jaklic repeated that Latits attempted to ram his cruiser. (***Recording-67***, R. 32-4, 00:59:30-00:59:44; ***Radio***, R. 32-7, Track 5; ***Phillips***, R. 32-10, Pg. ID 1123).

Latits initially headed in the direction of Eight Mile, but Jaklic positioned his cruiser between Latits' vehicle and Eight Mile. (***Jaklic***, R. 32-8, Pg. ID 1049).

Latits drove across an open field, cut directly in front of Wurm, and headed southbound on Woodward. (***Recording-61***, R. 32-2, 00:57:24-00:57:45; ***Recording-66***, R. 32-3, 00:56:57-00:56:58; ***Recording-67***, R. 32-4, 00:59:30-00:59:44; ***Jaklic***, R. 32-8, Pg. ID 1049; ***Wurm***, R. 32-9, Pg. ID 1073-1074; ***Phillips***, R. 32-10, Pg. ID 1123, 1125).

Wurm, Jaklic, and Defendant chased Latits southbound on Woodward. (***Recording-61***, R. 32-2, 00:57:45-00:58:20; ***Recording-66***, R. 32-3, 00:56:58-00:57:33; ***Recording-67***, R. 32-4, 00:59:44-01:00:19; ***Jaklic***, R. 32-8, Pg. ID 1049; ***Wurm***, R. 32-9, Pg. ID 1074; ***Phillips***, R. 32-10, Pg. ID 1125). Wurm estimated the speed at 60 miles per hour[1] as the chase proceeded southbound on Woodward and approached the State Fair. (***Radio***, R. 32-7, Track 5; ***Jaklic***, R. 32-8, Pg. ID 1050; ***Wurm***, R. 32-9, Pg. ID 1074; ***Phillips***, R. 32-10, Pg. ID 1127).

Latits fled past the State Fair and entered a turnaround, which circled back to northbound Woodward. (***Recording-61***, R. 32-2, 00:58:20-00:58:27; ***Recording-66***, R. 32-3, 00:57:33-00:57:36; ***Recording-67***, R. 32-4, 01:00:20-01:00:28; ***Radio***, R. 32-7, Track 5; ***Jaklic***, R. 32-8, Pg. ID 1050; ***Phillips***, R. 32-10, Pg. ID 1125-1126). Latits made a wide turn onto northbound Woodward and experienced difficulty in maintaining control of his vehicle. (***Wurm***, R. 32-

[1] The posted speed limit is 40 miles per hour.

9, Pg. ID 1074). Latits regained control of his vehicle and accelerated in front of Wurm, at which point the front of Wurm's cruiser collided with the passenger side of Latits' vehicle. (***Recording-61***, R. 32-2, 00:58:27-00:58:28; ***Recording-66***, R. 32-3, 00:57:37-00:57:39; ***Wurm***, R. 32-9, Pg. ID 1074-1075, 1080; ***Jaklic***, R. 32-8, Pg. ID 1050).

As Latits accelerated and gained speed, he swerved across all of the northbound lanes of traffic on Woodward. (***Recording-61***, R. 32-2, 00:58:29-00:58:47; ***Radio***, R. 32-7, Track 6; ***Wurm***, R. 32-9, Pg. ID 1074-1075; ***Danielson***, R. 32-11, Pg. ID 1162). It appeared as though Latits was trying to strike the officers' cruisers. (***Recording-61***, R. 32-2, 00:58:29-00:58:47; ***Danielson***, R. 32-11, Pg. ID 1162). Wurm reported that Latits hit his cruiser several times. (***Radio***, R. 32-7, Track 6; ***Phillips***, R. 32-10, Pg. ID 1126).

Since Wurm witnessed Latits operate his vehicle in a manner that threatened the safety of others, he initiated contact with the intent to disable Latits' vehicle. (***Recording-61***, R. 32-2, 00:58:31-00:58:32; ***Recording-66***, R. 32-3, 00:57:44-00:57:36; ***Wurm***, R. 32-9, Pg. ID 1075; ***Danielson***, R. 32-11, Pg. ID 1161). Wurm tried to pin Latits' vehicle up against a nearby curb. (***Wurm***, R. 32-9, Pg. ID 1075-1076). Latits' vehicle appeared to come to a rest near the curb; within a split second, however, Latits was "off to the races" again. (***Wurm***, R. 32-9, Pg. ID 1075-1076).

Latits accelerated toward and passed in front of Wurm, after which he fled northbound on Woodward. (***Phillips***, R. 32-10, Pg. ID 1126; ***Wurm***, R. 32-9, Pg. ID 1076). Since Wurm was unable to contain Latits' vehicle (***Wurm***, R. 32-9, Pg. ID 1076), Defendant initiated contact with and struck the driver's side of Latits' vehicle. (***Recording-61***, R. 32-2, 00:58:47-00:58:56; ***Recording-66***, R. 32-3, 00:58:00-00:58:04; ***Recording-67***, R. 32-4, 01:00:42-01:00:50; ***Phillips***, R. 32-10, Pg. ID 1126-1127; ***Jaklic***, R. 32-8, Pg. ID 1050-1051). Defendant's cruiser pushed Latits' vehicle over a curb, at which point Latits' vehicle struck a pole and came to a momentary rest. (***Jaklic***, R. 32-8, Pg. ID 1051; ***Wurm***, R. 32-9, Pg. ID 1076; ***Phillips***, R. 32-10, Pg. ID 1128; ***Danielson***, R. 32-11, Pg. ID 1162-1163). Defendant, Jaklic, and Wurm positioned their cruisers around and attempted to box in Latits' vehicle. (***Jaklic***, R. 32-8, Pg. ID 1051-1052; ***Wurm***, R. 32-9, Pg. ID 1076). As Danielson approached the scene, Defendant exited his cruiser. (***Recording-64***, R. 32-5, 00:58:00-00:58:04; ***Phillips***, R. 32-10, Pg. ID 1128). Jaklic remained in his cruiser. (***Jaklic***, R. 32-8, Pg. ID 1052).

Defendant ran toward Latits and drew his gun, at which point Latits accelerated forward and rammed Jaklic's *occupied* cruiser. (***Recording-61***, R. 32-2, 00:58:53-00:58:57; ***Recording-67***, R. 32-4, 01:00:50-01:00:55; ***Recording-64***, R. 32-5, 00:58:00-00:58:04; ***Jaklic***, R. 32-8, Pg. ID 1052; ***Wurm***, R. 32-9, Pg. ID 1076-1077; ***Phillips***, R. 32-10, Pg. ID 1128-1130; ***Danielson***, R. 32-11, Pg. ID

1160-1161). Latits revved the engine and looked over his shoulder in the direction of Defendant. (***Phillips***, R. 32-10, Pg. ID 1130-1131). Latits then put his vehicle in reverse, accelerated backward, and appeared to turn the wheel in the direction of Defendant. (***Recording-67***, R. 32-4, 01:00:56-01:00:58; ***Recording-64***, R. 32-5, 00:58:04; ***Jaklic***, R. 32-8, Pg. ID 1054; ***Phillips***, R. 32-10, Pg. ID 1131). Defendant, positioned on the passenger side of Latits' vehicle, yelled at Latits to stop and fired a volley of consecutive shots. (***Recording-61***, R. 32-2, 00:58:59-00:59:00; ***Recording-67***, R. 32-4, 01:00:58-01:01:03; ***Radio***, R. 32-7, Track 7; ***Phillips***, R. 32-10, Pg. ID 1130-1131, 1133). The time span between the point at which Latits rammed Jaklic's cruiser (***Recording-61***, R. 32-2, 00:58:53-00:58:57) and the point at which Defendant fired shots (***Recording-61***, R. 32-2, 00:58:59-00:59:00)[2] was a couple seconds or less.

Defendant explained that he opened fire based on his perception that Latits posed an imminent risk of serious harm to him and his fellow officers:

> Q. . . . Why did you fire four shots at [Latits]?
>
> * * *
>
> **A. I was involved in a pursuit, I was informed by two officers of attempted ramming and ramming. When I got out of my vehicle, I observed [Latits] ram [Jaklic]. As I approached his vehicle, I could hear the**

[2] The spent shell casings, which appear toward the bottom of the screen in the recording from Jaklic's cruiser, look like small white dots that fly up in the air and fall down. (***Recording-61***, R. 32-2, 00:58:59-00:59:00; ***Simon***, R. 32-12, Pg. ID 1183-1185).

engine revving, he looked back over his shoulder directly at me. As he started moving I felt fear for my life, I wasn't -- I wasn't sure as to how -- how much room I had between his vehicle and my vehicle. I fired to ensure my own safety and the safety of my fellow officers.

* * *

Q. . . . And there were no officers behind Latits when he was backing up, right?

A. I don't know.

Q. Well isn't that something you should figure out before you start shooting him?

* * *

A. I felt that my life was in danger, I had witnessed him commit a felonious assault on an officer with a weapon. I fired to protect my fellow officers and myself.

Q. How did you feel your life was in danger?

A. As I was running up to the vehicle, I could see [Latits] look back at me, appeared to be turning the wheel, he was revving the engine, the car started moving in my direction.

(***Phillips***, R. 32-10, Pg. ID 1130-1131). Danielson explained that Latits' intended course was anything but predictable and that everyone in the vicinity was at risk:

Q. . . . If [Latits] kept . . . on [his] course and you kept on your course, there was no chance of the two cars colliding; right?

A. I don't know what course he was planning on staying, sir.

* * *

Q. When [Defendant] fired, you were not, you, were not in any danger of serious physical harm from [Latits], were you?

* * *

A. Well, sir, I believe that anyone that was in the vicinity of [Latits'] vehicle was in danger.

Q. Okay. I'm asking you specifically whether you were.

A. Well, sir, I was in the vicinity, so yes.

* * *

Q. . . . Did you see [Defendant] in risk of imminent physical harm when he fired?

A. Yes.

Q. All right. And in risk of imminent serious physical harm when he fired?

A. Yes.

Q. Okay. Can you tell me why?

A. Well, sir, [Latits] was in charge of a 2,000 pound serious weapon, sir.

* * *

Q. . . . [W]as [Defendant] firing to protect [Wurm] from serious physical harm?

A. I believe he was firing to protect all officers that were in the vicinity, sir.

* * *

Q. What was the imminent risk of physical harm that [Wurm] faced?

* * *

A. It was a 2,000 pound vehicle, sir. It's a big weapon that can strike and/or injure a lot of people.

Q. And it was backing away from him at the time he fired?

A. He was backing and going forward in multiple different times, so how do we know what in his mind he's going to do next?

Q. Okay. What about for [Jaklic]?

A. Yes.

Q. Same thing?

A. Yes, sir.

Q. Okay. And what about [Defendant]?

A. Yes, sir.

Q. And how was he at risk?

A. Same thing, sir.

Q. Okay. So . . . that allows deadly force to be used?

* * *

A. . . . I wouldn't say that it was just those reasons, sir, but all of those plus the fact that he had attempted to ram vehicles, injure officers, and he was using his vehicle as a weapon, sir.

* * *

Q. . . . You also said that [Latits] used his car as a weapon?

A. Yes, sir.

Q. How did he do that?

A. Well, sir, he was ramming vehicles while people are inside of them, and to me that means he has intent to injure people.

(***Danielson***, R. 32-11, Pg. ID 1167, 1159-1161).

Latits' vehicle eventually came to a rest near a curb, roughly forty feet from the point at which Latits' vehicle rammed Jaklic's cruiser. (***Jaklic***, R. 32-8, Pg. ID 1054; ***Phillips***, R. 32-10, Pg. ID 1133, 1135). Defendant approached with his gun aimed at Latits, as he did not know whether Latits still posed an imminent risk of physical harm. (***Phillips***, R. 32-10, Pg. ID 1134-1135, 1139).

Danielson, assisted by Defendant, removed Latits from his vehicle. (***Phillips***, R. 32-10, Pg. ID 1134, 1140; ***Jaklic***, R. 32-8, Pg. ID 1044). Defendant tried to help Danielson as she struggled to secure Latits in handcuffs, at which point Defendant observed blood on Latits' hand and realized that Latits had been shot. (***Phillips***, R. 32-10, Pg. ID 1134-1135).

Wurm immediately radioed dispatch; he reported that shots were fired and that paramedics were needed. (***Wurm***, R. 32-9, Pg. ID 1078-1079). Paramedics arrived quickly and transported Latits to the hospital, during which time they administered medical care. (***Report***, R. 32-13, Pg. ID 1198-1203; ***Kazee***, R. 32-14, Pg. ID 1208-1211; ***Hoard***, R. 32-15, Pg. ID 1229, 1231-1233; ***Schwall***, R. 32-16, Pg. ID 1242-1246, 1248).

Latits died at approximately 5:40 a.m. (***Autopsy***, R. 32-17, Pg. ID 1260). The medical examiner found evidence of three gunshot wounds to Latits' upper body. (***Autopsy***, R. 32-17, Pg. ID 1262-1263, 1266-1267). The toxicologist

detected the presence of alcohol, opiates, and hydrocodone in Latits' system. (***Autopsy***, R. 32-17, Pg. ID 1269).

The search of Latits' vehicle uncovered a prescription bottle that contained 82 tablets of Vicodin — more than the prescribed quantity, per the label on the prescription bottle — and two plastic bags that collectively contained approximately 25 grams of marijuana. (***Lemke***, R. 32-18, Pg. ID 1273). The search of Latits' person uncovered 2.6 grams of cocaine. (***Goebel***, R. 32-19, Pg. ID 1281).

II. PROCEDURAL HISTORY

A. State Court[3]

Plaintiff commenced this action in the Circuit Court. Plaintiff filed a complaint on June 28, 2010, followed by an amended complaint on July 30, 2010. Plaintiff raised a claim for assault/battery and a claim for gross negligence.

Defendant filed a motion for summary disposition on March 22, 2011. The Circuit Court entered an order denying Defendant's motion for summary disposition on May 23, 2011. Defendant filed a claim of appeal on May 27, 2011. In a published opinion issued on August 21, 2012 — *Latits v. Phillips*, 298 Mich.

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[3] The register of actions is available at: Third Judicial Circuit of Michigan — Odyssey Public Access, https://cmspublic.3rdcc.org/ (last accessed March 9, 2016) (Non-Criminal Case Records → Search By: Case → Case Number: 10-007384-NO).

App. 109; 826 N.W.2d 190 (2012) — the Court of Appeals reversed and remanded to the Circuit Court for entry of an order granting Defendant's motion for summary disposition.

Defendant filed a proposed order granting his motion for summary disposition on August 28, 2012. Plaintiff filed a motion for leave to file a second amended complaint, accompanied by an objection to Defendant's proposed order granting his motion for summary disposition, on August 31, 2012. The Circuit Court entered an order granting Defendant's motion for summary disposition on September 13, 2012, followed by an order granting Plaintiff's motion for leave to file a second amended complaint on September 19, 2012.

Plaintiff filed a second amended complaint on September 20, 2012. Plaintiff raised a claim for excessive force. Defendant removed the action to the District Court on September 27, 2012. (***Notice***, R. 1, Pg. ID 1-15).

B. Federal Court

The parties filed a joint discovery plan on March 3, 2015. (***Notice***, R. 21, Pg. ID 481-482; ***Plan***, R. 22, Pg. ID 483-490). Defendant objected to discovery on the ground that the parties engaged in extensive discovery during the state action. Plaintiff requested 120 days for discovery related to statements purportedly made in Defendant's employment action, as well as unspecified issues deemed unique to Plaintiff's claim for excessive force.

The District Court held a scheduling conference on March 19, 2015. (***Notice***, R. 21, Pg. ID 481-482). The District Court entered a discovery scheduling order, which placed limitations on the duration and scope of discovery, on March 25, 2015. (***Order***, R. 24, Pg. ID 493-494).

Plaintiff served Defendant with a subpoena on April 14, 2015. (***Subpoena***, R. 25-2, Pg. ID 517-520). Defendant filed a motion for protective order on April 17, 2015. (***Motion***, R. 25, Pg. ID 495-524; ***Response***, R. 26, Pg. ID 525-560; ***Reply***, R. 27, Pg. ID 561-572). Plaintiff filed a motion to enlarge the duration and scope of discovery on May 5, 2015. (***Motion***, R. 28, Pg. ID 573-760). The District Court entered an order staying discovery on May 6, 2015. (***Order***, R. 29, Pg. ID 761-765). Plaintiff filed a motion to lift the stay of discovery on May 20, 2015. (***Motion***, R. 30, Pg. ID 766-983; ***Response***, R. 36, Pg. ID 1297-1311).

Defendant filed a motion for summary judgment on May 22, 2015. (***Motion***, R. 32, Pg. ID 988-1289; ***Response***, R. 38, Pg. ID 1315-1675; ***Reply***, R. 42, Pg. ID 1685-1707). The District Court entered an order granting Defendant's motion for summary judgment and denying the pending discovery motions as moot on September 30, 2015. (***Order***, R. 44, Pg. ID 1709-1723; ***Judgment***, R. 45, Pg. ID 1724). Plaintiff filed a notice of appeal on October 26, 2015. (***Notice***, R. 46, Pg. ID 1725).

SUMMARY OF ARGUMENT

Defendant is entitled to qualified immunity on Plaintiff's claim for excessive force. Latits presented a threat of serious harm in uncertain and rapidly-unfolding circumstances, which justified Defendant's use of deadly force. Further, no case law clearly establishes that Defendant's use of deadly force amounted to excessive force.

Plaintiff's inability to establish liability on her claim for excessive force obviates the need to entertain her claim for punitive damages. In any event, the Court of Appeals previously determined that governmental immunity protected Defendant because he acted in good faith — *viz.*, without malicious intent or reckless and callous indifference — when he shot Latits. Since Plaintiff's claim for punitive damages is analyzed under the same subjective standard, the law-of-the-case doctrine bars relief.

Plaintiff is not entitled to the proposed discovery. Though Plaintiff filed a response in opposition to Defendant's motion for summary judgment, she did not attach an affidavit or a declaration in accordance with Rule 56(d). Moreover, she did not reference Rule 56(d) or otherwise complain that summary judgment would be premature based on a need for the proposed discovery. The proposed discovery, moreover, will not change the outcome.

STANDARDS OF REVIEW

I. SUMMARY JUDGMENT AND QUALIFIED IMMUNITY

This Court reviews a decision on a motion for summary judgment based on a qualified immunity defense under the *de novo* standard. *Dickerson v. McClellan*, 101 F.3d 1151, 1157 (6th Cir. 1996).

A. Summary Judgment

Summary judgment is proper when the evidence, viewed in the light most favorable to the non-movant, reveals no genuine issue of material fact and establishes the movant's entitlement to judgment as a matter of law. Fed. R. Civ. P. 56(a). The movant bears the initial burden of demonstrating the nonexistence of genuine issues of material fact. *Scott v. Harris*, 550 U.S. 372, 380 (2007). Once the movant satisfies this burden, the burden shifts to the non-movant to show more than "some metaphysical doubt as to the material facts." *Id.* The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Id.*

B. Qualified Immunity

An officer may assert the defense of qualified immunity when his use of force is the subject of a civil action under 42 U.S.C. § 1983. *Gravely v. Madden*, 142 F.3d 345, 348 (6th Cir. 1998); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). An officer may not be stripped of qualified immunity and subjected to personal

liability unless (1) the officer violated a right, and (2) the right was clearly established at the time of the violation. *Lane v. Franks*, 134 S. Ct. 2369, 2381 (2014). Generally, only precedent from this Court or the Supreme Court can clearly establish the existence of a right. *Hocker v. Pikeville City Police Dep't*, 738 F.3d 150, 153-54 (6th Cir. 2013). The inquiry is context-specific; the Supreme Court has repeatedly cautioned against defining a clearly established right at too high a level of generality. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014). Contextual specificity is "especially important in the Fourth Amendment context" because "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015).

A claimant bears the burden of showing that an officer is not entitled to qualified immunity. *Livermore v. Lubelan*, 476 F.3d 397, 403 (6th Cir. 2007). Because qualified immunity provides ample protection for factual and legal mistakes, the claimant must show that the officer knowingly violated the Constitution or exhibited plain incompetence. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013).

II. DISCOVERY

This Court reviews a decision on a motion for discovery under the abuse of discretion standard. *Fifth Third Mortg. Co. v. Chicago Title Ins.*, 692 F.3d 507,

510 (6th Cir. 2012). Deference to the District Court is "the hallmark" of the abuse of discretion standard. *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 258 (6th Cir. 2001). To find an abuse of discretion, the Court must be left with a "definite and firm conviction" that the District Court "committed a clear error of judgment." *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989).

COUNTER-ARGUMENT

Defendants submits that his motion for summary judgment should be deemed unopposed. *Howard v. Nationwide Prop. and Cas. Ins.*, 306 Fed. Appx. 265, 266-68 (6th Cir. 2009). Plaintiff failed to file a timely response. (***Reply***, R. 42, Pg. ID 1691) (citing E.D. Mich. L.R. 7.1(e)(1)(B)). Plaintiff also failed to obtain leave to file an untimely response — a procedure that required her to file a motion and demonstrate "excusable neglect," which is a "strict" standard that "can be met only in extraordinary cases." *Turner v. City of Taylor*, 412 F.3d 629, 650 (6th Cir. 2005); Fed. R. Civ. P. 6(b)(1)(B). Even if Plaintiff had filed a motion under Rule 6(b)(1)(B), she would not have been able to demonstrate excusable neglect. *Kendall v. Hoover*, 751 F.2d 171, 175 (6th Cir. 1984).

I. EXCESSIVE FORCE

A. Standard

A claim that an officer used excessive force is analyzed under the Fourth Amendment's "reasonableness" standard, which "is not capable of precise

definition or mechanical application." *Graham v. Connor*, 490 U.S. 386, 395-96 (1989). Proper application of the reasonableness standard requires careful attention to the circumstances and consideration of (1) where the crime fell on the spectrum of severity, (2) whether the suspect posed an immediate threat to the safety of officers or others, and (3) whether the suspect resisted arrest or attempted to evade arrest by flight. *Id.*

The crucial inquiry is whether the officer's actions were objectively reasonable under the circumstances. *Id.* at 397.

> 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 [use of force], even if it may later seem unnecessary in the peace of a judge's chambers, 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.

Id. at 396-97 (internal quotations and citations omitted). The reasonableness 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). The Court "must avoid substituting [its] personal notions of proper police procedure for the instantaneous decision of the officer at the scene." *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992). The Court "must never allow the theoretical, sanitized

world of [its] imagination to replace the dangerous and complex world that policemen face every day." *Id.* And the Court must recognize that "[w]hat constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure." *Id.*

An officer may use deadly force to prevent a fleeing suspect's escape if the officer has probable cause to believe that the suspect poses a threat of serious physical harm to him or others. *Williams v. City of Grosse Pointe Park*, 496 F.3d 482, 487 (6th Cir. 2007); *Dudley v. Eden*, 260 F.3d 722, 726 (6th Cir. 2001). Whether the officer has probable cause depends not only on the firsthand observations made by the officer, but also on the secondhand information relayed to the officer. *Boyd v. Baeppler*, 215 F.3d 594, 600-01 (6th Cir. 2000). In the context of vehicular flight, the critical question is whether an officer has reason to believe that a fleeing vehicle presents an imminent danger to others in the vicinity. *Cass v. City of Dayton*, 770 F.3d 368, 375 (6th Cir. 2014). The officer may use deadly force if, from an objective standpoint, the suspect "appears ready to drive into an officer or a bystander." *Id.* (citation omitted). The officer may also use deadly force, even when neither he nor his fellow officers is in the vehicle's direct path, if prior interactions suggest that the suspect "will continue to endanger others" with his vehicle. *Id.*

B. Analysis

Only admissible evidence may be used to oppose a motion for summary judgment. *Sperle v. Mich. Dep't of Corr.*, 297 F.3d 483, 495 (6th Cir. 2002). Irrelevant evidence "is not admissible." Fed. R. Evid. 402. These longstanding principles of summary judgment are lost on Plaintiff, who relies on irrelevant and inadmissible evidence in an effort to either deflect attention from the pertinent issue or paint Defendant in a negative light. Irrelevant and inadmissible evidence "must be disregarded." *U.S. Structures v. J.P. Structures*, 130 F.3d 1185, 1189 (6th Cir. 1997).

Evidence that Defendant allegedly violated the Department's policies is irrelevant and inadmissible. Internal policies do not set constitutional standards, and violations of internal policies do not establish or support § 1983 claims. *Smith*, 954 F.2d at 347; *Laney v. Farley*, 501 F.3d 577, 580 n. 2 (6th Cir. 2007); *Combs v. Wilkinson*, 315 F.3d 548, 560 (6th Cir. 2002).

Further, evidence that the Department disciplined Defendant[4] is irrelevant and inadmissible. The issue is whether Defendant may be subject to liability for

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[4] Plaintiff misleadingly implies that the Department disciplined Defendant for his use of deadly force. But Police Chief Timothy Collins ("Collins") testified that the shooting "was legal and appropriate" under the circumstances. (***Collins***, R. 38-2, Pg. ID 1385). Collins explained that Latits "rammed into the front of . . . Jaklic's vehicle," after which he "began to back up and canter his vehicle toward [Defendant]." (***Collins***, R. 38-2, Pg. ID 1386). Collins reasoned that Latits' actions "[placed

violating Latits' clearly established rights, not whether Defendant may be subject to discipline for violating the Department's policies. *Smith*, 954 F.2d at 347. Any "disciplinary action taken against [Defendant] . . . in the aftermath of the shooting" is not relevant to liability. *Lewis v. Jefferson Cnty. Police Dep't*, No. 93-6287, 1994 WL 589643, *2, 4 (6th Cir. Oct. 21, 1994).

Finally, evidence that Defendant allegedly engaged in prior misconduct is irrelevant and inadmissible. Such evidence has no tendency to establish that Defendant used excessive force during the underlying incident. Fed. R. Evid. 401. Such evidence is calculated to lead only to the discovery of inadmissible character (propensity) evidence. Fed. R. Evid. 404(b)(1); *Franklin v. Messmer*, 111 Fed. Appx. 386, 388 (6th Cir. 2004); *Helfrich v. Lakeside Park Police Dep't*, 497 Fed. Appx. 500, 506-09 (6th Cir. 2012).

1. *First Prong of Qualified Immunity*

a. *Graham* Factors

As to the first *Graham* factor, Latits committed dangerous crimes. While Plaintiff focuses on the crimes observed prior to and during the traffic stop, which may fall on the low end of the severity spectrum, Plaintiff fails to acknowledge that the crimes observed after the traffic stop fall on the high end

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Defendant's] life in danger" and "necessitat[ed] the shooting." (***Collins***, R. 38-2, Pg. ID 1401-1402).

of the severity spectrum. Latits fled from and eluded Jaklic, which is a felony. M.C.L. § 257.602a; M.C.L. § 750.479a. Fleeing and eluding is regarded as a *violent* felony that involves aggressive conduct, poses a serious risk of physical injury, and typically leads to a confrontation. *United States v. Young*, 580 F.3d 373, 377-78 (6th Cir. 2009). Latits also rammed his vehicle into Jaklic's cruiser, which is a felonious assault. M.C.L. § 750.82; *People v. McCadney*, 111 Mich. App. 545, 549; 315 N.W.2d 175 (1981).

With respect to the second *Graham* factor, Latits posed a significant threat because he was armed with a dangerous and deadly weapon — a vehicle. A vehicle may be used as a weapon. *Dunn v. Matatall*, 549 F.3d 348, 354 (6th Cir. 2008); *Sykes v. United States*, 131 S. Ct. 2267, 2279 (2011). In fact, both this Court and the Supreme Court have recognized that a vehicle "can be a ***deadly*** weapon." *Smith*, 954 F.2d at 347; *Sykes*, 131 S. Ct. at 2279.

Analysis of the third *Graham* factor is relatively straightforward. Latits clearly attempted to evade arrest by vehicular flight.

b. Case Law

In *Plumhoff*, a lieutenant initiated a traffic stop that culminated in a chase. *Plumhoff*, 134 S. Ct. at 2017. The lieutenant, assisted by a sergeant and four officers, tried to stop the suspect using a rolling roadblock. The technique proved unsuccessful. The chase came to a momentary halt when the suspect attempted

to make a quick right turn. *Id*. The suspect's vehicle made contact with one of the officer's cruisers, spun out into a parking lot, and collided with the sergeant's cruiser. The suspect put his vehicle in reverse, at which point the sergeant and the officer exited their cruisers. They drew their guns and approached the suspect's vehicle, which then made contact with another officer's cruiser. The sergeant fired three shots, but the suspect put his vehicle in reverse and managed to maneuver onto the street. As the suspect resumed flight, two officers fired twelve more shots. The suspect lost control of the vehicle, crashed into a building, and died. *Id.* at 2018. On appeal, the estate argued that the Fourth Amendment does not permit the use of deadly force to terminate a chase. *Id.* at 2020-21. The Supreme Court rejected this argument:

> [The suspect's] outrageously reckless driving posed a grave public safety risk. . . . [T]he record conclusively disproves [the estate's] claim that the chase in the present case was already over when [the sergeant and the officers] began shooting. Under the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that [the suspect] was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road.
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> * * *
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> In light of the circumstances . . . , it is beyond serious dispute that [the suspect's] flight posed a grave public safety risk, and . . . the police acted reasonably in using deadly force to end that risk.

Id. at 2021-22. The estate also argued that even if the Fourth Amendment permits the use of deadly force to terminate a chase, the sergeant and the officers

went too far when they collectively fired fifteen shots. *Id.* at 2021. The Supreme Court found that this argument fared no better:

> It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended. . . . [I]f lethal force is justified, officers are taught to keep shooting until the threat is over.

Id. at 2022.

In *Smith*, an officer tried to initiate a traffic stop after he observed a vehicle speed out of an apartment complex and run a stop sign. *Smith*, 954 F.2d at 344. The suspect refused to pull over and led the officer on a high-speed chase. At one point, the suspect backed up in a field at the edge of a road. The tires on the suspect's vehicle began to spin. Operating under the belief that the suspect was stuck, the officer pulled in front of the suspect. The suspect proceeded forward and swerved toward the officer. The officer maneuvered out of the way and avoided a collision, at which point he tried to position himself in front of the suspect. The suspect swerved at the officer again. A backup officer tried to block in the suspect, but the suspect drove around the backup officer and continued to flee. The suspect turned onto a dead-end road. The officer followed. Meanwhile, several backup officers set up a roadblock at the end of the road to prevent escape. When the suspect realized that he did not have an outlet, he tried to turn around on a lawn. At this point, the officer's cruiser and the suspect's vehicle

were head to head. The officer exited his cruiser with the intent to remove the suspect from his vehicle. The suspect backed up, sped forward, and rammed the officer's cruiser. The suspect backed up again, maneuvered around the officer, and crashed into a fence. As the suspect drove past the officer, the officer drew his gun and fatally shot the suspect. On appeal, the estate argued that the officer's use of deadly force was unreasonable because the backup officers set up a roadblock to prevent the suspect's escape. This Court disagreed:

> In an instant [the officer] had to decide whether to allow his suspect to escape. He decided to stop him, and no rational jury could say he acted unreasonably. Even if there were a roadblock at the end of [the road], [the officer] could reasonably believe that [the suspect] could escape the roadblock, as he had escaped several times previously. In any event, [the suspect] had freed his car from [the officer's] attempted blockade, and was undoubtedly going to escape from [the officer], if not the entire police force. Had he proceeded unmolested down [the road], he posed a major threat to the officers manning the roadblock. Even unarmed, he was not harmless; a car can be a deadly weapon. . . . Finally, rather than confronting the roadblock, he could have stopped his car and entered one of the neighboring houses, hoping to take hostages. [The suspect] had proven he would do almost anything to avoid capture; [the officer] could certainly assume he would not stop at threatening others.

Id. at 347.

In *Hocker*, officers gave chase after they observed a vehicle with the headlights off speed past their cruisers. *Hocker*, 738 F.3d at 152. The suspect pulled off the road, turned into a gravel driveway, stopped, and turned the music up. The officers pulled up behind the suspect, deactivated their lights and sirens,

and exited their cruisers. *Id.* at 153. The suspect reversed, operating under the belief that he was alone on the gravel driveway, and shot backward due to a throttle defect that caused his vehicle to accelerate to 4,000 RPMs on its own. *Id.* at 152. The suspect's vehicle struck one of the cruisers, causing the door to swing shut and temporarily trap one of the officer's arms. *Id.* at 153. The officer soon freed himself from the door. Both officers opened fire. In total, the officers fired twenty shots and struck the suspect nine times. Because the suspect rammed one of the cruisers and placed the safety of the officers at risk, this Court found that the use of deadly force was objectively reasonable. *Id.* at 154. The Court rejected the suspect's argument that firing shots at "a *moving* (and potentially departing) vehicle" is *per se* unreasonable. *Id.* at 155. The Court also rejected the suspect's argument that by the time the officers opened fire, neither was in harm's way. *Id.* at 154-55. The Court reasoned:

> It is not that easy, particularly in the context of the lightning-quick evolution of this encounter. It is undisputed that neither officer knew where the other one was when they began firing. That one officer was safe does not mean the other one was. This reality by itself justified the officers' conduct. While it may be easy for [the suspect] to say that each officer was safe once the officer was no longer in the direct path of [the suspect's] vehicle, no reasonable officer would say that the night's peril had ended at that point. [The suspect] remained in the car, and for the prior ten minutes or so — from the officers' reasonable perspective — had put others, including most recently the officers, in harm's way with his car. What in that short time span would leave anyone with the impression that [the suspect] no longer presented a threat to their

> safety? He remained in the car, and the car engine remained on. Only [the suspect's] self-restraint stood in the way of further threats to their safety. From the officers' reasonable perspective, the peril remained.

Id. at 155.

The circumstances in this case are comparable to the circumstances in *Plumhoff*, *Smith*, and *Hocker*. Defendant heard that Latits escalated a traffic stop into a chase, attempted to ram Jaklic's cruiser, and hit Wurm's cruiser several times. Based on the radio broadcasts, Defendant reasonably believed that Latits posed an immediate threat to and intended to injure his fellow officers. Defendant observed Latits operate his vehicle in a threatening manner, at which point he reasonably believed that Latits also posed an immediate threat to the safety of other motorists or pedestrians. Perhaps most importantly, Defendant observed Latits accelerate forward and ram Jaklic's *occupied* cruiser, which validated his belief that Latits possessed an intent to injure his fellow officers. Defendant subsequently observed Latits place his vehicle in reverse and back up. As in *Hocker*, Defendant was unable to discern whether any of his fellow officers were directly behind Latits. *Hocker*, 738 F.3d at 155. But, at the same time, Defendant was unable to anticipate or predict Latits' intended course. Defendant did not know whether Latits intended to proceed in reverse, accelerate forward, or find an outlet and escape. But Defendant did know that Latits was armed with a dangerous and deadly weapon (a vehicle), that his

fellow officers were in the vicinity, and that Latits was not in a position of surrender. Since Latits — like the suspect in *Smith* — "had proven he would do almost anything to avoid capture," Defendant "could certainly assume he would not stop at threatening others." *Smith*, 954 F.2d at 347. And since Latits had demonstrated his willingness to harm Defendant's fellow officers by ramming Jaklic's *occupied* cruiser, Defendant was "not required to step aside and let [Latits] escape." *Cass*, 770 F.3d at 377; see also *Hocker*, 738 F.3d at 155. Defendant was confronted with tense, uncertain, and rapidly-evolving circumstances. *Id*. Defendant's response to the escalating risks created by Latits was precisely the type of split-second decision that an officer "may, sometimes must, take in the line of duty." *Id.* Based on the reasoning of the above-cited decisions, Defendant's use of deadly force was objectively reasonable.

Plaintiff argues that the circumstances in this case presented less of a threat than the circumstances in the above-cited decisions. But even if this Court accepted Plaintiff's argument, "the mere fact that [this Court and the Supreme Court] have approved deadly force in more extreme circumstances says little, if anything, about whether such force was reasonable in the circumstances here." *Mullenix*, 136 S. Ct. at 312. For the reasons outlined above, Defendant's use of deadly force was reasonable under the circumstances.

* * *

According to Plaintiff, Jaklic falsely reported that Latits attempted to ram his cruiser in the parking lot. Based on the recording from Defendant's dashboard camera, Plaintiff infers that Defendant had an unobstructed view of the events that transpired in the parking lot. But Jaklic broadcast that he followed Latits into the parking lot around 00:59:16 of the recording, at which point Defendant's cruiser faced the opposite direction. (***Recording-67***, R. 32-4, 00:59:16). Defendant testified that when he turned around and headed toward the parking lot, he focused on avoiding an oncoming vehicle. (***Phillips***, R. 32-10, Pg. ID 1123-1124). Defendant's testimony coincides with the recording. (***Recording-67***, R. 32-4, 00:59:22-00:59:26). Defendant also testified that he did not identify Jaklic's cruiser until he passed the oncoming vehicle. (***Phillips***, R. 32-10, Pg. ID 1124). Plaintiff stresses that Defendant had already pulled into the parking lot at the time of Jaklic's broadcast. Be that as it may, Jaklic merely broadcast that Latits tried to ram his cruiser — he did not state that Latits tried to ram his cruiser *at the precise moment of* or *immediately before* his broadcast. Plaintiff puts forth no *evidence* that Defendant had reason to question the credibility of Jaklic's broadcast. Her *speculation* is not evidence. *Moross Ltd. P'ship v. Fleckenstein Capital, Inc.*, 466 F.3d 508, 517 (6th Cir. 2006).

According to Plaintiff, Wurm falsely broadcast that Latits hit his cruiser several times. Wurm, like Jaklic, did not specify the point at which Latits

allegedly hit his cruiser. But at the time of Wurm's broadcast, Latits' vehicle was swerving across all of the northbound lanes of traffic. (***Recording-61***, R. 32-2, 00:58:29-00:58:47). Defendant's belief that Latits hit Wurm's cruiser was reasonable.

In any event, Plaintiff's focus on the radio broadcasts is misplaced. The Court takes a "segmented approach" to analyzing an excessive force claim. *Greathouse v. Couch*, 433 Fed. Appx. 370, 372 (6th Cir. 2011). The Court focuses on the actions taken by the suspect and the split-second judgments made by the officer *immediately before* the shooting. *Mullins v. Cyranek*, 805 F.3d 760, 766 (6th Cir. 2015); *Livermore*, 476 F.3d at 407. In so doing, the Court disregards the events that transpired "in the hours and minutes leading up to" the shooting. *Id.* *Greathouse*, which involved a fatal shooting during execution of a search warrant, is instructive:

> [The estate] contends that we must view [the deputy's] gunfire in light of the entire sequence of events . . . in order to evaluate the reasonableness of his actions. She contends that [the deputy] created the tense situation . . . and that "[the deputy] should not be able to legally benefit from his wrongful actions . . . ." [Citation omitted].
>
> Our precedent does not support [the estate's] position, and, indeed, we have rejected the same argument in similar cases. We apply a "segmented approach" to excessive force claims, in which we "carve up" the events surrounding the challenged police action and evaluate the reasonableness of the force by looking only at the moments immediately preceding the officer's use of force. [Citations omitted]. Our segmented approach applies even to

> encounters lasting very short periods of time. [Citation omitted]. Part of the rationale behind this approach is that,
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> > Other than random attacks, all [excessive force] cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause, and which, if kept within constitutional limits, society praises the officer for causing.
>
> [Citations omitted].

Id. at 372-73. In the moments that immediately preceded his use of force, Defendant observed Latits accelerate forward and ram Jaklic's *occupied* cruiser. He then observed Latits place his vehicle in reverse. He did not know whether Latits intended to proceed in reverse, accelerate forward, or find an outlet and escape. But he did know that Latits was armed with a dangerous and deadly weapon (a vehicle), that his fellow officers were in the vicinity, and that Latits was not in a position of surrender. Such circumstances justified Defendant's split-second decision to respond to the threat with deadly force.

* * *

Plaintiff asserts that Jaklic turned into Latits' escape route and rammed Latits' vehicle. The recordings from the dashboard cameras clearly show that as Jaklic positioned his cruiser to box in Latits' vehicle and prevent escape, Latits accelerated forward and struck Jaklic's cruiser. (***Recording-61***, R. 32-2, 00:58:53-

00:58:57; ***Recording-67***, R. 32-4, 01:00:50-01:00:55; ***Recording-64***, R. 32-5, 00:58:00-00:58:04). Defendant's perception and belief that Latits rammed Jaklic's cruiser was, at the very least, objectively reasonable.

* * *

The recording from Danielson's dashboard camera shows that Latits placed his vehicle in reverse and accelerated backward after he struck Jaklic's cruiser. (***Recording-64***, R. 32-5, 00:58:04). Plaintiff maintains that Latits backed away from Defendant. But as shown by the recording, Defendant was forced to jump out of the way when Latits accelerated backward. (***Recording-64***, R. 32-5, 00:58:04). And at the end of the day, whether Latits backed away from or toward Defendant is not material. Defendant could not predict Latits' next maneuver. Just as Latits placed his vehicle in reverse after he accelerated forward and rammed Jaklic's cruiser, Latits could have placed his vehicle in drive and struck Defendant after he accelerated backward.

* * *

The recording from Jaklic's dashboard camera shows that Defendant fired shots within a couple seconds or less[5] after Latits struck Jaklic's cruiser.

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[5] In *Mullins*, this Court stated that bullet casings depicted in video footage may be considered "evidence of the timing of the shots," but they are "not conclusive evidence of the precise timing of [the] shots." *Mullins*, 805 F.3d at 764. In other words, this Court recognized that bullet casings may appear after — rather than "instantaneously with" — the actual shots. *Id.*

(***Recording-61***, R. 32-2, 00:58:57, 00:58:59-00:59:00). The recording corroborates Defendant's testimony that he fired shots as soon as Latits began to accelerate backward. (***Phillips***, R. 32-10, Pg. ID 1130). By the same token, the recording belies Plaintiff's assertion that five seconds passed before Defendant fired shots.

Plaintiff contends that the officers were not directly behind Latits when Defendant opened fire. There is no question that the officers were all in the vicinity, and there is no question that Latits' intended course was anything but predictable. (***Danielson***, R. 32-11, Pg. ID 1159-1167). Regardless of whether the officers were in Latits' direct path, the threat of serious physical harm remained. *Hocker*, 738 F.3d at 155.

This Court has held that "[w]ithin a few seconds of reasonably perceiving a sufficient danger, officers may use deadly force even if in hindsight the facts show that the persons threatened could have escaped unharmed." *Mullins*, 805 F.3d at 767. Defendant used deadly force within a few seconds of reasonably perceiving a sufficient danger — Latits' use of a dangerous weapon (a vehicle) to commit a felonious assault on Jaklic. Even if hindsight suggests that Defendant and his fellow officers could have escaped unharmed, Defendant's use of force was reasonable. *Id.*

* * *

Defendant recalled firing only one volley of shots, which consisted of four consecutive shots. (***Phillips***, R. 32-10, Pg. ID 1130). Seven shell casings were recovered from the scene. (***Evidence***, R. 38-10, Pg. ID 1631). Such evidence may permit an inference that Defendant fired seven shots. Plaintiff, however, invites the Court to draw additional inferences. First, she invites the Court to infer that Defendant fired two volleys of shots — the first of which consisted of four shots and the second of which consisted of three shots. Second, she invites the Court to infer that Defendant fired the second volley of shots after Latits backed all the way past him. And third, she invites the Court to infer that the second volley of shots struck Latits. The Court should decline Plaintiff's invitation to draw the aforementioned inferences, all of which are based on speculation.

Jaklic testified that he heard five or more gunshots. (***Jaklic***, R. 32-8, Pg. ID 1053). Wurm testified that he heard gunshots only one time. He testified that he heard consecutive gunshots; he did not hear a gap between gunshots. He testified that when he heard gunshots, Latits' vehicle had just rammed Jaklic's cruiser and begun to reverse. (***Wurm***, R. 32-9, Pg. ID 1077-1079, 1081, 1083). Danielson testified that she witnessed Defendant fire shots into the passenger side of Latits' vehicle (***Danielson***, R. 32-11, Pg. ID 1159, 1167). Plaintiff presents no evidence that contradicts the aforementioned testimony. Moreover, no evidence in the record indicates that Latits' front windshield sustained bullet

damage or otherwise supports Plaintiff's supposition that the other three shots "must have been fired" after Latits backed all the way past Defendant. Plaintiff hangs her hat on speculation, which is not evidence. *Moross*, 466 F.3d at 517.

Plaintiff presents no evidence that the other three shots struck Latits. Plaintiff contends that because Defendant did not see Latits immediately react to the four shots that he recalled firing, the three shots that he did not recall firing must have been the shots that struck Latits. However, Plaintiff neglects to mention that Defendant did not see Latits react to *any* of the shots. When Latits' vehicle came to a rest, Defendant approached Latits' vehicle with his gun drawn because he did not know whether Latits continued to pose a threat of danger. (***Phillips***, R. 32-10, Pg. ID 1134-1135, 1139). Defendant did not realize that he had shot Latits until he helped Danielson handcuff Latits, at which point he saw blood and heard Latits say that he had been shot. (***Phillips***, R. 32-10, Pg. ID 1134-1135). Needless to say, Plaintiff's contention that the other three shots must have been the shots that struck Latits is based on speculation rather than evidence. *Moross*, 466 F.3d at 517. Given the absence of evidence that the other three shots struck Latits, there is no merit to Plaintiff's claim that the other three shots amounted to excessive force. *Adams v. City of Auburn Hills*, 336 F.3d 515, 520 (6th Cir. 2003); *Cameron v. City of Pontiac*, 813 F.2d 782, 785 (6th Cir. 1987).

In the state action, the Court of Appeals concluded that "because there is no explanation of the extra three rounds being fired, [P]laintiff can merely speculate about when those rounds were fired [and] whether they are the rounds that struck Latits." *Latits*, 298 Mich. App. at 118. Since Plaintiff continues to speculate about the timing and trajectory of the other three shots, this Court should reach the same conclusion.

* * *

Plaintiff relies on one case from this Court — *Smith v. Cupp*, 430 F.3d 766 (6th Cir. 2005). Plaintiff's reliance on *Cupp* is misplaced.

In *Cupp*, an officer arrested a suspect in a parking lot for making harassing phone calls. *Cupp*, 430 F.3d at 768-69. The officer placed the suspect in his cruiser. *Id.* at 769. The suspect cooperated. The officer left him unattended, at which point he took control of the cruiser. He drove past the officer and headed toward the exit. The officer ran after him and fatally shot him. At the time of the shooting, neither the officer nor anyone else was not in his line of flight. *Id.* at 769-71, 773-76. While this Court acknowledged that "the issue [was] close," it ultimately concluded that the officer's use of deadly force was unreasonable. *Id.* at 773-77.

Cupp is a case in which "a potentially dangerous situation had evolved into a safe one." *Mullins*, 805 F.3d at 766 (citing *Cupp*, 430 F.3d at 774-75). This

case is not. This case is more comparable to *Williams,* which distinguished *Cupp.* In *Williams*, an officer and a sergeant pursued a vehicle that had been reported stolen. *Williams*, 496 F.3d at 484. The sergeant positioned his cruiser in front of the vehicle as the officer approached the vehicle from the rear. *Id.* The suspect put the vehicle in reverse, found his egress blocked, and collided with the officer's cruiser. The sergeant exited his cruiser, approached the driver side window of the vehicle, and pointed his gun directly at the suspect's head. The suspect accelerated, tried to navigate the sergeant's cruiser, and drove onto the sidewalk. The sergeant failed to release his grasp on the vehicle and fell down. The officer fired several shots, one of which left the suspect paralyzed. This Court held that the officer's use of deadly force was reasonable:

> At the point [the officer] fired his weapon, he was faced with a difficult choice: (1) use deadly force to apprehend a suspect who had demonstrated a willingness to risk the injury of others in order to escape; or (2) allow [the suspect] to flee, give chase, and take the chance that [the suspect] would further injure [the sergeant] or an innocent civilian in his efforts to avoid capture. Moreover, [the officer] had only an instant in which to settle on a course of action. Under the circumstances, we cannot say that [the officer] acted unreasonably, nor do we believe that a rational juror could conclude otherwise.
>
> The evidence fully supports the conclusion that [the officer's] conduct was "objectively reasonable" as a matter of law. . . . [The suspect], intent on escape, collided with [the officer's] squad car. Then, in spite of the fact that [the sergeant's] weapon was pointed at his head, [the suspect] continued his attempted flight, driving onto a sidewalk and knocking [the sergeant] to the ground.
>
> * * *

> [The officer] had no way of knowing whether [the suspect] might reverse the [vehicle], possibly backing over [the sergeant], or cause injury to other drivers or pedestrians in the area. As a consequence, [the officer] elected to fire his weapon in order to prevent [the suspect from] potentially causing someone injury. That [the suspect] may not have *intended* to injure [the sergeant] or anyone else is immaterial. From [the officer's] viewpoint, [the suspect] was a danger, and he acted accordingly.

Id. at 486-87. The Court found *Cupp* "inapplicable" based on "the events depicted on the video" that captured the incident, which "demonstrate[d] that [the officer] reasonably believed that [the suspect] posed a threat of serious harm and acted in accordance with that belief." *Id.* at 487-88.

Like the officer in *Williams*, Defendant observed Latits drive into his fellow officer's cruiser immediately before he opened fire. And like the video footage in *Williams*, the video footage in this case compels but one conclusion: Defendant reasonably believed that Latits posed a threat of serious harm and acted in accordance with his belief.

* * *

Plaintiff relies on two cases from other circuits — *Adams v. Speers*, 473 F.3d 989 (9th Cir. 2007) and *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003). Plaintiff's reliance on *Adams* and *Vaughan* is misplaced.

In *Adams*, a detective tried to initiate a traffic stop after he observed a suspect run several stop signs. *Adams*, 473 F.3d at 991. A chase ensued. The

suspect drove nonchalantly and even waved as he passed acquaintances. Nonetheless, at least six cruisers and a helicopter became involved in the chase. Another officer learned of the chase through a radio broadcast, picked up a spectator, and joined the chase. The officer eventually assumed the primary position in the chase. The officer rammed the suspect's vehicle near a very steep embankment, dragging his cruiser and the suspect's vehicle down an on-ramp for some distance. When the officer's cruiser and the suspect's vehicle disentangled, the chase continued. The officer rammed the suspect's vehicle again, knocking the suspect's vehicle off the shoulder of the road and down into a sandy embankment or ditch. The other cruisers surrounded the suspect's vehicle and cut off any possible avenue of escape. *Id.* at 991-92. The officer, without a warning and without a need to defend himself or others, exited his cruiser and fatally shot the suspect. *Id.* at 992. Immediately before the shooting, a different officer had approached the vehicle and broken the window with the intent to pepper spray the suspect. The Ninth Circuit held that the officer's use of deadly force was unreasonable. *Id.* at 993-94.

In *Vaughan*, a deputy joined a chase and attempted to stop a fleeing vehicle, occupied by a suspect (passenger) and another male (driver), with a rolling roadblock. *Vaughan*, 343 F.3d at 1326. The deputy pulled in front of the vehicle and applied his brakes, which caused the vehicle to accidentally collide

with the deputy's cruiser. *Id.* at 1326, 1330.[6] The deputy maintained control of his cruiser, and the chase continued. *Id.* The deputy drew his firearm, rolled down his window, shifted one lane to the left, and slowed down to let the vehicle pass him. *Id.* at 1236-37. When the deputy's cruiser was alongside the vehicle, the deputy activated his lights. *Id.* at 1327. The vehicle accelerated but made no aggressive or evasive maneuvers. *Id.* at 1327, 1330, 1331. The deputy traveled alongside the vehicle for 30 to 45 seconds and then, without warning, fired three rounds into the vehicle. *Id.* at 1327, 1331. The third round paralyzed the suspect below the chest. *Id.* at 1327. The Eleventh Circuit determined that the officer's use of force was unreasonable. *Id.* at 1329-33.

As the Supreme Court recently recognized, *Adams* and *Vaughan* are cases in which the suspects did "little more than flee at relatively low speeds." *Mullenix*, 136 S. Ct. at 312; see also *Plumhoff*, 134 S. Ct. at 2024. In this case, Latits did more than flee at relatively low speeds. As but one example, Latits drove into Jaklic's *occupied* cruiser in an effort to evade apprehension. Suffice it

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[6] Plaintiff implies that the suspect intentionally rammed the cruiser while traveling at excessive speeds, which mischaracterizes the facts in *Vaughan*. The suspect did not intentionally ram the cruiser; he occupied the passenger seat. The driver did not intentionally ram the cruiser; he accidentally collided with the cruiser because the officer pulled in front of his vehicle and applied the brakes. *Id.* at 1326, 1330.

to say that *Adams* and *Vaughan* are "simply too factually distinct to speak clearly to the specific circumstances here." *Mullenix*, 136 S. Ct. at 312.

* * *

Plaintiff argues that to the extent Defendant confronted any danger, Defendant created such danger because he exited his cruiser in violation of the Department's policies. Plaintiff relies on *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993) for the proposition 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.'"

Plaintiff's argument is unavailing for several reasons. First, Defendant's alleged violation of the Department's policies is immaterial for the reasons set forth in section I.B., *supra* (pages 22-23). Second, the District Court correctly recognized that both the Supreme Court and this Court have granted qualified immunity to officers who did precisely what Defendant did. (***Order***, R. 44, Pg. ID 1720-1721) (citing *Plumhoff*, 134 S. Ct. at 2017; *Cass*, 770 F.3d at 372-73, 377; *Williams*, 496 F.3d at 484); see also *Smith*, 954 F.2d at 344. Third, *Starks* is readily distinguishable. *Starks* involved circumstances in which an officer allegedly jumped in front of a rapidly moving vehicle, leaving a suspect no time to brake or otherwise react, and immediately opened fire. *Starks*, 5 F.3d at 233-34. Here, by contrast, Latits could have stopped and surrendered when

Defendant exited his cruiser. Instead, Latits accelerated forward and drove into Jaklic's *occupied* cruiser. Latits could have stopped and surrendered at this point, too, but he proceeded to place his vehicle in reverse and back up. Such circumstances are not comparable to the circumstances at issue in *Starks*. Moreover, Plaintiff's analysis of *Starks* neglects to mention rather significant commentary. Although the Seventh Circuit permitted the case to proceed to the jury, it noted that the jury would be compelled to find in the officer's favor if the jury concluded either (1) the officer was in the path of the moving vehicle before the vehicle accelerated forward or (2) the suspect could have, but chose not to, brake. *Id.* Here, the video footage shows (1) Defendant was outside of his cruiser and in close proximity to Latits' vehicle before Latits accelerated forward and struck Jaklic's cruiser and (2) Latits could have, but chose not to, stop and surrender after Defendant exited his cruiser and before Defendant fired his gun.

2. *Second Prong of Qualified Immunity Analysis*

Tennessee v. Garner, 471 U.S. 1 (1985), which is often regarded as the seminal case concerning the use of deadly force, does not resolve the qualified immunity issue before the Court. Unlike *Garner*, which involved flight on foot, this action involves vehicular flight. The threat posed by a suspect fleeing on foot is not "even remotely comparable" to the threat posed by a suspect fleeing in a vehicle. *Scott*, 550 U.S. at 383. In that regard, *Garner* is "cast at a high level of

generality." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). Thus, the Court "must still slosh [its] way through the factbound morass of 'reasonableness'" to resolve the qualified immunity issue. *Scott*, 550 U.S. at 383.

In *Brosseau*, an officer responded to the scene of an altercation. *Brosseau*, 543 U.S. at 195. The suspect fled and hid in the neighborhood. *Id.* at 196. The officer, assisted by two backup officers, canvassed the neighborhood and tried to locate the suspect. The officer spotted the suspect and pursued him on foot. The suspect jumped into the driver's seat of a vehicle. The officer approached the vehicle, pointed her gun at the suspect, and ordered the suspect to exit the vehicle. The suspect ignored the officer's command. The officer shattered the driver's side window with her gun. The officer attempted to grab the keys, to no avail, and hit the suspect on the head with the barrel of her gun. The suspect started the vehicle and began to accelerate. Fearing for the backup officers "who [she] *believed* were in the immediate area," as well as "other citizens who *might* be in the area," the officer fired her gun and shot the suspect in the back. *Id.* at 196-97 (alteration in original; emphasis added); see also *Mullenix*, 136 S. Ct. at 309-10. After the suspect drove roughly a half block, he realized that he had been shot and brought the vehicle to a halt. *Brosseau*, 543 U.S. at 197. He was airlifted to the hospital and diagnosed with a collapsed lung. On appeal, the parties directed the Supreme Court's attention to a handful of decisions, one of which

was this Court's decision in *Smith*. *Id.* at 200-01. The Supreme Court acknowledged that *Smith* was close, but it found that neither *Smith* nor any of the other decisions squarely addressed the particular situation confronted by the officer. *Id.* The Supreme Court noted that the decisions, taken together, suggested that the officer's conduct "fell in the hazy border between excessive and acceptable force." *Id.* at 201 (internal quotations omitted). As such, the Supreme Court held that the officer was entitled to qualified immunity. *Id.*

In *Plumhoff*, the Supreme Court examined *Brosseau* and observed that as of February 21, 1999 (the date of the incident in *Brosseau*), "it was not clearly established that it was unconstitutional to shoot a fleeing driver to protect those whom his flight might endanger." *Plumhoff*, 134 S. Ct. at 2023. The Supreme Court also observed that no countervailing authority emerged before July 18, 2004 (the date of the incident in *Plumhoff*). *Id.* at 2024.

In light of the foregoing, Plaintiff "must show at a minimum" either (1) that Defendant's conduct in this case materially differed from the officer's conduct in *Brosseau* or (2) that between July 18, 2004 and June 24, 2010, "there emerged either controlling authority or a robust consensus of cases of persuasive authority that would alter [the Court's] analysis of the qualified immunity question." *Id.* at 2023 (internal citations and quotations omitted). Plaintiff cannot make either showing. First, as in *Plumhoff*, certain facts in this case "are

more favorable" to Defendant and more deserving of qualified immunity. *Id.* at 2023-24. Defendant used deadly force after Latits escalated a routine traffic stop into a dangerous chase and struck Jaklic's cruiser in an effort to evade apprehension. Suffice it to say that the threat presented by Latits "was at least as immediate" as the threat presented by the suspect in *Brosseau* — who had "just begun to drive off," *Mullenix*, 136 S. Ct. at 310, who "had not yet driven his car in a dangerous manner," *Plumhoff*, 134 S. Ct. at 2023, and who had "headed only in the general direction of officers and bystanders," *Mullenix*, 136 S. Ct. at 310. Further, neither "controlling authority [n]or a robust consensus of persuasive authority" establishes that the Supreme Court's analysis in *Brosseau* was "out of date" by June 24, 2010. *Id.*

* * *

Plaintiff relies exclusively on *Hermiz v. City of Southfield*, 484 Fed. Appx. 13 (6th Cir. 2012). Rather than analyze the circumstances in *Hermiz*, Plaintiff simply recites the following excerpt:

> At the time of the incident [on September 27, 2007], Supreme Court and Sixth Circuit case law clearly established the unreasonableness of shooting at the driver of a car ***that no longer poses a threat***.

Id. at 17 (emphasis added). Clearly, Latits still posed a threat when Defendant opened fire. Even if Defendant and his fellow officers were "no longer in the direct path" of Latits' car, "no reasonable officer would say that the night's peril

had ended at that point." *Hocker*, 738 F.3d at 155. Latits "remained in the car, and the car engine remained on." *Id.* "Only [Latits'] self-restraint stood in the way of further threats to [the] safety [of Defendant and his fellow officers]." *Id.* "From [Defendant's] reasonable perspective, the peril remained." *Id.*

While *Hermiz* is factually distinguishable to the extent that the officer allegedly shot at the driver after the threat ceased to exist, *Hermiz* is also instructive. As the Court recognized in *Hermiz*, the Fourth Amendment permits "an officer [to] 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." *Hermiz*, 484 Fed. Appx. at 16. By a parity of reasoning, the Fourth Amendment permits an officer to shoot at a driver who *actually drives into another officer* with his car. As noted above, Defendant opened fire within a couple seconds or less after Latits drove into Jaklic's cruiser. (***Recording-61***, R. 32-2, 00:58:57, 00:58:59-00:59:00).

Plaintiff fails to identify any authority that clearly establishes the contours of a Fourth Amendment right on the facts presented to the Court and supported by the record. Consequently, Plaintiff fails to overcome Defendant's qualified immunity defense. *Koulta v. Merciez*, 477 F.3d 442, 448 (6th Cir. 2007); *Lyons v. City of Xenia*, 417 F.3d 565, 579 (6th Cir. 2005).

II. PUNITIVE DAMAGES

A. Standard

Punitive damages are not recoverable absent proof of the requisite intent: either (1) malicious conduct, *viz.*, an intentional violation of constitutional rights; or (2) willful conduct, *viz.*, a reckless and callous indifference to constitutional rights. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 n. 9 (1986); *Smith v. Wade*, 461 U.S. 30, 51 (1983); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536 (1999). The appropriateness of punitive damages thus depends on an officer's *subjective* state of mind. *Id*.

Under the law-of-the-case doctrine, "a district court is precluded from revisiting an issue . . . expressly or impliedly decided by an appellate court." *McKenzie v. BellSouth Telecomm., Inc.*, 219 F.3d 508, 513 (6th Cir. 2000) (citation omitted). Thus, rulings made at one stage in the litigation are generally binding at subsequent stages of the same litigation. *Rouse v. DaimlerChrysler*, 300 F.3d 711, 715 (6th Cir. 2002); *Bowles v. Russell*, 432 F.3d 668, 676 (6th Cir. 2005). The law-of-the-case doctrine applies not only when a federal action is remanded after an appeal, but also when a state action is removed to a federal court. *Birgel v. Bd. of Comm'rs*, 125 F.3d 948, 950 (6th Cir. 1997); *Pacific Employers Ins. v. Sav-a-Lot*, 291 F.3d 392, 398 (6th Cir. 2002); *EEOC v. United Ass'n of Journeymen & Apprentices*, 235 F.3d 244, 250 n. 1 (6th Cir. 2000).

B. Analysis

In light of the District Court's decision to grant summary judgment based on Defendant's entitlement to qualified immunity, the District Court did not reach the issue of punitive damages. Since the District Court did not err in granting summary judgment, this Court need not reach the issue of punitive damages either. Nevertheless, Defendant will address the issue of punitive damages to preserve his arguments. *Fox v. Van Oosterum*, 176 F.3d 342, 352-53 (6th Cir. 1999) (noting that the Court may decide an issue briefed by the parties but passed upon by the District Court).

Based on the logic of *Brosseau* and the conduct of Latits — including the conduct reported to Defendant and the conduct observed by Defendant — the Court of Appeals determined that Defendant reasonably feared for his safety, as well as the safety of his fellow officers, and acted in good faith when he opened fire. *Latits*, 298 Mich. App. at 111-12, 115-18. The import of the Court of Appeals' determination that Defendant acted in good faith is borne out by *Odom v. Wayne County*, 482 Mich. 459; 760 N.W.2d 217 (2008), a case in which the Supreme Court canvassed cases and secondary sources in an effort to provide guidance in defining the parameters of the good faith standard:

> The cases cited by Prosser [on Torts] indicate that there is no immunity when the governmental employee acts maliciously or with a wanton or reckless disregard of the rights of another.

> This standard is . . . consistent with prior Michigan caselaw. . . . [T]he Court of Appeals [has] held that an "action may lie only if the officer has utilized wanton or malicious conduct or demonstrated a reckless indifference to the common dictates of humanity."
>
> * * *
>
> [This] Court [has] held:
>
> > [The] discretion reposed in . . . [an] officer, making an arrest for felony, as to the means taken to apprehend the supposed offender . . . cannot be passed upon by a court or jury unless it has been abused through malice or wantonness or a reckless indifference to the common dictates of humanity.
>
> In addition, this Court has held that "willful and wanton misconduct is made out only if the conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does." Similarly, our standard civil jury instructions define "willful misconduct" as "conduct or a failure to act that was intended to harm the plaintiff" and "wanton misconduct" as "conduct or a failure to act that shows such indifference to whether harm will result as to be equal to a willingness that harm will result."

Id. at 473-75 (internal citations and embedded footnotes omitted).

As noted above, an award of punitive damages requires either malicious intent or reckless and callous indifference to the rights of another. *Stachura*, 477 U.S. at 306 n. 9; *Smith*, 461 U.S. at 51; *Kolstad*, 527 U.S. at 536. In light of *Odom*, the Court of Appeals' determination that Defendant acted with good faith constituted a determination that Defendant did not act with malice or reckless and callous indifference to Latits' rights. That the Court of Appeals decided the question of governmental immunity, rather than the question of punitive

damages, does not preclude application of the law-of-the-case doctrine. *Bench Billboard Co. v. City of Covington*, 547 Fed. Appx. 695, 704 (6th Cir. 2013). Because Plaintiff fails to show extraordinary circumstances, the law-of-the-case doctrine bars recovery of punitive damages.

* * *

Plaintiff argues that because this Court previously determined that the law-of-the-case doctrine does not bar her claim for excessive force, it necessarily follows that the law-of-the-case doctrine does not bar her claim for punitive damages. Plaintiff's argument lacks merit.

Defendant previously filed a motion for judgment on the pleadings as to Plaintiff's claim for excessive force, asserting qualified immunity based in part on the law-of-the-case doctrine. Defendant acknowledges that this Court affirmed the denial of qualified immunity, determining that the law-of-the-case doctrine did not apply. *Latits v. Phillips*, 573 Fed. Appx. 562, 565 (6th Cir. 2014). However, the Court based its determination on the distinction between *subjective* good faith required for governmental immunity and *objective* good faith required for qualified immunity. The standard for punitive damages — like the good faith standard for governmental immunity and unlike the good faith standard for qualified immunity — is subjective.

* * *

Plaintiff cites this Court's decision in *Hill v. Marshall*, 962 F.2d 1209 (6th Cir. 1992) for the proposition that the conduct needed to support a punitive damages award is one and the same as the conduct needed to support an excessive force claim. Plaintiff thus takes the position that so long as she can establish liability, which is evaluated under an *objective* standard, she is entitled to punitive damages regardless of Defendant's *subjective* state of mind. Plaintiff misconstrues *Hill* and disregards the weight of authority.

In *Hill*, this Court cited *Smith* for the proposition that punitive damages are available in a § 1983 action if the conduct in question was malicious or recklessly and callously indifferent to the rights of another. *Id.* at 1217 (citing *Smith*, 461 U.S. at 56). As the Supreme Court recognized in *Kolstad*, the standard set forth in *Smith* (and recited in *Hill*) is subjective:

> While the *Smith* Court determined that it was unnecessary to show actual malice to qualify for a punitive award, its intent standard, at a minimum, required recklessness in its **subjective** form. The Court referred to a **subjective** consciousness of a risk of injury or illegality and a criminal indifference to civil obligations. The Court thus compared the recklessness standard to the requirement that defendants act with knowledge of falsity or reckless disregard for the truth before punitive awards are available in defamation actions, a **subjective** standard . . . .

Kolstad, 527 U.S. at 536 (internal citations and quotations omitted; emphasis added); see also *Swipies v. Kofka*, 419 F.3d 709, 718 (8th Cir. 2005). Consistent with *Kolstad*, the Court's sister circuits have recognized that the standard for

punitive damages is subjective. *Id.*; *Cabral v. U.S. Dep't of Justice*, 587 F.3d 13, 24 (1st Cir. 2009); *Franet v. Alameda Cnty. Soc. Serv. Agency*, 291 Fed. Appx. 32, 35 (9th Cir. 2008); *Wulf v. Wichita*, 883 F.2d 842, 867 (10th Cir. 1989); *Bollinger v. Oregon*, 305 Fed. Appx. 344, 345 (9th Cir. 2008); *Iacobucci v. Boulter*, 193 F.3d 14, 26 n. 8 (1st Cir. 1999).

The Court's decisions discredit Plaintiff's argument that a finding of liability, in and of itself, supports an award of punitive damages. In *Pouillon v. City of Owosso*, 206 F.3d 711 (6th Cir. 2000), the Court held that regardless of whether the plaintiff could establish liability, the defendant's conduct "hardly [rose] to the level of egregiousness justifying punitive damages." *Id.* at 719. In *Wolfel v. Bates*, 707 F.2d 932 (6th Cir. 1983), the Court noted that imposition of punitive damages is "limited to cases involving egregious conduct or a showing of willfulness or malice." *Id.* at 934. The Court concluded that "[n]othing in the record below support[ed] the suggestion that the . . . defendants' actions rose to such a level of misconduct," even though the Court determined that the defendants "were properly held liable for violating [the plaintiff's] constitutional rights." *Id.* In *Ivey v. Wilson*, 832 F.2d 950 (6th Cir. 1987), the District Court adopted the Magistrate Judge's recommendation to deny the defendants' motion to dismiss based on qualified immunity, as the defendants failed to file their objection and thus waived their qualified immunity defense. *Id.* at 957. This

Court affirmed the award of compensatory damages, but it reversed the award of punitive damages based on the lack of evidence that the defendants "act[ed] in bad faith" or "harbored any ill will toward [the plaintiff]." *Id.* at 958. And as recognized by the Court in *Ciak v. Lasch*, No. 96-5400, 1997 WL 535781 (6th Cir. Aug. 28, 1997), "the simple fact that an officer has been denied qualified immunity, and the simple fact that a jury could reasonably determine that he or she [violated the Constitution], do not by themselves warrant a punitive damages instruction." *Id.* at *4. The Court noted that there "must be something more in the record than . . . objectively unreasonable [conduct]." *Id.*

III. DISCOVERY

A. Standard

Rule 56(d) is a mechanism by which a party, faced with a motion for summary judgment, may request that the District Court defer a decision and allow time to take discovery. The party must show "by ***affidavit or declaration*** that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d) (emphasis added). Denial of discovery is appropriate if the party fails to submit the requisite affidavit or declaration. *CareToLive v. F.D.A.*, 631 F.3d 336, 345 (6th Cir. 2011); *Sandusky Wellness Ctr. v. Medco Health Sol.*, 788 F.3d 218, 226 (6th Cir. 2015). Even when the party submits the requisite affidavit or declaration, denial of discovery is nevertheless

appropriate if the proposed discovery would not have changed the outcome. *Thornton v. Graphic Commc'ns Conference of Int'l Bhd. of Teamsters*, 566 F.3d 597, 617-18 (6th Cir. 2009).

B. Analysis

In *CareToLive*, the plaintiff's counsel made a Rule 56(d) request for discovery by way of an affidavit. *CareToLive*, 631 F.3d at 344-45. This Court found that the request "woefully fail[ed] to meet the requirements of an affidavit, as it "was not sworn to before a notary public nor signed under penalty of perjury pursuant to 28 U.S.C. § 1746." *Id.* at 345. This Court concluded that "[w]ithout [the plaintiff] having filed a proper affidavit," the District Court "did not abuse its discretion by denying discovery." *Id.*

In *Sandusky*, the plaintiff filed a motion in which it "requested discovery under Rule 56(d) . . . to oppose [the defendant's] summary judgment motion." *Sandusky*, 788 F.3d at 225. Relying on *CareToLive*, this Court determined:

> [The plaintiff's] motion "fail[ed] to meet the requirements of an affidavit" or declaration under Rule 56(d). [*CareToLive*, 631 F.3d at 345]. Such a motion must be supported by a proper "affidavit or declaration." Fed. R. Civ. P. 56(d). This one was not. . . . [The plaintiff's motion] contained the date and a list of what it sought. But it "was not sworn to before a notary public nor signed under penalty of perjury pursuant to 28 U.S.C. § 1746." *CareToLive*, 631 F.3d at 345. So it was an improper Rule 56(d) motion. And without "having filed a proper affidavit [or declaration], the district court did not abuse its discretion by denying discovery." *Id.*

Id. at 226.

Here, Plaintiff did not file a Rule 56(d) motion. Plaintiff did file two discovery motions — a motion to enlarge the scope and duration of discovery, as well as a motion to lift the stay of discovery — before Defendant filed a motion for summary judgment. But Plaintiff did not reference Rule 56(d) in her discovery motions, much less support her discovery motions with an affidavit or declaration in accordance with Rule 56(d). After Defendant filed a motion for summary judgment, Plaintiff filed a response in opposition. Plaintiff did not reference Rule 56(d) in her response, attach an affidavit or declaration in accordance with Rule 56(d), or otherwise request that the Court defer a ruling pending additional discovery. If the District Court's denial of discovery in *CareToLive* and *Sandusky* did not amount to an abuse of discretion, then by a parity of reasoning, the District Court's denial of discovery in this case did not amount to an abuse of discretion.

* * *

Plaintiff complains that the District Court deprived her of the opportunity to obtain witness statements from Defendant's employment action, policies, and disciplinary records. However, Plaintiff fails to demonstrate that the proposed discovery would have changed the outcome. *Thornton*, 566 F.3d at 617-18.

Plaintiff claims that witness testimony from Defendant's employment action is needed for potential impeachment. Plaintiff hopes that the witnesses who testified in this action gave inconsistent testimony in Defendant's employment action, such that she can challenge their credibility. Plaintiff fails to appreciate the existence of objective evidence — video footage that captures the events in question and resolves any perceived factual disputes. A recent decision, *Witham v. Intown Suites Louisville Northeast*, --- F.3d --- (6th Cir. 2016), drives home the point. In *Witham*, the plaintiff argued that a jury should evaluate the credibility of witness testimony regarding the reasons for the defendant's termination of her employment. *Id.* at *4. Since the proffered reasons concerned an incident that happened to be captured by a security camera, the Court stated:

> We need not deny what our eyes can see through this visual evidence or cede all ground to the jury by suspending belief in our own eyes. We instead must "view [ ] the facts in the light depicted by the videotape," which is all that the summary judgment standard demands. [*Scott*, 550 U.S. at 381].

Id. Plaintiff invites the Court to do precisely what the Court refused to do in *Witham*: turn a blind eye to the video footage, which shows the justification for and reasonableness of Defendant's use of deadly force, and allow her case to proceed to a jury. The Court should decline her invitation.

Plaintiff contends that whether Defendant complied with the Department's policies is "directly relevant" to liability. Additionally, Plaintiff

contends that whether the Department disciplined Defendant is "highly probative" of whether Defendant acted reasonably when he used deadly force. For the reasons outlined in section I.B., *supra* (pages 22-23), Plaintiff is wrong on both counts. Neither evidence that the Department disciplined Defendant nor evidence that Defendant violated the Department's policies is relevant to liability. *Laney*, 501 F.3d at 580 n. 2; *Combs*, 315 F.3d at 560; *Smith*, 954 F.2d at 347; *Lewis,* 1994 WL 589643, at *2, 4.

CONCLUSION

Defendant respectfully requests that this Honorable Court **AFFIRM** the District Court's judgment.

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Dated: March 31, 2016

CERTIFICATE OF COMPLIANCE

I certify that Defendant's brief complies with the type-volume limitation. The brief contains 13,994 words, excluding the contents exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

I further certify that Defendant's brief complies with the typeface requirement. I prepared the brief in Microsoft® Word 2013 and used Calisto MT, a proportionally-spaced font, at 14 point.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2016, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification to the following: *All Attorneys of Record*.

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▪ Exhibit 3: Transcript of David Spellman's Deposition (Employment Case)	38-4	1440-1459
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