No. _____

In The
Supreme Court of the United States

OFFICER VANCE PLUMHOFF, et al.,

Petitioners,

vs.

WHITNE RICKARD, a minor child, individually, and as surviving daughter of Donald Rickard, deceased, by and through her mother Samantha Rickard, as parent and next friend,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a civil case against police officers for excessive force, a court must grant qualified immunity unless the use of force was prohibited by clearly established law. Here, the Sixth Circuit denied qualified immunity for force used in 2004 to end a vehicular pursuit that is similar to the force ruled permissible in *Scott v. Harris*, 550 U.S. 372 (2007). The Sixth Circuit denied qualified immunity by distinguishing *Scott* "in the details" from the force used three years *earlier* in this case. (Pet. App. at 8-9.) The Sixth Circuit applied a similar analysis in *Walker v. Davis*, 649 F.3d 502 (6th Cir. 2011), where it also distinguished *Scott* to deny qualified immunity for pre-2007 conduct. As Judge McKeague noted in his extended dissent, the Sixth Circuit stands alone in this analysis. *Id.* at 504-11 (McKeague, J., dissenting). Petitioners believe this Court has an opportunity to correct the errors in the Sixth Circuit's qualified immunity analysis by agreeing to hear their case. The specific questions presented are as follows:

1. Whether the Sixth Circuit wrongly denied qualified immunity to Petitioners by analyzing whether the force used in 2004 was distinguishable from factually similar force ruled permissible three years later in *Scott v. Harris*, 550 U.S. 372 (2007). Stated otherwise, the question presented is whether, for qualified immunity purposes, the Sixth Circuit erred in analyzing whether the force was *supported* by subsequent case decisions as opposed to *prohibited* by clearly established law at the time the force was used.

QUESTIONS PRESENTED – Continued

2. Whether the Sixth Circuit erred in denying qualified immunity by finding the use of force was not reasonable as a matter of law when, under Respondent's own facts, the suspect led police officers on a high-speed pursuit that began in Arkansas and ended in Tennessee, the suspect weaved through traffic on an interstate at a high rate of speed and made contact with the police vehicles twice, and the suspect used his vehicle in a final attempt to escape after he was surrounded by police officers, nearly hitting at least one police officer in the process.

PARTIES TO THE PROCEEDINGS

Petitioners are the following members of the West Memphis Police Department: Officer Vance Plumhoff; Officer John Bryan Gardner; Officer Tony Galtelli; Officer Lance Ellis; Officer Jimmy Evans; and Officer Joseph Forthman.

Respondent is Whitne Rickard, a minor and surviving daughter of Donald Rickard, deceased. The lawsuit was filed on her behalf by Samantha Rickard, as parent and next friend.

No corporations are parties to the proceedings.

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OPINIONS AND JUDGMENTS BELOW

On January 20, 2011, the United States District Court for the Western District of Tennessee entered an order granting in part and denying in part Petitioners' motion for summary judgment. The district court's order is available on Westlaw at *Estate of Allen v. City of West Memphis*, Nos. 05-2489 and 05-2585, 2011 WL 197426 (W.D. Tenn. Jan. 20, 2011). In addition, the district court's order is reproduced in the appendix to this petition. (Pet. App. at 16-62.)

On October 9, 2012, the United States Court of Appeals for the Sixth Circuit issued an opinion affirming the district court's order. On November 14, 2012, the Sixth Circuit vacated its October 9, 2012 opinion and issued a substitute opinion that also affirmed the district court's order. The Sixth Circuit's November 14, 2012 opinion is available on Westlaw at *Estate of Allen v. City of West Memphis*, No. 11-5266, 2012 WL 6634306 (6th Cir. Nov. 14, 2012). The Sixth Circuit denied rehearing en banc on December 13, 2012. Both the November 14, 2012 opinion that is the subject of this petition and the order denying rehearing en banc are reproduced in the appendix. (Pet. App. at 1-15 and 63-64.)[1]

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[1] The Sixth Circuit's opinion of October 9, 2012 is noted on Westlaw as having been superseded by the November 14, 2012 opinion. *Estate of Allen v. City of West Memphis*, No. 11-5266, 2012 WL 6603083 (6th Cir. Oct. 9, 2012). Petitioners do not cite herein to the October 9, 2012 opinion that was superseded by the November 14, 2012 opinion and are informed that it need

(Continued on following page)

STATEMENT OF JURISDICTION

The Sixth Circuit had appellate jurisdiction over Petitioners' initial appeal because the district court's January 20, 2011 order was a final decision within the meaning of 28 U.S.C. § 1291 and the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985).

Following the Sixth Circuit's issuance of its November 14, 2012 opinion, Petitioners filed a timely request for rehearing en banc, which the Sixth Circuit denied on December 13, 2012. (Pet. App. at 1-15 and 63-64.) This petition is timely because it is being filed within 90 days after the Sixth Circuit's denial of Petitioners' request for rehearing en banc. SUP. CT. R. 13(1) and (3).

The Court has jurisdiction to consider this appeal under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Respondent seeks damages pursuant to 42 U.S.C. § 1983 for an alleged violation of the decedent's rights

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not be included in the appendix. The opinion can be obtained from the Sixth Circuit, or will be provided by Petitioners, if desired by the Court nevertheless.

under the Fourth Amendment to the United States Constitution.

The Fourth Amendment provides in pertinent part that "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

Section 1983 provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. Introduction.

Respondent's decedent was killed when he lost control of his vehicle after being shot by police officers following a high-speed pursuit that began at a gas station next to an interstate highway entrance in

West Memphis, Arkansas, and ended on the streets of Memphis, Tennessee. The Sixth Circuit affirmed the denial of summary judgment on qualified immunity grounds because it could not "conclude that the officers' conduct was reasonable as a matter of law." (Pet. App. at 10.) In so finding, the circuit court acknowledged "the similarity of the facts here to the facts of *Scott* [*v. Harris*, 550 U.S. 372 (2007)]," where this Court found the officer had not violated the Fourth Amendment when he "intentionally rammed into the back of the fleeing car causing it to leave the road and crash, resulting in crippling injuries to the driver." (Pet. App. at 8.) The Sixth Circuit acknowledged that a very close analysis was required to distinguish *Scott*: "the devil is in the details, and it is those details that cause us to conclude that *Scott* is distinguishable." (*Id.* at 8-9.)

Petitioners believe the Sixth Circuit committed clear error in its qualified immunity analysis in two main respects: (1) it denied qualified immunity based solely on a determination of whether the force was reasonable under the Fourth Amendment as a matter of law; and (2) it relied on distinctions "in the details" from the post-incident decision in *Scott* to deny qualified immunity to Petitioners based on the absence of clearly established law *supporting* the force they applied. Petitioners note that these errors are not unique to this case but are part of the Sixth Circuit's precedent. On the first point, and contrary to this Court's teachings in *Saucier v. Katz*, 533 U.S. 194 (2001), as discussed below, the Sixth Circuit has held

that "qualified immunity in cases involving deadly force is difficult to determine on summary judgment because liability turns on the Fourth Amendment's reasonableness test." *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 903 (6th Cir. 1998). The Sixth Circuit has relied on this reasoning to deny qualified immunity on other occasions as well. *See, e.g.*, *Rodriguez v. Passinault*, 637 F.3d 675, 689 (6th Cir. 2011); *Murray-Ruhl v. Passinault*, 246 F. App'x 338, 343 (6th Cir. 2007); *Smith v. Kim*, 70 F. App'x 818, 819 (6th Cir. 2003). Petitioners request that this repeated error in the Sixth Circuit's precedent be addressed in their case.

On the second point as well, Sixth Circuit precedent has distinguished *Scott* to deny qualified immunity in a pursuit case that also predated *Scott*. In *Walker v. Davis*, 649 F.3d 502 (6th Cir. 2011), the majority opinion reasoned that the force was prohibited based on "general statements" of law that preceded *Scott* and because "[t]he chase here was a sleeper by comparison [to *Scott*]." *Id.* at 503. In a lengthy dissent, Judge McKeague took the majority to task for its reliance on distinctions from *Scott* and its generalized statements of law. He wrote: "I respectfully dissent because I think the majority has significantly downplayed the level of risk that [the suspect] posed to the public, and defined clearly-established law at too high a level of generality." *Id.* at 504. Petitioners have the identical objection to the Sixth Circuit's reasoning in this case that Judge McKeague articulated in *Walker*.

Petitioners believe the conceptual flaws in the Sixth Circuit's case law conflict directly with this Court's precedent as well as cases from the sister circuits. This is particularly troubling to Petitioners because qualified immunity is immunity from suit and not just damages such that "it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526; *see also Hunter v. Bryant*, 504 U.S. 224, 227 (1991) (directing lower courts to resolve qualified immunity questions "at the earliest stage possible of the litigation"). Here, Petitioners are being forced to trial without the Sixth Circuit having ever examined whether they violated clearly established law.

On occasions where there has been clear error, this Court has reversed the circuit court's judgment summarily, as it did in *Brosseau v. Hagen*, 543 U.S. 194 (2004) (per curiam), which is discussed below. Petitioners recognize that summary reversal on a petition is unusual but believe they should not be exposed to civil liability under clear precedent of this Court. Alternatively, Petitioners request that this Court grant their petition to allow for plenary consideration of their qualified immunity defense.

B. Facts and procedural history.

The Sixth Circuit's ruling was based on facts that Petitioners conceded for purposes of the summary judgment analysis. In that respect, the lower court found that around midnight on July 18, 2004, Officer

Joseph Forthman of the West Memphis Police Department stopped a white Honda Accord because it had only one operating headlight. (Pet. App. at 3.) Instead of complying with Officer Forthman's request to step out of the vehicle, the driver (who was later identified as Donald Rickard) fled away in the Honda. (*Id.*) Officer Forthman commenced a vehicular pursuit and radioed for assistance. (*Id.*) He was joined by officers in four other vehicles in pursuing Rickard who turned onto I-40 heading east from Arkansas into Tennessee. (*Id.*) One officer stated on the police radio that Rickard tried to ram him, and another officer stated that Rickard was trying to ram another vehicle. (*Id.* at 3-4.)

Once he crossed the Mississippi River into Memphis, Rickard left the freeway and sped recklessly through city streets. As found by the lower court, Rickard continued to use his vehicle as a means of escape:

> "As the Rickard vehicle approached Jackson Avenue, it made a quick right turn onto Jackson Avenue and contact occurred between the Rickard vehicle and a police vehicle. The contact caused the Rickard vehicle to spin around in a parking lot at the intersection of Danny Thomas Boulevard and Jackson Avenue. Separate Defendants assert that the Rickard vehicle then turned directly toward Plumhoff's vehicle and had a head-on collision with it. Plaintiffs dispute these statements and aver that the Rickard vehicle was still moving forward from the

momentum caused by the spinout after contact with Evans' vehicle and that this momentum caused the collision with Plumhoff's vehicle.

At or near this stage of events, the other officers formed a semicircle around the Rickard vehicle, attempting to use the building in the parking lot to prevent the vehicle from fleeing. Because of the building and the location of the police cars, the only unobstructed way for Rickard to escape was to back up. Rickard reversed in an attempt to escape, and as he did so Evans and Plumhoff exited their vehicles and approached the Rickard vehicle. Evans tried to get into the vehicle by pounding on the passenger-side window with his gun in his hand. Gardner and other officers also approached the vehicle. At this point, the wheels of the Rickard vehicle were spinning, and the vehicle made contact with Gardner's vehicle. Separate Defendants assert that the vehicle's engine was "revving," but Plaintiffs dispute this and state that the vehicle was rocking back and forth, and it is unclear whether the engine noise in conjunction with this rocking motion should be characterized as revving the engine.

Plumhoff fired three shots into the Rickard vehicle. The video from unit # 279 shows that Plumhoff was near the passenger-side of the vehicle when he fired those shots. The Rickard vehicle then reversed in a 180 degree arc onto Jackson Avenue heading east. As the Rickard vehicle reversed, Galtelli

> exited his vehicle and ran to join the other officers who were chasing the vehicle as it maneuvered onto Jackson Avenue. Ellis was standing near the rear passenger-side of Rickard's vehicle and had to step to his right to avoid the vehicle. Gardner then fired ten shots toward the vehicle, initially from the passenger side and then from the back of the vehicle. Gardner fired all ten shots while the vehicle was moving forward (i.e., away from the officers). Galtelli also fired two shots at the vehicle. As the officers were shooting, Rickard was fleeing down Jackson Avenue. Rickard then lost control of the vehicle, and the Rickard vehicle crashed into a building at the corner of Jackson Avenue and Manassas Street. Both Rickard and Allen were killed."

(Pet. App. at 4-6 (quoting Pet. App. at 22-24).)[2]

Based on this recitation of facts, the Sixth Circuit found summary judgment was inappropriate because "we cannot conclude that the officers' conduct was

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[2] Videotaped evidence from the police cruisers that confirms these facts are in the record of the case. Petitioners invite the Court to view the videotapes that can be forwarded by the Sixth Circuit or supplied by Petitioners. If reviewed by the Court, Officer Forthman's videotape shows the fleeing suspect weaving around vehicles and culminates with shots fired at the vehicle as the suspect tries to evade capture, shown from minute markers 9:12 to 16:51. Officer Ellis' videotape shows the suspect's driving from minute markers 13:45 to 18:30, and Officer Galtelli's videotape depicts the driving from minute markers 00:45 to 02:31.

reasonable as a matter of law." (Pet. App. at 10.)[3] In so concluding, the panel relied primarily on distinctions it found with the facts of *Scott* where "[t]he fleeing motorist . . . was still fleeing at very high speeds when he was rammed from behind." (*Id.* at 9.) In contrast, the Sixth Circuit wrote that Petitioners used firearms when the suspect's vehicle "was essentially stopped and surrounded by police officers and police cars although some effort to elude capture was still being made." (*Id.*)[4]

Even though *Scott* was decided three years after the events in this case, the Sixth Circuit relied on distinctions that it acknowledged were "in the details" of the subsequent decision as a basis for denying qualified immunity to Petitioners. And, instead of considering the governmental interest in ending the

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[3] The district court dismissed the constitutional claims brought on behalf of Rickard's passenger Kelly Allen based on findings that the Due Process Clause of the Fourteenth Amendment, and not the Fourth Amendment, applied and that the use of force was not shocking to the conscience to show liability under the Fourteenth Amendment pursuant to *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). (Pet. App. at 43-47.) The claims involving the passenger are not at issue in this Petition.

[4] Petitioners note that what the Sixth Circuit characterized as Rickard's "effort to elude capture" is shown on the videotapes as Rickard maneuvering his vehicle in reverse to get around the officers who were on foot and then speeding away recklessly. Officer Forthman's videotape at minute markers 16:25 to 16:30; Officer Ellis' videotape at minute markers 18:35 to 18:48; Officer Forthman's videotape from minute markers 16:30 to 16:51.

ongoing threat to the public from Rickard's dangerous propensities, the Sixth Circuit focused instead on "the degree of danger that the officers were placed in as a result of Rickard's conduct." (*Id.* at 10.)

For the reasons presented in the Argument section below, the Sixth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c). Review is warranted to address these important and recurring procedural and substantive issues in the Fourth Amendment and qualified immunity contexts.

ARGUMENT

A. The Sixth Circuit erred in analyzing whether the force was supported by subsequent case law as opposed to prohibited by clearly established law at the time the force was used.

The Sixth Circuit upheld the denial of qualified immunity based on a finding that it could not deem the force used under Respondent's version of facts to be reasonable under established law. This is an inversion of the qualified immunity inquiry which is whether the use of force was *precluded* by established law. Notably, a finding of reasonableness for Fourth Amendment purposes is distinct from whether the officer violated clearly established law. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011) ("The general proposition . . . that an unreasonable search or seizure violates the Fourth Amendment is of little help in

determining whether the violative nature of particular conduct is clearly established.") The notion that reasonable use of force is synonymous with the qualified immunity analysis was rejected soundly over a decade ago in *Saucier* as follows:

> If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.
>
> The qualified immunity inquiry, on the other hand, has a further dimension. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It 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. An officer could correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

533 U.S. at 205. This Court then summed up the distinction between the standards as follows:

> Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have

> violated the Constitution. Yet, even if a court were to hold that the officer violated the Fourth Amendment . . . , *Anderson* [*v. Creighton*, 483 U.S. 635 (1987),] still operates to grant officers immunity for reasonable mistakes as to the legality of their actions. The same analysis applies in excessive force cases, where in addition to the deference officers received on the underlying constitutional claim, qualified immunity can apply in the event the mistaken belief was reasonable.

Id. at 206.

To underscore the distinction between Fourth Amendment reasonableness and the qualified immunity analysis, *Saucier* set up what was subsequently termed a "rigid 'order of battle'" requiring lower courts to resolve whether there is evidence of a constitutional violation instead of skipping to whether the right was "clearly established." *Morse v. Frederick*, 551 U.S. 393, 430 (2007) (Alito, J., concurring). In *Pearson v. Callahan*, this Court relaxed that requirement by holding that the courts have discretion, in certain circumstances, to find that an alleged constitutional right was not clearly established without having to resolve first whether there was, in fact, a constitutional violation. 555 U.S. 223, 230 (2009) ("[T]here will be cases in which a court will rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all.").

Although *Pearson* allowed lower courts discretion to determine whether there was a constitutional violation, it did not remove the requirement that courts determine whether the right was clearly established. *Id.* at 232 ("[I]f the plaintiff has satisfied [the] first step, the court must decide whether the right at issue was 'clearly established' at the time of the defendant's alleged misconduct."). Yet that imperative is exactly what the Sixth Circuit did not do in this case: it found the evidence could support an unreasonable use of force and *on that basis* stripped Petitioners of qualified immunity. This reasoning runs directly afoul of this Court's clear direction in *Saucier* that courts must *not* conflate reasonableness of force under the Fourth Amendment with the question of whether the law was clearly established for qualified immunity purposes. Stated otherwise, even if a court (or jury) were to find that Petitioners used excessive force under the Fourth Amendment, they would still be entitled to qualified immunity unless they violated clearly established law.

As stated above, the decision in this case is not the only time the Sixth Circuit has conflated the inquiry, contrary to the clear admonitions of *Saucier*. In *Sova*, the Sixth Circuit wrote that "qualified immunity in cases involving claims of deadly force is difficult to determine on summary judgment because liability turns upon the Fourth Amendment's reasonableness test." 142 F.3d at 902. *Sova* was applied more recently to deny qualified immunity based on a finding that "'there are contentious factual disputes over the

reasonableness of the use of deadly force.'" *Rodriguez*, 637 F.3d at 689 (quoting *Sova,* 142 F.3d at 903); *accord Murray-Ruhl*, 246 F. App'x at 343; *Smith*, 70 F. App'x at 819. Petitioners believe the Sixth Circuit's repeated error in their case warrants further review on the merits to clarify the distinction between the reasonable use of force for Fourth Amendment purposes and the reasonable interpretation of law inherent in the qualified immunity analysis.

In addition to denying qualified immunity solely based on a finding that it could not deem the force reasonable as a matter of law, the Sixth Circuit skipped entirely the crucial step in the inquiry of whether Petitioners violated clearly established law at the time the force was applied in July 2004. Instead, the Sixth Circuit denied qualified immunity because it determined that the force was distinguishable from case law decided three years after the fact. The inquiry, however, is whether the force was *prohibited* by clearly established law *at the time the force was used*. *Pearson*, 555 U.S. at 230 (finding the inquiry is whether the right was "clearly established" at the time of the events in question); *Filarsky v. Delia*, 132 S. Ct. 1657, 1668 (2012) (Ginsburg, J., concurring) ("Qualified immunity may be overcome, however, if the defendant knew or should have known that his conduct violated a right 'clearly established' *at the time of the episode in suit*.") (emphasis added). Any question as to the relevant time period was put to rest in *Brosseau*:

> Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.

543 U.S. at 198.

Yet instead of focusing on the law at the time of Petitioners' conduct, the Sixth Circuit chose instead to minutely examine *Scott*, decided almost three years later in 2007, as a basis for judging Petitioners' entitlement to qualified immunity for conduct in 2004. Petitioners believe this error in the analysis is material given the "'hazy border between excessive and acceptable force.'" *Id.* at 201 (quoting *Saucier*, 533 U.S. at 206). Had the Sixth Circuit applied the proper analysis, it would have had to conclude that the use of force was *not* prohibited by clearly established law.

> To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right. In other words, existing precedent must have placed the statutory or constitutional question beyond debate. This clearly established standard protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by

> ensuring that officials can reasonably anticipate when their conduct may give rise to liability for damages.

Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012) (punctuation, citations, and internal quotation marks omitted). "[T]he right allegedly violated must be established, not as a broad general proposition . . . but in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Id.* at 2094 (citation and internal quotation marks omitted). For this reason, "we do not define clearly established law at . . . a 'high level of generality.'" *Ashcroft*, 131 S. Ct. at 2084.

To determine whether Petitioners violated clearly established law, the Sixth Circuit should have examined precedent that existed as of July 2004 when the events in this case took place. Significantly, the shots that ultimately caused Rickard to lose control of his vehicle were fired when Rickard had maneuvered his vehicle in reverse and was about to speed away. At that precise moment, as the Sixth Circuit stated, "'Ellis was standing near the rear passenger-side of Rickard's vehicle and had to step to his right to avoid the vehicle. Gardner then fired ten shots toward the vehicle, initially from the passenger side and then from the back of the vehicle.'" (Pet. App. at 6 (quoting Pet. App. at 24).)[5]

[5] The shots that were fired before Rickard lost control of his vehicle came from three of the six Petitioners (Officers Plumhoff,

(Continued on following page)

Under these facts that formed the basis for the Sixth Circuit's decisions, Petitioners did not violate clearly established law, at least as of July 2004 when the force was used. Petitioners are law enforcement officers in West Memphis, Arkansas, which lies in the Eighth Circuit. Reasonable officers in their position would have been operating under Eighth Circuit precedent which clearly supports the use of force in this case. *Cole v. Bone*, 993 F.3d 1328, 1331 (8th Cir. 1993) (holding officer was justified in shooting and killing a driver who had driven recklessly to elude capture even though the path was "momentarily clear of civilian traffic"). Even if it had examined its own precedent, the Sixth Circuit would have had to find the force was not in violation of clearly established law at least as of July 2004. *See, e.g.*, *Dudley v. Eden*, 260 F.3d 722, 724-27 (6th Cir. 2001) (holding the officers were justified in firing shots at the fleeing suspect even though the "cars came to a complete stop" due to the suspect's "refusal to comply with the commands of armed policemen[ ] and his reckless driving"); *Scott v. Clay County*, 205 F.3d 867, 877 (6th Cir. 2000) (holding the officers were justified in firing shots at a suspect who was about to turn on to a highway because his reckless driving in eluding arrest "posed an

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Gardner and Galtelli). (Pet. App. at 5-6.) Although the Sixth Circuit opinion stated that the other officers might be entitled to qualified immunity on remand, Judge Clay wrote a concurring opinion to specify that the denial of qualified immunity is absolute against *all* the officers. (*Id.* at 11 n.4 & 14-15.)

immediate threat to the safety of officers as well as innocent civilians"); *Smith v. Freland*, 954 F.2d 343, 344 (6th Cir. 1992) (holding the officer was justified in shooting and killing the suspect after he "backed up and zoomed around the police car" in an ongoing attempt to elude capture). The facts of these cases, which upheld the use of deadly force, are sufficiently analogous to the facts in this case to preclude a finding that Petitioners violated "clearly established" law in July 2004.

In denying Petitioners qualified immunity, however, the Sixth Circuit did not look at *any* precedent that existed at the time of the force but instead relied on distinctions from the facts in *Scott*, which was decided *after* the use of force in this case. If anything, the post-incident case law confirms that Petitioners did not violate law that was clearly established at any time. In that respect, this Court's decision in *Brosseau*, which was issued in December 2004, is particularly instructive.

Officer Brosseau, who was engaged in a foot pursuit, saw the suspect (Haugen) jump into a Jeep. Brosseau ordered Haugen to get out of the vehicle and pounded several times on the window with her gun, eventually shattering the glass and striking him on the head. Undeterred, Haugen started the Jeep and began to drive. Brosseau jumped back and fired her weapon "through the rear driver's side window at a forward angle, hitting Haugen in the back." 543 U.S. at 196-97. Brosseau acted out of fear for the "officers who she *believed* were in the immediate area,

and for the occupied vehicles in Haugen's path and for any other citizens who *might* be in the area." *Id.* at 196 (emphasis added) (punctuation and internal quotation marks omitted).

In a per curiam decision, this Court reversed the denial of qualified immunity to the officer. Relying in part on case law from the Sixth Circuit, this Court noted that "'a car can be a deadly weapon'" and that Haugen "'had proven he would do almost anything to avoid capture.'" *Id.* at 200 (quoting *Smith*, 954 F.2d at 347). This Court concluded that because no case clearly precluded Brosseau's use of force, her actions fell in the "'hazy border between excessive and acceptable force.'" *Id.* at 201 (quoting *Saucier*, 533 U.S. at 206). Accordingly, the denial of qualified immunity was reversed summarily on the petition for certiorari.

Petitioners believe that the Sixth Circuit's errors in analyzing their right to qualified immunity are as egregious as the Ninth Circuit's reasoning that led to this Court's summary reversal in *Brosseau*. Whereas the officer in *Brosseau* used her firearm based on a belief that the suspect *might become* a menace to the public, Petitioners used force after Rickard had *already proven to be* a danger to themselves and the general public. By then, Rickard had weaved through traffic on the interstate at a high rate of speed without regard to vehicles in his path. When he was surrounded by police officers on a Memphis street, he swung his vehicle around in reverse to avoid capture, narrowly missing officers standing in his path. In the process, the suspect struck the officers' vehicles, one

of them head-on.[6] As the Sixth Circuit found, the shots that caused Rickard to lose control of his vehicle were fired when "'Ellis was standing near the rear passenger-side of Rickard's vehicle and had to step to his right to avoid the vehicle. Gardner then fired ten shots toward the vehicle, initially from the passenger side and then from the back of the vehicle.'" (Pet. App. at 6 (quoting Pet. App. at 24).) By continuing to use his vehicle as a dangerous weapon, Rickard demonstrated that he would not stop being a threat to the general public without a higher level of force being used. In sharp contrast, Brosseau fired shots at Haugen from behind out of a fear that he *might* drive menacingly and that there *might* be others in his path. If Officer Brosseau's use of deadly force did not violate clearly established law in December 2004, then it necessarily follows that Petitioners' use of the same force under similar circumstances did not violate clearly established law in July 2004.

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[6] If the Court obtains the videotapes, *see supra* note 2, Rickard's dangerous driving on the interstate and in Memphis can be seen on Officer Forthman's videotape at the minute markers 11:25 to 16:15. The head-on contact by Rickard is depicted vividly on Officer Galtelli's videotape at minute markers 02:35 to 02:38.

Rickard's reverse maneuver of his vehicle is captured on Officer Forthman's videotape at minute markers 16:25 to 16:30. That officers are in Rickard's path at that point is shown on Officer Ellis' videotape at minute markers 18:35 to 18:48. At that point shots are fired after which Rickard drives for a distance before losing control, almost hitting another car head-on, and then crashing the car himself, as depicted on Officer Forthman's videotape from minute markers 16:30 to 16:51.

At the very least, the Sixth Circuit should have examined cases that were decided as of July 2004 to identify the law that was clearly established as opposed to relying on distinctions from *Scott* which was issued in April 2007. Unlike civil rights lawyers or judges, officers do not have the luxury of freeze-framing each action and reaction to calculate the degree of force required. *Graham v. Connor,* 490 U.S. 386, 396 (1989) ("The 'reasonableness' of a particular use of force must be judged from the perspective of the reasonable officer on the scene, rather than with the 20/20 vision of hindsight."). Here, the Sixth Circuit charged Petitioners with looking into the future to foresee fine distinctions that might be drawn from a set of facts that might be ruled admissible force in the future, as in this Court's 2007 decision in *Scott*. That is simply an unworkable and illogical burden to impose on Petitioners who had to make immediate decisions to quell the rapidly evolving and dangerous threat that Rickard posed to them and to the general public. Given the implications of these decisions on law enforcement policies and civil liability, in the Sixth Circuit and beyond, review by this Court is warranted.

B. The Sixth Circuit erred in denying qualified immunity by finding the use of force was not reasonable as a matter of law.

As explained above, the Sixth Circuit denied qualified immunity to Petitioners based on a finding that the force was not clearly reasonable under Fourth

Amendment law, thereby inverting the "clearly established" inquiry. For the reasons provided above, Petitioners did not violate "clearly established law." Moreover, as a predicate, the Sixth Circuit should have found that the force was reasonable as a matter of law thereby rendering the "clearly established" inquiry moot.

Tellingly, the Sixth Circuit did not discuss the standards informing the Fourth Amendment analysis that balances the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396 (internal quotation marks omitted); *accord United States v. Place*, 462 U.S. 696, 703 (1983). In high-speed vehicular pursuits, the governmental interests are very strong because there is "an actual and imminent threat to the lives of pedestrians . . . , to other civilian motorists, and to the officers involved in the chase." *Scott*, 550 U.S. at 384; *see also Brosseau*, 543 U.S. at 196-97 (finding the officer acted out of a reasonable concern for the safety of other officers "and for any other citizens who might be in the area"). This Court further wrote: "we are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives in danger." *Scott*, 550 U.S. at 385.

That vehicles are dangerous instrumentalities is not a novel or unknown concept. As this Court explained in *Sykes v. United States*, the "[r]isk of

violence is inherent to vehicle flight." 131 S. Ct. 2267, 2274 (2011).

> Between the confrontations that initiate and terminate the incident, the intervening pursuit creates high risks of crashes. . . . It is well known that when offenders use motor vehicles as their means of escape they create serious potential risks of physical injury to others. Flight from a law enforcement officer invites, even demands, pursuit. As that pursuit continues, the risk of an accident accumulates. And having chosen to flee, and thereby commit a crime, the perpetrator has all the more reason to seek to avoid capture.

Id.

Even though this Court held in *Scott* that this governmental interest outweighs the "risk of serious injury or death" to the fleeing motorist, 550 U.S. at 386, the Sixth Circuit focused on whether the force was justified based on "the degree of danger that the officers were placed in as a result of Rickard's conduct." (Pet. App. at 10.) As in *Scott*, "[i]t was [Rickard] . . . who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that [Petitioners] confronted." 550 U.S. at 382. Also as in *Scott*, the fleeing suspect's vehicle struck a police officer's vehicle as part of the ongoing attempt to elude capture. *Id.* at 375 ("Respondent evaded the trap by making a sharp turn, colliding with Scott's police car, exiting the parking

lot, and speeding off once again down a two-lane highway.").

Inexplicably, the Sixth Circuit did not consider the relevant governmental interest of eliminating the risk *to the general public* inherent in Rickard's ongoing conduct. Instead, the Sixth Circuit sought to distinguish *Scott* because shots were fired at Rickard's vehicle from behind after Rickard had swung his vehicle around in reverse to avoid capture. But this identical scenario was present in *Scott* as well: "when Scott rammed respondent's vehicle it was not threatening any other vehicles or pedestrians." 550 U.S. at 380 n.7. It is this *risk*, and not just the fear of imminent harm to the officers, that justifies the use of force against the fleeing suspect. Further, in *Scott*, "[m]ultiple police cars with blue lights flashing and sirens blaring, had been chasing [the suspect] for nearly 10 miles but he ignored their warning to stop." *Id.* at 384. Likewise, in this case, Rickard engaged the police on an extended high-speed pursuit and, when cornered, used his vehicle to plow past the officers imploring him to stop. The Sixth Circuit should have found Petitioners' use of force was permissible as a matter of law based on the governmental interests in confronting the risk of harm that Rickard posed to the officers around him and to the general public.

Petitioners are mindful that the Fourth Amendment prohibits using deadly force solely to prevent a suspect's escape. *Tennessee v. Garner*, 471 U.S. 1 (1985). *Garner* involved an officer who shot an unarmed

suspect in the back of the head during a foot chase and is distinguishable where, as here, it is the means of flight itself that perpetuates the hazard to the public. *Scott*, 550 U.S. at 382 n.9. As in *Scott*, Rickard's use of his vehicle was akin to a suspect wielding a deadly weapon in a menacing manner. Lastly, the Sixth Circuit sought to distinguish *Scott* where the officer rammed the suspect's car as opposed to the shots that were fired in this case. But this distinction was rejected in *Scott* as well: "[w]hether or not Scott's actions constituted application of 'deadly force,' all that matters is whether Scott's actions were reasonable." *Id.* at 383.

In the final analysis, the sole distinguishing feature from *Scott* may be that at the time force was used in that case, the suspect was driving at a high rate of speed whereas Rickard had turned his car around and was trying to speed away. The fact remains that Officer Ellis had to step aside to avoid being hit by Rickard's vehicle at the time the force was used and by then, as in *Scott*, the suspect had shown that he was determined to elude capture at all costs, even maneuvering in reverse with officers standing around his vehicle attempting to make the lawful arrest.

Viewed from the perspective of the officers as required by Fourth Amendment jurisprudence, Petitioners reasonably believed that Rickard was an immediate threat to the safety of themselves and the general public, and that Rickard would continue to be a safety risk absent even more forceful intervention.

Under these circumstances, the Sixth Circuit should not have found a jury issue on the reasonableness of the force employed and should have upheld the qualified immunity defense as a matter of law on that basis.

Petitioners note that a finding that the force they used was permissible would simply mean the force was within the broad spectrum of Fourth Amendment reasonableness. Clear articulations of the reasonableness standard are necessary because court decisions such as the one in this case are guideposts for law enforcement agencies who can then formulate policies for particular jurisdictions. In that respect, the Sixth Circuit's decision has implications beyond the question of Petitioners' exposure to civil liability for the force applied in this case. For this reason as well, Petitioners believe review should be granted by this Court.

CONCLUSION

This case exemplifies that the Sixth Circuit's decisions conflict with fundamental principles established by this Court in the Fourth Amendment and qualified immunity contexts. Accordingly, Petitioners respectfully request that the decision of the Sixth Circuit denying qualified immunity be summarily

reversed, or alternatively, that a writ of certiorari be issued so full review can be had by this Court.

Respectfully submitted,

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NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION
File Name: 12a1178n.06

No. 11-5266

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

ESTATE OF KELLY A. ALLEN, Deceased; CLAUDIA G. ALLEN; MARIA NICOLE ALLEN, a minor by next friend, Kenneth B. Allen; ALEXIS LANE ALLEN, a minor by next friend, Kenneth B. Allen; WHITNE RICKARD, a minor child, individually, and as surviving daughter of Donald Rickard, deceased, by and through her mother Samantha Rickard, as parent and next friend,

Plaintiffs-Appellees,

v.

CITY OF WEST MEMPHIS, et al.,

Defendants,

OFFICER VANCE PLUMHOFF; OFFICER JOHN BRYAN GARDNER; OFFICER TONY GALTELLI; OFFICER LANCE ELLIS; OFFICER JIMMY EVANS;

On Appeal from the United States District Court for the Western District of Tennessee

AMENDED

(Filed Nov. 14, 2012)

OFFICER JOSEPH FORTHMAN, individually and in their official capacity as an officer of the West Memphis Police Department,

Defendants-Appellants. /

Before: GUY and CLAY, Circuit Judges; HOOD, District Judge.*

RALPH B. GUY, JR., Circuit Judge. This litigation arose following the fatal shooting of Donald Rickard and Kelly Allen by West Memphis, Arkansas police officers. Plaintiffs each brought constitutional claims under 42 U.S.C. § 1983, as well as claims under state law against the individual police officers, the Mayor, and the Chief of Police. At plaintiffs' request all cases were consolidated for trial. All defendants filed motions for summary judgment, but the only issue involved in this appeal is the district court's determination that, as to plaintiff Rickard's excessive force claims, the defendant officers were not entitled to either qualified immunity or immunity under state law from liability for their actions.[1]

* The Honorable Denise Page Hood, United States District Judge for the Eastern District of Michigan, sitting by designation.

[1] The district court dismissed the claims brought against the Mayor and Chief of Police. The court also dismissed the Fourth Amendment excessive force claims of the *Allen* plaintiffs. The *Allen* plaintiffs filed a cross-appeal from the dismissal of

(Continued on following page)

I.

West Memphis, Arkansas Police Officer Joseph Forthman stopped a white Honda Accord on July 18, 2004, at approximately midnight, for the reason that the car had only one operating headlight. The car was driven by Donald Rickard and had one passenger, Kelly Allen, seated in the front passenger seat.

As he approached the car, Forthman noticed an indentation in its windshield. Allen volunteered that the indentation in the windshield resulted from hitting a curb. Forthman questioned Rickard for a few moments, then asked him to get out of the car. Rather than get out, Rickard drove away. Forthman got in his police cruiser and began a pursuit.

Several additional West Memphis officers joined in the pursuit. Officer Vance Plumhoff became the lead officer in the chase. Four additional vehicles joined in the chase, driven by Officers Jimmy Evans, Lance Ellis, Tony Galtelli, and Bryan Gardner. Video cameras on three of the vehicles recorded all or part of the chase and subsequent activity.

Rickard entered the I-40 freeway heading east into Memphis and crossed over a bridge from Arkansas into Tennessee. During the chase, Plumhoff stated on the police radio that "he just tried to ram me." Forthman's statement that "he is trying to ram

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their excessive force claims, but the appeal was dismissed *sua sponte* by another panel of this court.

another car" was recorded, followed by his statement that "[w]e do have aggravated assault charges on him." In deposition, three officers (driving or riding in three different cars) described what appeared to them to be Rickard attempting to veer and/or ram his car into the moving police cars, which they reported over the police radio during the pursuit.

After Rickard and the pursuing police officers left the freeway via an exit ramp and entered Memphis, Tennessee

> the Rickard vehicle turned and exited I-40 onto Danny Thomas Boulevard. The pursuit was momentarily on Alabama Avenue before the Rickard vehicle turned right onto Danny Thomas Boulevard. At that point, Plumhoff made a statement on the radio about ending the pursuit. Evans replied, "terminate the pursuit?" Another voice can then be heard on the radio saying, "negative. See if you can get in front of him." As the Rickard vehicle approached Jackson Avenue, it made a quick right turn onto Jackson Avenue and contact occurred between the Rickard vehicle and a police vehicle. The contact caused the Rickard vehicle to spin around in a parking lot at the intersection of Danny Thomas Boulevard and Jackson Avenue. Separate Defendants assert that the Rickard vehicle then turned directly toward Plumhoff's vehicle and had a head-on collision with it. Plaintiffs dispute these statements and aver that the Rickard vehicle was still moving forward from the momentum caused by the spinout after

contact with Evans' vehicle and that this momentum caused the collision with Plumhoff's vehicle.

At or near this stage of events, the other officers formed a semicircle around the Rickard vehicle, attempting to use the building in the parking lot to prevent the vehicle from fleeing. Because of the building and the location of the police cars, the only unobstructed way for Rickard to escape was to back up. Rickard reversed in an attempt to escape, and as he did so Evans and Plumhoff exited their vehicles and approached the Rickard vehicle. Evans tried to get into the vehicle by pounding on the passenger-side window with his gun in his hand. Gardner and other officers also approached the vehicle. At this point, the wheels of the Rickard vehicle were spinning, and the vehicle made contact with Gardner's vehicle. Separate Defendants assert that the vehicle's engine was "revving," but Plaintiffs dispute this and state that the vehicle was rocking back and forth, and it is unclear whether the engine noise in conjunction with this rocking motion should be characterized as revving the engine.

Plumhoff fired three shots into the Rickard vehicle. The video from unit # 279 shows that Plumhoff was near the passenger-side of the vehicle when he fired those shots. The Rickard vehicle then reversed in a 180 degree arc onto Jackson Avenue heading east. As the Rickard vehicle reversed, Galtelli exited his vehicle and ran to join the other

> officers who were chasing the vehicle as it maneuvered onto Jackson Avenue. Ellis was standing near the rear passenger-side of Rickard's vehicle and had to step to his right to avoid the vehicle. Gardner then fired ten shots toward the vehicle, initially from the passenger side and then from the back of the vehicle. Gardner fired all ten shots while the vehicle was moving forward (i.e., away from the officers). Galtelli also fired two shots at the vehicle. As the officers were shooting, Rickard was fleeing down Jackson Avenue. Rickard then lost control of the vehicle, and the Rickard vehicle crashed into a building at the corner of Jackson Avenue and Manassas Street. Both Rickard and Allen were killed.

Estate of Allen, et al. v. City of West Memphis, et al., Nos. 05-2489/2585, 2011 WL 197426, at *3 (W.D. Tenn. Jan.20, 2011) (citations omitted) (unpublished).

In its ruling on summary judgment as to the Rickard claims brought under § 1983, the district court determined that the facts, considered in a light most favorable to the plaintiff, established a violation of the Fourth Amendment. *Id.* at *10. Next, the district court found that the facts did not support the finding that a reasonable officer would have considered Rickard's continued flight a clear risk to others. *Id.* at *11. For this reason, the district court denied qualified immunity to all of the officers on the scene as to the Rickard § 1983 claims.

Concerning the Rickard state law claims, the district court determined that Tennessee law applied, and that the officers were therefore not eligible for statutory immunity under Arkansas law. The district court also determined that immunity was not available to the officers under various provisions of Tennessee law. *Id.* at *14-15.

This appeal followed the district court's ruling. After it was filed, the Rickard plaintiff moved to dismiss the appeal for lack of jurisdiction. A panel of this court initially granted the motion on the grounds that the qualified immunity determination of the district court turned on disputed factual issues. That order was vacated, and the issue was referred to the merits panel, following the defendants' petition for rehearing.[2]

II.

A. Qualified Immunity

A motion for qualified immunity denied on the basis of a district court's determination that there exists a triable issue of fact generally cannot be appealed on an interlocutory basis. *Johnson v. Jones,* 515 U.S. 304, 313 (2005). The Supreme Court, however,

[2] On September 14, 2011, this court granted rehearing to consider our jurisdiction to review the denial of state law immunity, vacated our earlier dismissal of the qualified immunity appeal, and referred the entire motion to dismiss for action by the merits panel.

carved out an exception to this rule in *Scott v. Harris,* 550 U.S. 372 (2007). The Court emphasized that: "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.* at 380 (citations omitted). Reconciling *Scott* and *Johnson,* we stated that "where the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory appeal." *Moldowan v. City of Warren,* 578 F.3d 351, 370 (6th Cir. 2009) (citations and internal quotation marks omitted); *see also Austin v. Redford Twp. Police Dep't,* 690 F.3d 490, 496 (6th Cir. 2012) (after viewing video, affirmed denial of qualified immunity).

What makes these cases particularly relevant to the case at bar is the similarity of the facts here to the facts in *Scott.* The multi-car police chase of a fleeing speeder in *Scott* ended when one of the police cars intentionally rammed into the back of the fleeing car causing it to leave the road and crash, resulting in crippling injuries to the driver. All of this was captured on videotape. When the subsequent excessive force case was brought by the injured driver, the police defendant sought the protection of qualified immunity, which was denied. On interlocutory appeal, the court of appeals affirmed. The Supreme Court granted review and reversed. As might be expected, the police defendants in our case vigorously argue that *Scott* should control. Although the framework of the two cases is similar, as always, the devil

is in the details, and it is those details that cause us to conclude that *Scott* is distinguishable.

The fleeing motorist in *Scott* was still fleeing at very high speeds when he was rammed from behind. *Scott* framed the issue as: "Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?" The Court answered this question in the affirmative. In our case, the fleeing vehicle was essentially stopped and surrounded by police officers and police cars although some effort to elude capture was still being made.

Further, although the police in *Scott* used a maneuver to stop the fleeing car that might very well cause a crash and injury, the police here fired fifteen shots at close range, all but two of which apparently hit the subjects and twelve of which hit the driver. It's also worthy of note that when deciding to use lethal force, the police knew there was a passenger in the fleeing vehicle thus doubling the risk of death. The police make much of the fact that they felt they were in personal danger, but the degree to which that was true is not resolved by the video recordings.

Also, since the plaintiff in *Scott* survived, there were actually three versions of what occurred: the plaintiff's, the police defendants' and the video. The Supreme Court, in reversing the court of appeals, determined that the video resolved the questions at issue and granted summary judgment in favor of the

defendant. It wasn't that the video did not support plaintiff's version of what occurred, but rather that conceding plaintiff's version which was supported by the video, the conduct of the officer was reasonable as a matter of law. This is what the defendants ask us to conclude in this case.

However, the case at bar is more complex in its facts than was *Scott.* After carefully reviewing the video, as did the district judge, we cannot conclude that it provides clear support for either the plaintiff's or the defendants' version of what occurred. That is particularly true as it relates to the degree of danger that the officers were placed in as a result of Rickard's alleged conduct. Unlike in *Scott,* we cannot conclude that the officers' conduct was reasonable as a matter of law.[3]

Defense counsel stated at oral argument, in essence, that if lethal force is justified, officers are taught to keep shooting until the threat is over. The dictionary synonym for "lethal" is "deadly." As the Court in *Scott* explained in distinguishing the use of deadly force in *Tennessee v. Garner,* 471 U.S. 1 (1985), "'[a] police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person.'" *Scott,* 550 U.S. at 383 (quoting *Adams v. St. Lucie County Sheriff's Dept.,* 962 F.2d 1563, 1577

[3] The district court made a number 3 of findings as to disputed issues of fact, which we do not repeat here, and which we cannot say were "blatantly and demonstrably false."

(11th Cir. 1992) (Edmonson, J., dissenting), *adopted by* 998 F.2d 923 (11th Cir. 1993) (en banc)). Nor does the Supreme Court's decision in *Sykes* compel a different result. *Sykes v. United States,* 131 S. Ct. 2267 (2011). The holding in *Sykes* that vehicular flight from an officer may categorically present "a serious potential risk of physical injury to another" so as to constitute a "violent felony" for purposes of sentencing enhancement under 18 U.S.C. § 924(e) addresses a question distinct from whether the force applied – including deadly force – to effect the seizure of a fleeing suspect in a given case was objectively reasonable as a matter of law under the Fourth Amendment.[4]

Usually, when we review an appeal from a denial of qualified immunity, we dismiss the appeal for lack of jurisdiction if the immunity was denied on the basis of genuine factual disputes. *Johnson,* 515 U.S. at 307. After *Scott,* however, it would appear that an

[4] We note that the officers have filed all pleadings as a group and no distinctions were made among the officers. In *Bishop v. Hackel,* 636 F.3d 757, 767 (6th Cir. 2011), a qualified immunity appeal, the panel held "[t]he district court erred in this case by failing to evaluate the liability of each Deputy individually" and then proceeded to do so. We have not been asked to make such a review, nor have the defendants raised as an issue on appeal that there was no individual determination made in the district court. Nothing in this opinion, however, precludes the district court from considering on remand whether the individual defendants who did not fire their weapons may be entitled to qualified immunity. Additional discovery may be taken if necessary.

interlocutory appeal of a denial of qualified immunity which makes a good faith *Scott* claim requires us to review the record. *Scott,* 550 U.S. at 319 ("we concede that a court of appeals may have to undertake a cumbersome review of the record"). After this review if we reach the same conclusion as did the district judge, as we do here, it would seem that what we are doing is affirming that judgment. Whether we call it a dismissal for lack of jurisdiction or an affirmance of the denial of qualified immunity, the result is the same. *See, e.g., Austin,* 690 F.3d at 498-99.

B. State Law Immunity

The officers also contend they should be immune from liability under state law, and that the district court erred in determining they were not. These determinations by the district court are legal determinations, and our review is *de novo. DiCarlo v. Potter,* 358 F.3d 408, 414 (6th Cir. 2004).

The ruling of the district court concerning immunity under Arkansas law is only summarily addressed by the officers. Defendants state only that: "The trial court ruled that the officers were not eligible for statutory immunity pursuant to Arkansas law because they were in Tennessee: this is a question of law that this court can resolve." The officers do not dispute that Tennessee law applies to their state law claims, and have presented neither argument nor authority to establish why they might be entitled to statutory immunity under Arkansas law. We find this

issue to lack merit and, in any case, to have been waived on appeal. *See United States v. Phinazee,* 515 F.3d 511, 520 (6th Cir. 2008) (holding issues adverted to in only a perfunctory manner, unaccompanied by any effort at developed argument, are deemed waived).

Defendants rely first on the Interstate Fresh Pursuit Act, Tenn. Laws Ann. § 40-7-201, *et seq.,* to claim entitlement to immunity under Tennessee law. This statute gives officers of another state (here, Arkansas), who enter into Tennessee in "fresh pursuit" of a person they believe to have committed a felony in that other state, authority regarding actions they take to effect arrest and hold suspects in custody in Tennessee. As plaintiff points out, however, nothing in that statute addresses a police officer's *immunity* from suit for alleged civil rights violations, and we decline to further address this issue.

The officers' additional assertion that they are entitled to immunity under the Tennessee Governmental Tort Liability Act (TGTLA), Tenn. Code Ann. § 29-20-101 *et seq.,* merits no further consideration. The defendants, officers from West Memphis, Arkansas, do not contest the district court's determination that they do not meet the statute's requirements because "employees" covered by the statute are those of "governmental entities," which is defined as "any political subdivision of the *State of Tennessee.*" TENN. CODE. ANN. § 29-20-102(3) (emphasis added).

Finally, defendants argue that Tennessee's public duty doctrine shields them against negligence claims brought by plaintiff. The public duty doctrine is aimed at shielding a public employee from liability for an injury to an individual member of the public due to the public employee's breach of a duty owed to the public at large. As discussed in *Ezell v. Cockrell,* 902 S.W.2d 394 (Tenn. 1995), various public policy considerations support the recognition of the public duty doctrine, such as avoiding landing police officers in the "untenable position of insuring the personal safety of every member of the public, or facing a civil suit for damages." *Id.* at 398. The doctrine would not offer an officer protection from liability for an injury to the subject of the pursuit whose civil rights were allegedly infringed by that officer. The doctrine has no application here.

AFFIRMED.

CLAY, Circuit Judge, concurring. The majority states in footnote four: "Additional discovery may be taken if necessary." This language is at the very least misleading. It should be noted that additional discovery is not necessary for the qualified immunity inquiry here, because a qualified immunity defendant must argue "merely that his alleged conduct did not violate clearly established law." *Everson v. Leis,* 556 F.3d 484, 496 (6th Cir. 2009) (citing *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985)). Defendants "must be prepared to overlook any factual dispute and to

concede an interpretation of the facts in the light most favorable to the plaintiff's case." *Id.*; *Marvin v. City of Taylor,* 509 F.3d 234, 244 (6th Cir. 2007). Additional discovery with regard to the qualified immunity inquiry would run contrary to caselaw and thwart its purpose. *Skousen v. Brighton High School,* 305 F.3d 520, 527 (6th Cir. 2002) ("By refusing to address qualified immunity when it was raised, the district court had undercut one of the primary rationales for such immunity – to save officials from unwarranted discovery.") Thus, the language of footnote four risks confusing the district court into believing it would need to take additional discovery with respect to its qualified immunity determination; it does not.

To the extent the language merely encourages the district court to proceed with managing the case, which may include conducting additional discovery related to the merits of each claim asserted against each defendant following this appeal, the district court is fully aware of its power to do so.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ESTATE OF KELLY ALLEN, Deceased, CLAYTON DAVID ALLEN, MARIA NICOLE ALLEN, a minor by Next Friend, Kenneth Allen, ALEXIS LANE ALLEN, a minor by Next Friend, Kenneth B. Allen, Plaintiffs v. CITY OF WEST MEMPHIS, et al., Defendants/ Third Party Plaintiffs v. ESTATE OF DONALD RICKARD, deceased, through its Administrator SCOTT B. PEATROSS, *Consolidated with* WHITNE RICKARD, a minor child, Individually, and as Surviving Daughter of Donald Rickard, Deceased, by and through her mother SAMANTHA RICKARD, As parent and next friend, Plaintiff v. CITY OF WEST MEMPHIS, et al., Defendants.	Nos. 05-2489, 05-2585

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

Before the Court is Defendants Mayor William H. Johnson, Chief Robert Paudert, and West Memphis Police Officers Tony Galtelli, John Gardner, Lance Ellis, Jimmy Evans, Joseph Forthman, and Vance Plumhoff's (collectively the "Separate Defendants") November 30, 2009 Motion for Summary Judgment.[1] Each of the Plaintiffs[2] makes numerous claims against the Separate Defendants, alleging, *inter alia,* excessive force claims in violation of the Fourth and Fourteenth Amendments; violations of the Fifth and Sixth Amendments; tort claims arising under the laws of Arkansas or Tennessee, including assault and battery, malicious harassment, intentional infliction of emotional distress, false imprisonment, false arrest, and abuse of process; and violations of the Tennessee Constitution.

[1] Although the Separate Defendants style their Motion as a Motion for Summary Judgment, they seek dismissal of some of the claims brought against them. The Court will address each of the claims separately and note whether the Separate Defendants seek summary judgment or dismissal of each claim.

[2] *Estate of Kelly Allen, et al. v. City of West Memphis,* No. 05-2489 was consolidated with *Whitne Rickard v. City of West Memphis,* No. 05-2585 on September 24, 2009.

The Separate Defendants maintain that actions taken by the West Memphis Police Officers were reasonable given the circumstances existing at the time of the incidents alleged and, thus, that their actions did not violate the Plaintiffs' constitutional rights; that the officers are entitled to qualified immunity for their actions; that the Separate Defendants are entitled to summary judgment based on privileges and/or statutory immunity; and that the claims against Mayor Johnson[3] and Chief Paudert should be dismissed.

Plaintiffs Alexis Lane Allen, Clayton David Allen, Maria Nicole Allen, and the Estate of Kelly A. Allen (collectively the "Allen Plaintiffs") filed a response to the Separate Defendants' Motion for Summary Judgment on January 25, 2010. Also on January 25, 2010, Plaintiff Whitne Rickard (the "Rickard Plaintiff") filed a response to the Separate Defendants' Motion for Summary Judgment.[4] The Separate Defendants filed a Reply to the Allen Plaintiffs and the

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[3] In their Reply, the Separate Defendants include a reference to the claims against Mayor Johnson in their discussion of the claims against Chief Paudert. (Defs.' Reply 10.) However, the Separate Defendants also assert that Mayor Johnson is not sued in his personal capacity, as the other individual Defendants are. (Defs.' Memo 7.) Therefore, the claims against Mayor Johnson should be considered tantamount to the claims against the City and not against him personally, and, thus, are not within the scope of the pending Motion. *See Moore v. City of Harriman,* 272 F.3d 769, 772 (6th Cir. 2001).

[4] "Plaintiffs" will refer to both the Allen Plaintiffs and the Rickard Plaintiff.

Rickard Plaintiff's responses on February 8, 2010. For the following reasons, the Separate Defendants' Motion is GRANTED IN PART and DENIED IN PART.

I. Background

The following facts are undisputed unless otherwise stated. The incidents giving rise to this lawsuit occurred around midnight on July 18, 2004, when West Memphis Police Officer Joseph Forthman initiated the traffic stop of a white Honda Accord (the "Rickard vehicle") in West Memphis, Arkansas. (Rickard Plaintiff's Response to Defendants' Statement of Facts, Dkt. 61, Exh. 5 ¶ 1.) ("Pl.'s SOF") Forthman was driving patrol unit # 279, which had a video camera that recorded the events from the initial traffic stop through the entire sequence of events. (Defendants' Statement of Facts, Dkt. 59, Exh. 2 ¶ 6.) ("Defs.' SOF") Donald Rickard was the driver of the Rickard vehicle and Kelly Allen was a passenger. Forthman stopped the vehicle because of an inoperable headlight. (*Id.* ¶ 2.)

Forthman approached the vehicle and asked the driver, Rickard, for his license and registration. (*Id.* ¶ 13.) As he approached the Rickard vehicle, Forthman noticed an indentation, "roughly the size of a head or a basketball," in the windshield. (*Id.* ¶ 14.) Forthman asked Rickard what was wrong with the windshield, and the passenger, Allen, answered that the car had hit a curb, causing damage to the

windshield. (*Id.* ¶¶ 16-17.) Forthman then glanced into the car and asked, "You haven't had any Keystone tonight have you?"; Rickard replied that he had not. (*Id.* ¶¶ 19-20.) After waiting for Rickard to produce his driver's license, Forthman asked Rickard to step out of the vehicle, "[b]ecause he was so nervous and he went over his I.D. card or driver's license several times without producing it to me." (*Id.* ¶¶ 24, 26.) Forthman states that he then asked Rickard twice to step out of the vehicle before the vehicle sped away. (*Id.* ¶ 28.)

Forthman returned to his vehicle and informed dispatch that he had a "runner," meaning someone fleeing the scene of a traffic stop. (*Id.* ¶ 29.) Officer Vance Plumhoff was close to the location where Forthman had stopped Rickard and heard that Forthman had a runner. (*Id.* ¶ 32.) Plumhoff quickly became involved in the pursuit and became "primary," meaning the lead vehicle in the chase. (*Id.* ¶ 33.) Plumhoff was driving patrol unit # 290, which did not have a video camera. (*Id.* ¶ 31.) Officer Jimmy Evans saw the Rickard vehicle, being pursued by two police vehicles, turn onto the Interstate 40 ("I-40") ramp heading east toward Memphis, Tennessee, and joined the pursuit. (*Id.* ¶ 34.) Evans was driving patrol unit # 205, which was not equipped with a video camera. (*Id.* ¶ 35.) Officer Lance Ellis was in route to aid Forthman in his stop, when he learned of the pursuit and joined the other officers in the pursuit. (*Id.* ¶ 36.) Ellis was driving unit # 284, which was equipped with a video camera that was able to record some of

the events at issue in this suit. (*Id.* ¶ 37.) Officers Troy Galtelli and John Gardner also joined the pursuit after finishing a traffic stop. (*Id.* ¶¶ 38-41.) Galtelli was driving unit # 286, which was equipped with a camera that was able to record some of the events; Gardner was driving unit # 287, which was equipped with a video camera that was nonoperational. (*Id.* ¶¶ 39, 41.)

Forthman, Plumhoff, Evans, Ellis, Galtelli, and Gardner pursued the Rickard vehicle as it headed east on I-40 toward Memphis. Forthman said over the radio, "we got enough [meaning vehicles to perform a rolling roadblock] lets shut him down before he gets to Memphis." (*Id.* ¶ 42 (alteration in original).) Evans then got in front of the Rickard vehicle to perform a rolling roadblock. (*Id.* ¶ 47.) As Evans was getting in front of the vehicle, Plumhoff said on the radio, "he just tried to ram me." (*Id.*) Although it is undisputed that Plumhoff made such a statement, the alleged attempted ramming is not clearly demonstrated on the video of unit # 279, which was behind Plumhoff and Rickard, and Plaintiffs dispute whether such an attempt was made. (Pl.'s SOF ¶ 47.) After nearing Plumhoff's car on the right side of the road, the Rickard vehicle moved left. Forthman can be heard on the radio saying, "he is trying to ram another car." (Defs.' SOF ¶ 54.) Plaintiffs again do not challenge that Forthman made such a statement, but assert that the stated activity is not clearly depicted on the video and dispute whether such an attempt was made. (Pl.'s SOF ¶ 54.)

After the officers' assertions that the Rickard vehicle had attempted to ram Plumhoff and then Evans, Forthman said over the radio, "[w]e do have aggravated assault charges on him West Memphis advise Memphis that we do have felony charges." (Defs.' SOF ¶ 62 .) Whether there were in fact felony charges at this point is disputed. (Pl.'s SOF ¶ 62.) As the pursuit continued over the I-40 bridge spanning the Mississippi River, Plumhoff can be heard saying that Rickard had another count of aggravated assault. (Defs.' SOF ¶ 64.) That activity is not clearly depicted on the video and is disputed. (Pl.'s SOF ¶ 64.)

Once in Memphis, Tennessee, the Rickard vehicle turned and exited I-40 onto Danny Thomas Boulevard. (Defs.' SOF ¶ 69.) The pursuit was momentarily on Alabama Avenue before the Rickard vehicle turned right onto Danny Thomas Boulevard. (*Id.* ¶ 71.) At that point, Plumhoff made a statement on the radio about ending the pursuit. Evans replied, "terminate the pursuit?" Another voice can then be heard on the radio saying, "negative. See if you can get in front of him." (*Id.* ¶ 72.) As the Rickard vehicle approached Jackson Avenue, it made a quick right turn onto Jackson Avenue and contact occurred between the Rickard vehicle and a police vehicle. (*Id.* ¶ 76.) The contact caused the Rickard vehicle to spin around in a parking lot at the intersection of Danny Thomas Boulevard and Jackson Avenue. (*Id.* ¶ 77.) Separate Defendants assert that the Rickard vehicle then turned directly toward Plumhoff's vehicle and had a

head-on collision with it. (*Id.* ¶¶ 83-85.) Plaintiffs dispute these statements and aver that the Rickard vehicle was still moving forward from the momentum caused by the spinout after contact with Evans' vehicle and that this momentum caused the collision with Plumhoff's vehicle. (Pl .'s SOF ¶ 86.)

At or near this stage of events, the other officers formed a semicircle around the Rickard vehicle, attempting to use the building in the parking lot to prevent the vehicle from fleeing. (Defs.' SOF ¶ 90.) Because of the building and the location of the police cars, the only unobstructed way for Rickard to escape was to back up. (*Id.* ¶ 93.) Rickard reversed in an attempt to escape, and as he did so Evans and Plumhoff exited their vehicles and approached the Rickard vehicle. (*Id.* ¶¶ 94-95.) Evans tried to get into the vehicle by pounding on the passenger-side window with his gun in his hand. (*Id.* ¶ 97.) Gardner and other officers also approached the vehicle. (*Id.* ¶¶ 98, 100 .) At this point, the wheels of the Rickard vehicle were spinning, and the vehicle made contact with Gardner's vehicle. (Pl.'s SOF ¶ 101.) Separate Defendants assert that the vehicle's engine was "revving," but Plaintiffs dispute this and state that the vehicle was rocking back and forth, and it is unclear whether the engine noise in conjunction with this rocking motion should be characterized as revving the engine. (*Id.* ¶ 102.)

Plumhoff fired three shots into the Rickard vehicle. (Defs.' SOF ¶ 103.) The video from unit # 279 shows that Plumhoff was near the passenger-side of

the vehicle when he fired those shots. (Videotape of Unit # 279, at 11:14:24.) The Rickard vehicle then reversed in a 180 degree arc onto Jackson Avenue heading east. (Defs.' SOF ¶ 108.) As the Rickard vehicle reversed, Galtelli exited his vehicle and ran to join the other officers who were chasing the vehicle as it maneuvered onto Jackson Avenue. (*Id.* ¶ 110.) Ellis was standing near the rear passenger-side of Rickard's vehicle and had to step to his right to avoid the vehicle. (Pl.'s SOF ¶ 111.) Gardner then fired ten shots toward the vehicle, initially from the passenger side and then from the back of the vehicle. (*Id.* ¶ 114.) Gardner fired all ten shots while the vehicle was moving forward (i.e., away from the officers). (Deposition of Forthman, Dkt. No. 61, Exh. 1, at 158.) Galtelli also fired two shots at the vehicle. (Pl.'s SOF ¶ 116.) As the officers were shooting, Rickard was fleeing down Jackson Avenue. (Defs.' SOF ¶ 118.) Rickard then lost control of the vehicle, and the Rickard vehicle crashed into a building at the corner of Jackson Avenue and Manassas Street. (*Id.* ¶ 121.) Both Rickard and Allen were killed. The events between the time Rickard collided with Evans and spun out and the time Rickard fled down Jackson Avenue occurred within a matter of seconds. (*Id.* ¶ 120.)

II. Jurisdiction and Choice of Law

This Court has original jurisdiction to adjudicate federal claims under 28 U.S.C. § 1331 and supplemental jurisdiction over Plaintiffs' state law claims under 28 U.S.C. § 1367.

Plaintiffs' Complaint alleges various common law torts under Tennessee and/or Arkansas law. Separate Defendants assert that Arkansas law should be applied, and Plaintiffs assert that Tennessee law should be applied. (Defendants' Memorandum of Law in Support of Motion for Summary Judgment 26-29 ("Defs.' Memo"); Allen Plaintiffs' Memorandum in Response to Defendants' Motion for Summary Judgment 14-15 ("Allen Pls.' Resp."); Rickard Plaintiff's Memorandum in Response to Defendants' Motion for Summary Judgment 34 ("Rickard Pl.'s Resp.").) In a diversity case, a federal court applies the choice-of-law rules of the state in which it sits. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938). Therefore, the Court will apply Tennessee choice-of-law rules.

In *Hataway v. McKinley,* the Supreme Court of Tennessee adopted the "most significant relationship" approach to resolve conflict-of-law issues in tort cases. 830 S.W.2d 53, 54 (Tenn.1992). That approach is stated in the *Restatement (Second) of Conflict of Laws,* which provides that the law of the state where the injury occurred should be applied unless another state has a more significant relationship to the action. *Id.* at 59-60. The following factors from

Restatement (Second) § 6 provide guidance in determining which state has the most significant relationship:

(a) The needs of the interstate and international systems,

(b) The relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability, and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6(2). The court noted that a benefit of adopting this approach is its ease of application "in difficult cases because it provides a 'default' rule whereby trial courts can apply the law of the place where the injury occurred when each state has an almost equal relationship to the litigation." *Hataway,* 830 S.W.2d at 59.

Separate Defendants argue that Arkansas law should be applied because the relationship between decedents and Separate Defendants was centered in West Memphis, Arkansas; all Separate Defendants

were at all relevant times employees of an Arkansas municipality; and, but for Rickard's fleeing into Tennessee, the Defendant officers would never have entered Tennessee. (Defs.' Memo 27-28.) Plaintiffs argue that Tennessee law should apply because, although the chase began in Arkansas, it continued well into Tennessee; the spinout and vehicle contact occurred in Tennessee; the shootings and final vehicle crash occurred in Tennessee; the injuries occurred in Tennessee; and decedents were residents of Tennessee. (Allen Pls.' Resp. 15.)

Most of the material matters in dispute occurred in Tennessee. The interaction between the parties that resulted in the injuries and the alleged tortious behavior took place solely in Tennessee. Because the alleged tortious conduct and the injuries giving rise to this suit occurred in Tennessee, no state has a more significant relationship to this action than Tennessee. *See Hataway,* 830 S.W.2d at 59 (directing courts to apply the law of the place where the injury occurred even if another state has an almost equally significant relationship to the matter at issue). Therefore, the Court will apply Tennessee substantive law to Plaintiffs' state law claims. *Id.* at 54.

III. Standard of Review

A. Motion for Summary Judgment Pursuant to Rule 56

Federal Rule of Civil Procedure 56(a) provides that summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party moving for summary judgment "bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact, and the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." *Kochins v. Linden-Alimak, Inc.,* 799 F.2d 1128, 1133 (6th Cir. 1986). When confronted with a properly supported motion for summary judgment, the nonmoving party must set forth specific facts establishing that there is a genuine issue for trial by showing that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Id.* at 247-48.

When confronted with a properly-supported motion for summary judgment, the nonmoving party may not oppose it by mere reliance on the pleadings. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). Instead, the nonmoving party must present "concrete evidence supporting its claims and establishing the

existence of a genuine issue of fact." *Cloverdale Equip. Co. v. Simon Aerials, Inc.,* 869 F.2d 934, 937 (6th Cir. 1989) (citations omitted). The district court does not have a duty to search the record for this evidence; rather, the nonmovant has the duty to point out specific evidence in the record that would be sufficient to justify a jury decision in her favor. *InterRoyal Corp. v. Sponseller,* 889 F.2d 108, 111 (6th Cir. 1989).

B. Motion to Dismiss Pursuant to Rule 12(b)(6)

In addressing a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the Court must construe the complaint in the light most favorable to the plaintiff and accept all well-pled factual allegations as true. *League of United Latin Am. Citizens v. Bredesen,* 500 F.3d 523, 527 (6th Cir. 2007). A plaintiff can support a claim "by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 563 (2007). This standard requires more than bare assertions of legal conclusions. *Bovee v. Coopers & Lybrand C.P.A.,* 272 F.3d 356, 361 (6th Cir. 2001). "[A] formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555. Any claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Erickson v. Pardus,* 551 U.S. 89, 93 (2007) (*per curiam*). "Specific facts are not necessary; the statement need only 'give the defendant fair

notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* (citing *Twombly,* 550 U.S. at 555.) Nonetheless, a complaint must contain sufficient facts "to state a claim to relief that is plausible on its face" to survive a motion to dismiss. *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly,* 550 U.S. at 556). To survive a motion to dismiss, a complaint ultimately must demonstrate "facial plausibility," defined as "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted).

IV. Analysis

A. Qualified Immunity

The Separate Defendants assert that they are entitled to summary judgment on qualified immunity because their actions did not violate the constitutional rights of Donald Rickard or Kelly Allen and, even if a constitutional violation occurred, that violation was not of a clearly established right. (Defs.' Memo 7.)

Qualified immunity exists so that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,*

457 U.S. 800, 818 (1982) (citations omitted). Qualified immunity also protects law enforcement officers "from the sometimes hazy border between excessive and acceptable force." *Brosseau v. Haugen,* 543 U.S. 194, 198 (2004) (*per curiam*) (citation and internal quotation marks omitted). "Qualified immunity is *an immunity from suit* rather than a mere defense to liability; and like an absolute immunity it is effectively lost if a case is erroneously permitted to go to trial." *Marvin v. City of Taylor,* 509 F.3d 234, 243 (6th Cir. 2007) (citation and internal quotation marks omitted; emphasis in original). The Sixth Circuit presumes that qualified immunity ordinarily applies. *See Chappell v. City of Cleveland,* 585 F.3d 901, 907 (6th Cir. 2009). Thus, the burden is on the Plaintiffs to show that the Separate Defendants are not entitled to qualified immunity. *Id.*

The qualified immunity analysis requires the Court to answer a threshold question: "Taken in t.he [sic] light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Marvin,* 509 F.3d at 244 (internal quotation marks and citations omitted); *accord Dunn v. Matatall,* 549 F.3d 348, 353 (6th Cir. 2008) (also raising question when reviewing qualified immunity at summary judgment stage). If the Court answers that question in the affirmative, the Court must decide "whether the right was clearly established . . . in light of the specific context of the case." *Marvin,* 509 F.3d at 244 (internal quotation marks and citation omitted; omission in original). "In other

words, qualified immunity need only be granted if there is a violation of a constitutional right, but that right was not clearly established at the time the official violated it." *Id.* If there is no constitutional violation, the claim fails as a matter of law, and no immunity is necessary. *Id.*

1. Rickard Plaintiff

Section 1983 itself does not create substantive rights, but provides "a method for vindicating federal rights elsewhere conferred." *Graham v. Connor,* 490 U.S. 386, 394 (1989) (citation and internal quotation marks omitted). The first step in addressing § 1983 excessive force claims is to identify the constitutional rights allegedly violated by the asserted application of force. *Id.* The Rickard Plaintiff alleges violations of rights secured by the Fourth and Fourteenth Amendments.

a. Constitutional Violation

Excessive force claims resulting from an investigatory stop are subject to the protections of the Fourth Amendment. *Graham,* 490 U.S. at 394; *see also Tennessee v. Garner,* 471 U.S. 1, 7 (1985) ("[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.") In *Graham,* the Supreme Court made clear that "*all* claims that law enforcement officers have used excessive force-deadly or not-in the course of an . . . investigatory

stop . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham,* 490 U.S. at 395 (emphasis in original). The Rickard Plaintiff's constitutional claims brought pursuant to § 1983 must be analyzed under the Fourth Amendment's reasonableness standard.

The reasonableness standard asks "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397 (citations omitted). In analyzing the officers' actions, a court must "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Garner,* 471 U.S. at 8 (citations omitted). That balancing is the "key principle of the Fourth Amendment," *id.* (citation omitted), and "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." *Marvin,* 509 F.3d at 245 (citation omitted).

Factors to consider in determining whether an officer's actions are objectively reasonable are: the facts and circumstances of the case; the severity of the crime at issue in the case; the immediate threat that the suspect poses to the officers or others; and whether the suspect is actively resisting or evading arrest by flight. *See id.* (citation omitted). Reasonableness must be analyzed from the perspective of an

officer on the scene, as opposed to the "20/20 vision of hindsight." *Williams v. City of Grosse Pointe Park,* 496 F.3d 482, 486 (6th Cir. 2007) (quoting *Graham,* 490 U.S. at 396). That means the analysis "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.* (citation omitted). "[T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case. . . ." *Graham,* 490 U.S. at 396 (citation and internal quotation marks omitted).

In *Tennessee v. Garner,* the Supreme Court analyzed a Fourth Amendment seizure resulting in death and considered whether the totality of the circumstances justified the officer's actions. *See Garner,* 471 U.S. at 4, 9. In balancing the interests, the Court noted that "[t]he intrusiveness of a seizure by means of deadly force is unmatched," and that deadly force frustrates both the interests of the individual and society in judicial determination of guilt and punishment. *Id.* at 9. Against those interests, the Court weighed the government's interest in effective law enforcement, noting that "[b]eing able to arrest [fleeing suspects] is a condition precedent to the state's entire system of law enforcement." *Id.* at 10. Nevertheless, the Court was "not convinced that the

use of deadly force is a sufficiently productive means of accomplishing [the government's goals] to justify the killing of nonviolent suspects." *Id.* (citation omitted). The Court noted that deadly force is a "self-defeating way of apprehending a suspect," *id.,* and found that, where the suspect poses no immediate threat to the officers present or to others, the harm from failing to apprehend him is less than the harm from using deadly force: "It is not better that all felony suspects die than that they escape." *Id.* at 11. The Court noted, however, that there are times when deadly force is not constitutionally unreasonable. *See id.* Where the suspect threatens an officer with a weapon or where there is probable cause to believe the suspect has inflicted or threatened to inflict serious physical harm, and where, if possible, the officers give some warning, deadly force may be used. *See id.* at 11-12.

The Separate Defendants assert that the officers' actions were objectively reasonable. Therefore, there is no constitutional violation. The undisputed facts do not support that assertion. The first shots were fired from the side of the Rickard vehicle. Although Plumhoff testified that he thought he was in front of the vehicle, the video shows that he was to the side of the vehicle and in no danger of being hit by the vehicle. (Videotape of Unit # 279, at 11:14:24.) The remaining 12 shots were fired as the vehicle was passing or had passed the officers. (Pl.'s SOF ¶¶ 114, 116.) None of the officers on the scene believed that either Rickard or Allen was armed; the suspects were

initially stopped because of an inoperable headlight; and the suspects were driving away from officers when the shots were fired. Thus, the severity of the crime at issue was low, and the suspects posed little immediate threat to the officers or others. Although the suspects were fleeing arrest, that factor alone is insufficient to support a finding that deadly force was objectively reasonable. *See Garner,* 471 U.S. at 11.

The Separate Defendants argue that, although the initial stop was a misdemeanor, the officers' conduct was objectively reasonable because "[t]he record is also filled with incidents of felonious aggravated assault and felonious fleeing by the driver against the officers before any force was employed." (Defs.' Memo 10.) Whether such assaults occurred is disputed. The first alleged assault occurred as the officers pursued the Rickard vehicle on I-40. *(See* Defs.' SOF ¶ 47.) The second occurred when the Rickard vehicle changed from one lane to another and allegedly attempted to run an officer off the road. (*See* Deposition of Forthman at 107.) No contact was made between the Rickard vehicle and any of the police vehicles while they were on I-40. Although the Rickard vehicle and the officers were engaging in a high-speed chase, the video of the pursuit does not show any assaults, but only the Rickard vehicle changing lanes. It is difficult to determine the exact proximity of the vehicles during the chase. The objective evidence here, the videos of the chase, would not support a reasonable person in concluding that there were aggravated assaults. Therefore, the officers' conduct

was not objectively reasonable, even from the officers' perspective. *See Scott v. Harris,* 550 U.S. 372, 380-81 (2007) (stating that, on a motion for summary judgment, the court may view the facts in the light depicted by videotapes). The alleged aggravated assaults cannot serve as the foundation for finding that the officers' actions were objectively reasonable, and, thus, for concluding that no constitutional violation occurred.

The Separate Defendants also argue that Rickard's attempt to exit I-40 quickly; his swerving in traffic while traveling at a high speed; his disregard for the safety of others, including civilians; and his "intentional ramming of two different police vehicles" could lead a reasonable officer to think Rickard was an immediate threat, thus making their conduct objectively reasonable. (*See* Defs.' Memo 11-12.) The first three actions the Separate Defendants cite were caused by the pursuit of the Rickard vehicle. The video images of the pursuit could lead to the conclusion that the officers also engaged in dangerous behavior by exiting I-40, swerving through traffic at high speeds, and compromising the safety of civilians. All of those factors would support an argument that the pursuit should have been terminated. However, dangerous conduct that was solely the product of engaging in a high-speed chase cannot serve as the foundation for deadly force. If those factors alone justified deadly force, deadly force would be constitutionally reasonable whenever officers engaged in a

high-speed pursuit. The Supreme Court has held that this is not so. *See Garner,* 471 U.S. at 9-11.

Although it must give deference to the officers on the scene, *see Williams,* 496 F.3d at 486, when ruling on a motion for summary judgment, a court may adopt the version of facts told by a videotape of the incident. *Scott,* 550 U.S. at 380-81. The videotape here shows only that the vehicles were changing lanes and swerving through traffic. Based on that evidence, the Court must concludes that the officers' perception that they were the victims of assault was not objectively reasonable. The severity of the crime at issue, a misdemeanor, was low. The only objectively reasonable threat that Rickard posed was the threat that the officers also posed by participating in the pursuit.

The Separate Defendants also argue that Rickard posed an immediate threat because he intentionally rammed two police vehicles in Memphis. (*See* Defs.' Memo 12.) Whether the Rickard vehicle intentionally collided with the vehicles or collided with the Plumhoff vehicle as a result of momentum from an unintentional collision with the Evans vehicle is a disputed issue of material fact. As such, it cannot serve as the foundation for concluding that the officers' conduct was objectively reasonable. *See Marvin,* 509 F.3d at 244 (stating that, in determining whether officers' conduct violated a constitutional right, the court views the evidence in the light most favorable to the party asserting the injury).

Finally, the Separate Defendants argue that the officers' conduct was objectively reasonable because Rickard actively resisted arrest by affirmatively dangerous conduct and flight. (*See* Defs.' Memo 12.) Rickard did resist arrest, but it is not clear that his evasion of arrest was sufficiently dangerous to justify deadly force. Although the Court must give deference to the split second decisions of the officers, it must analyze the factors as a reasonable officer at the scene would have perceived the events. In *Smith v. Cupp,* an officer shot a fleeing suspect, asserting that he fired because the suspect's vehicle "was bearing down on them." 430 F.3d 766, 770 (6th Cir. 2005). The officer in *Smith* claimed that the suspect "rapidly accelerated directly at [him] and [another officer]" and "fearing for his life," he "drew his gun and fired four times in rapid succession at [the suspect]." *Id.* (first alteration in original). Although the officer conceded after the fact that he had fired while the car was passing him, he asserted that he did so as he jumped out of the way of the vehicle. *Id.* The Sixth Circuit in *Smith* found that "[e]ven viewing the events in the heat of the moment, without 20/20 hindsight, a jury could conclude that a reasonable officer in [the officer's] position was never in any danger." *Id.* at 774. The court went on to acknowledge the deference that is given to an officer's decision to shoot an unarmed suspect in a chase, but reiterated that the officer must have a reasonable belief that the suspect presents an imminent danger. *See id.* Based on that analysis, the court affirmed the district court's denial of qualified immunity. *Id.* at 777.

In the instant suit, a reasonable jury could determine that the belief that danger was imminent was not reasonable. Thus, granting summary judgment based on the absence of a constitutional violation would be inappropriate. *See id.* at 775 (finding constitutional violation in a qualified immunity analysis where a "jury would . . . be entitled to determine that [officer's] use of force was unreasonable and accordingly unconstitutional.") The vehicle was fleeing as shots were fired. Although the Separate Defendants contend that the car was "revving" when the first shots were fired, that is a disputed issue. The vehicle then turned, and it is undisputed that it was headed away from all of the officers when the final twelve shots were fired. No officers or civilians were in front of the vehicle as it was fleeing, the fleeing suspects were not armed, and the officers had no reason to believe that the suspects were violent or would continue to pose a threat if they were not apprehended. *Compare id.* (finding that that [sic] a jury could determine that no reasonable officer would perceive that there was an imminent danger), *with Scott v. Clay Cnty., Tenn.,* 205 F.3d 867, 872, 878 (6th Cir. 2000) (finding that deadly force was reasonable as a matter of law against an unarmed fleeing suspect where, after leaping out of the car's path, the officer fired on the fleeing car as it turned directly toward another police cruiser), *and Smith v. Freland,* 954 F.2d 343, 347 (6th Cir. 1992) (finding that deadly force was not unreasonable as a matter of law where suspect had attempted to ram a cruiser, was cornered, sped forward, and crashed into a police cruiser

that was blocking his escape, and was speeding up a street toward a roadblock manned by other officers); *see generally Adams v. Speers,* 473 F.3d 989, 993 (9th Cir. 2007) (distinguishing case from others where qualified immunity was granted when, taking plaintiffs' facts as true, there was a lack of danger to the shooter and others and an absence of warning from the shooting officer); *Vaughan v. Cox,* 343 F.3d 1323, 1327, 1330 (11th Cir. 2003) (finding that district court erred in granting officer qualified immunity where officer contended that he fired during a pursuit because the suspect swerved as if to smash into his cruiser because a reasonable jury could find that fleeing suspect did not present an immediate threat). Therefore, the officers' use of deadly force was not objectively reasonable and a constitutional violation has occurred. *See Smith,* 430 F.3d at 775; *see also Sigley v. City of Parma Heights,* 437 F.3d 527, 536 (6th Cir.2006) (citations omitted) ("[W]here there are contentious factual disputes relating to the reasonableness of an officer's use of deadly force, the court is precluded from granting summary judgment for [the] officers. . . ." (citation omitted)).

b. Right Clearly Established

After determining that the facts, taken in the light most favorable to the Rickard Plaintiff, establish a constitutional violation, the Court must determine whether, in the specific context of this case, Rickard's right to be free from excessive force was "clearly established." *See Marvin,* 509 F.3d at 244; *see also*

Dunn, 549 F.3d at 352-53. Thus, the Court must determine "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Floyd v. City of Detroit,* 518 F.3d 398, 407 (6th Cir. 2008) (citation omitted). Although Rickard's right to be free from excessive force is clearly established, the relevant question is whether the officers' perceptions were reasonable in determining that Rickard posed a threat sufficient to justify deadly force.

To support their argument that the right was not clearly established, the Separate Defendants cite *Brosseau,* in which the Supreme Court states that no court has found a Fourth Amendment violation where a police officer "shot a fleeing suspect who presented a risk to others." 543 U.S. at 198 (citations omitted). However, the court in *Smith* addresses the opposite situation, where a fleeing suspect poses no immediate threat, and holds, "[i]t is clearly established constitutional law that an officer cannot shoot a non-dangerous fleeing felon in the back of the head." *Smith,* 430 F.3d at 775-76. As discussed above, the facts here do not support a finding that a reasonable officer would have considered the fleeing suspects a clear risk to others. Therefore, Rickard's right to be free of excessive force was clearly established and the officers are not entitled to qualified immunity as a matter of law on the Rickard Plaintiff's § 1983 claims.

2. Allen Plaintiffs

The Allen Plaintiffs' Amended Complaint alleges violations of Kelly Allen's rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments. The Fifth Amendment applies only to actions of the federal government, and, thus, does not apply here. *See Scott,* 205 F.3d at 873 n.8. The Sixth Amendment right to a speedy and public trial is inapplicable on its face. Therefore, the Court need only address the Allen Plaintiffs' Fourth and Fourteenth Amendment claims. In determining whether to analyze the Allen Plaintiffs' claims under the Fourth Amendment, the issue is whether Allen was seized by the West Memphis Police Officers. A passenger or "innocent passerby" is not "seized" under the Fourth Amendment. A Fourth Amendment seizure occurs only "through means intentionally applied." *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 844 (1998) (citation omitted). The Fourth Amendment does not apply to passengers or other innocent third parties because "the authorities [cannot] 'seize' any person other than one who was a deliberate object of their exertion of force." *Claybrook v. Birchwell,* 199 F.3d 350, 359 (6th Cir. 2000) (citation omitted). Constitutional claims asserted by "persons collaterally injured" should be analyzed pursuant to "substantive due process norms." *Id.* (citation omitted). Therefore, the Allen Plaintiffs' Fourth, Fifth and Sixth Amendment claims are dismissed, and the Court will analyze the Allen Plaintiffs' claims under the Fourteenth Amendment.

Separate Defendants assert that they are entitled to qualified immunity on this claim and that their motion for summary judgment should be granted. As discussed above, the first step in a qualified immunity analysis is whether a constitutional violation has occurred. *See Floyd,* 518 F.3d at 404; *Marvin,* 509 F.3d at 244. The test for a Fourteenth Amendment violation is whether the alleged actions "shock the conscience" and violate the "decencies of civilized conduct." *Lewis,* 523 U.S. at 846 (citations omitted). Substantive due process is violated by government action only when that action "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." *Id.* at 847 (citation omitted). The Court in *Lewis* determined that in a high-speed chase, with "unforeseen circumstances demand[ing] an officer's instant judgment," the shocks-the-conscience analysis should be controlled by a malicious standard of proof, as opposed to a more relaxed "deliberate indifference" standard. *Id.* at 853-54. Because the officers in the instant suit were similarly engaged in a high-speed chase, where the initial collision and subsequent injuries occurred within a matter of seconds, the malicious standard of proof as applied and discussed in *Lewis* is the appropriate standard. *Id.* at 855; *see also Claybrook,* 199 F.3d at 360 ("[T]he 'malicious or sadistic' test of conscience-shocking behavior controls . . . because . . . [the officers] had no opportunity to ponder or debate their reaction to the dangerous actions of the armed man.") That standard is articulated in *Claybrook:*

> [I]n a rapidly evolving, fluid, and dangerous predicament which precludes the luxury of calm and reflective pre-response deliberation . . . public servants' reflexive actions "shock the conscience" only if they involved force employed "maliciously and sadistically for the very purpose of causing harm" rather than "in a good faith effort to maintain or restore discipline."

Claybrook, 199 F.3d at 359 (quoting *Lewis,* 523 U.S. at 853).

In applying the *Claybrook* standard, the most difficult cases are those where "executive action is worse than negligent but was not done for the purpose of injuring someone or in furtherance of invidious discrimination." *See Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.,* 542 F.3d 529, 536 (6th Cir. 2008). In this middle ground, factors to consider in determining whether activity should be considered arbitrary are: (1) the voluntariness of the relationship between the government and the injured party; (2) whether the government actor was required to act in haste without deliberation; and (3) whether the government actor acted in pursuit of a legitimate governmental purpose. *Id.* In applying those factors, the court in *Hunt* noted that "as a general rule . . . where some countervailing, mandatory governmental duty motivated [the] action, the action will not shock the conscience." *Id.* at 543. Only in "extreme cases [will] the governmental actor's choice to endanger a plaintiff in the service of a countervailing duty . . . be

deemed arbitrary." *Id.; see also Jones v. Byrnes,* 585 F.3d 971, 978 (6th Cir. 2009) ("[A]lthough *Lewis* established in 1998 that an officer's conduct in a police chase could theoretically shock the conscience, there have been no examples of what specific kinds of conduct rise to that level.").

The instant case is not such a case. There is no evidence that the officers' actions were malicious or sadistic. The officers who shot Allen were pursuing a legitimate governmental objective – stopping a fleeing suspect – and as part of that objective shot and killed Allen. Regardless of whether the officers made the correct decision in pursuing the fleeing suspect, their behavior does not meet the exacting standard applicable here. It does not shock the conscience, establish that the officers' actions were arbitrary, or that their actions were the result of malice or sadism.[5] *See Lewis,* 523 U.S. at 855 (finding that an officer's behavior did not shock the conscience and noting that "[w]hile prudence would have repressed the reaction, the officer's instinct was to do his job as a law enforcement officer, not to induce [the fleeing suspect's] lawlessness, or to terrorize, cause harm, or kill."); *Claybrook,* 199 F.3d at 360 ("[E]ven if, as the plaintiffs have argued, the actions of the three defendant

[5] In their Response to Separate Defendants' Motion, the Allen Plaintiffs recite the Model Penal Code's definition of recklessness. (Allen Pls.' Resp. 13.) They do not address whether the officers' conduct "shocks the conscience" or make any argument in favor of finding the officers' activity arbitrary.

patrolmen violated departmental policy or were otherwise negligent, no rational fact finder could conclude, even after considering the evidence in the light most favorable to [plaintiff], that . . . [defendants] acted with conscience-shocking *malice* or *sadism* towards the unintended shooting victim."). The Allen Plaintiffs have not established behavior that meets the high standard necessary to shock the conscience. Therefore, they have not established a constitutional violation under the Fourteenth Amendment. Because the Court has not found the violation of a constitutional right, it need not determine whether the right was clearly established and whether Separate Defendants are entitled to qualified immunity. *See Floyd,* 518 F.3d at 404 (citation omitted); *Marvin,* 509 F.3d at 244. Separate Defendants' Motion for Summary Judgment on the Allen Plaintiffs' Fourteenth Amendment claims is GRANTED.

B. Section 1983 Claims Against Chief Paudert

The Separate Defendants move to dismiss the § 1983 claims against Chief Paudert. Plaintiffs argue that Separate Defendants' Motion is premature. The Rickard Plaintiff asserts that the November 30, 2009 deadline was the deadline for Separate Defendants' dispositive motions dealing with qualified immunity only and that it would be premature to decide any claims beyond immunity. (Rickard Pl.'s Resp. 3.) To the extent Separate Defendants seek additional

relief, all Plaintiffs assert that the Motion is premature. Only two parties, Forthman and Plumhoff, have given depositions; there is much discovery to conduct; and the deadline for seeking dispositive relief other than qualified immunity has yet to pass. (*Id.* at 4; Allen Pls.' Resp. 14.) Specifically, Plaintiffs request that the Court refrain from addressing the claims against Chief Paudert until the parties take his deposition.

Plaintiffs' argument is not well-taken. The motion to dismiss was timely under the October 7, 2009 Scheduling Order, which set September 30, 2010 as the deadline for filing dispositive motions. (Rule 16(b) Scheduling Order, Dkt. No. 51, at 2.) "The Federal Rules of Civil Procedure allow for a Rule 12(b)(6) or a Rule 56 motion to be made at any time. Formal discovery need not have occurred." *Metro. Life Ins. Co. v. Biggs,* 68 F. App'x 644, 645 (6th Cir. 2003) (per curiam). Therefore, the motion to dismiss is not premature.

To state a § 1983 claim against an individual, a plaintiff must allege that the individual was personally involved in the alleged unconstitutional conduct. *See Grinter v. Knight,* 532 F.3d 567, 575 (6th Cir. 2008). In their Amended Complaints, Plaintiffs do not assert any personal involvement by Paudert beyond his supervisory responsibilities and his alleged public showing of support for the officers' actions after the shooting. Those allegations are insufficient to state a claim. There is no allegation that Paudert encouraged or approved the officers' conduct before it occurred or

directly participated in their conduct. *See Cardinal v. Metrish,* 564 F.3d 794, 802-03 (6th Cir. 2009) ("We have held that, even if a plaintiff can prove a violation of his constitutional rights, his § 1983 claim must fail against a supervisory official unless 'the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it.' 'At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.'") (citations omitted); *Shehee v. Luttrell,* 199 F.3d 295, 300 (6th Cir. 1999) ("[L]iability under § 1983 must be based on active unconstitutional behavior and cannot be based upon 'a mere failure to act.'") (citation omitted); *Poe v. Haydon,* 853 F.2d 418, 429 (6th Cir. 1988) (stating that, where the plaintiff alleged that supervisors were aware of sexual harassment but did not take appropriate action, the plaintiff's allegations were insufficient to impose liability on the supervisors under § 1983). Therefore, the § 1983 claims brought against Paudert in his individual capacity are DISMISSED. *See Iqbal,* 129 S. Ct. at 1949.

C. State Law Claims

Tennessee law applies to Plaintiffs' state law claims. Therefore, the Court need not address the Separate Defendants' arguments about immunity under Arkansas law, Ark. Code Ann. § 21-9-201; immunity from liability to felons under Arkansas Code Annotated § 16-120-301; and Plaintiffs' claims

pursuant to the Arkansas Civil Rights Act, Ark. Code Ann. § 16-123-105(a). The Arkansas claims are DISMISSED. *See Derthick Assocs., Inc. v. Bassett-Walker, Inc.,* Nos. 95-2230, 95-2231, 95-2232, 1997 WL 56908, at *4 (4th Cir. Feb.12, 1997) (affirming district court's dismissal of claims under Massachusetts law where district court concluded that Virginia law governed the dispute); *Elvig v. Nintendo of Am., Inc.,* 696 F. Supp. 2d 1207, 1215 (D. Colo. 2010) (dismissing claims under Washington law after finding that Colorado's choice-of-law rules require that Washington law not apply to plaintiffs' claims); *cf. Paul v. Deloitte & Touche LLP,* No. 06-225-MPT, 2007 WL 2402987, at *4 (D. Del. Aug. 20, 2007) (dismissing claim under Massachusetts law where the parties' contract required the application of Delaware law).

1. Immunity Under Tennessee law

The Separate Defendants assert that they are entitled to immunity for any allegations of false arrest, intentional infliction of emotional distress, and civil rights violations pursuant to the Tennessee Governmental Tort Liability Act ("TGTLA"), Tenn. Code Ann. §§ 29-20-101 *et seq*. (Defs.' Memo 41-42.) The TGTLA states:

> Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury arises out of:

. . . .

(2) false imprisonment pursuant to mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights.

Tenn. Code Ann. § 29-20-205. The TGTLA defines "employee" as "any official (whether elected or appointed), officer, employee or servant, or any member of any board, agency, or commission (whether compensated or not), or any officer, employee or servant thereof, of a governmental entity, including . . . police." Tenn. Code Ann. § 29-20-102(2). "Governmental entity" is defined as "any political subdivision of the state of Tennessee." *Id.* § 29-20-102(3)(A). Because none of the Separate Defendants is a governmental entity or an employee of a governmental entity, as defined by the TGTLA, the TGTLA does not provide Separate Defendants with immunity.

2. Felons Barred from Recovery

The Separate Defendants assert that they are entitled to absolute immunity from civil liability to the Rickard Plaintiff because any injuries were inflicted on Rickard while he was perpetrating a felony. (Defs.' Memo 43.) Pursuant to Tennessee Code Annotated § 29-34-201, a person is granted absolute immunity from civil liability, even for inflicting death, if:

(A) The person was preventing or attempting to prevent the perpetrator from committing the offense or was apprehending the perpetrator of the offense; and

(B) The perpetrator was committing one (1) or more of the offenses specified in subdivision (c)(1)-(9) or was attempting to commit one (1) or more of the offenses specified in subdivision (c)(10).

Tenn. Code Ann. § 29-34-201(b)(1). The Separate Defendants assert that subdivisions (c)(1), "[a]ny criminal homicide," and (c)(10), "[a]ttempt to commit first or second degree murder" are relevant here and provide them with immunity. (Defs.' Memo 42-43 (citing Tenn. Code Ann. § 29-34-201(c)(1), (10)).) Whether Rickard is properly considered a felon under the circumstances is a disputed issue of material fact. More pertinently, Separate Defendants allege only that Rickard committed attempted assault, which is not among the listed offenses. *See* Tenn. Code Ann. § 29-34-201(c). Because they have not alleged that Rickard committed any of the offenses for which this section grants immunity, the Separate Defendants' Motion for absolute immunity pursuant to § 29-34-201 is DENIED.

3. Tennessee Constitutional Claims

Separate Defendants assert that Plaintiffs' claims under the Tennessee Constitution should be dismissed because there is no separate right of action

under the Tennessee Constitution. (Defs.' Memo 44). Plaintiffs acknowledge that under Tennessee case law there is no private cause of action for violation of the Tennessee Constitution, but assert that the case law does not address the particular fact pattern presented here and does not account for the 1998 addition of Article I, Section 35 to the Tennessee Constitution. (Rickard Pl.'s Resp. 37.)[6]

Tennessee case law is clear: Tennessee does not recognize a private right of action for violation of the Tennessee Constitution. *See Bowden Bldg. Corp. v. Tenn. Real Estate Comm'n,* 15 S.W.3d 434, 446 (Tenn. Ct. App. 1999); *see also Cline v. Rogers,* 87 F.3d 176, 179 (6th Cir. 1996); *Lee v. Ladd,* 834 S.W.2d 323, 325 (Tenn. Ct. App. 1992), *appeal denied* (Tenn. 1992). The Court cannot alter this clearly established rule based on the particular facts of this case. Plaintiffs argue that the rationale in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), where the Supreme Court implied a

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[6] Article I, Section 35 of the Tennessee Constitution states, in pertinent part:

> To preserve and protect the rights of victims of crime to justice and due process, victims shall be entitled to the following basic rights:
>
> . . . .
>
> (2) The right to be free from intimidation, harassment and abuse throughout the criminal justice system;
>
> . . . .
>
> (7) The right to restitution from the offender.

cause of action for damages against federal officials who violated the Fourth Amendment, should extend to the Tennessee Constitution. (Rickard Pl.'s Resp. 40.) However, in *Lee,* the Tennessee Court of Appeals stated, "[s]o far as we are able to determine, the Tennessee courts have not extended the rationale of *Bivens* to give a state cause of action against a police officer for violating a person's civil rights." *Lee,* 834 S.W.2d at 325. Plaintiffs have cited no Tennessee case law contradicting this statement and extending the *Bivens* rationale to the Tennessee Constitution.

The adoption of Article I, Section 35 does not lead to a contrary conclusion. Since its adoption, Tennessee courts have continued to hold that Tennessee does not recognize a private right of action for violation of the Tennessee Constitution. *See, e.g., Crowe v. Bradley Equip. Rentals & Sales, Inc.,* No. E2008-02744-COA-R3-CV, 2010 WL 1241550, at *8 (Tenn. Ct. App. Mar. 31, 2010) (stating in 2010 that the plaintiff "fails to demonstrate that the General Assembly has created a private cause of action for violations of the Tennessee Constitution, and we know of no authority that recognizes a private cause of action for such violations") (citations omitted); *Bowden Bldg.* Corp., 15 S.W.3d at 446 (stating in 1999 that "Tennessee, however, has not recognized any such implied cause of action for damages based upon violations of the Tennessee Constitution") (citations omitted). Therefore, Separate Defendants' Motion to Dismiss the claims arising under the Tennessee Constitution is GRANTED.

4. Malicious Harassment

Plaintiffs have asserted claims of malicious harassment pursuant to Tennessee Code Annotated § 4-21-701. This Court has previously ruled that a malicious harassment claim "must be related to the victim's race, color, ancestry, religion or national origin." *Order Denying Plaintiffs' Motion to Certify Question to the Supreme Court,* Dkt. No. 32, at 5 (Nov. 13, 2006). Nevertheless, the Rickard Plaintiff argues that the Court should not rule on this issue until the Western Section of the Tennessee Court of Appeals rules in *Bowman v. City of Memphis,* No. W2009-00084-COA-R3-CV. (Rickard Pl.'s 40.) In a January 27, 2010 Opinion, the Tennessee Court of Appeals reaffirmed that a plaintiff must demonstrate conduct motivated by race, color, religion, ancestry, or national origin to state a claim of malicious harassment. *Bowman v. City of Memphis,* No. W2009-00084-COA-R3-CV, 2010 WL 322632, at *3 (Tenn. Ct. App. Jan. 27, 2010). Neither the Rickard Plaintiff nor the Allen Plaintiffs allege that any of the actions of the West Memphis Police Officers were motivated by race, color, ancestry, religion, or national origin. Therefore, the malicious harassment claims are DISMISSED.

5. Assault and Battery

Tennessee common law defines assault as "any act tending to do corporal injury to another, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of

using actual violence against that person." *Thompson v. Williamson Cnty.,* 965 F. Supp. 1026, 1037 (M.D. Tenn. 1997) (citation omitted). Battery in Tennessee requires a showing that a person committed a "conscious and volitional act" that was a harmful or offensive touching of another without privilege. *See City of Mason v. Banks,* 581 S.W.2d 621, 626 (Tenn. 1979).

The Separate Defendants move to dismiss the assault and battery claims against Paudert because he was not present during the events in question and because he was not personally involved in the pursuit. (Defs. Memo 34.) Plaintiffs' Amended Complaints do not allege that Chief Paudert was present. Therefore, they have not stated a claim of assault or battery against Chief Paudert and the claims of assault and battery against Paudert are DISMISSED.

The Separate Defendants also move to dismiss the assault claims as against all West Memphis Police Officers pursuant to Tennessee Code Annotated § 40-7-108, which states that a law enforcement officer has the right to use force reasonably necessary to apprehend a person resisting arrest. (Defs.' Memo 34.) Separate Defendants argue that it was reasonable for the officers to use force to apprehend Rickard and Allen in light of the facts and circumstances. (*Id.* at 34-35.) Separate Defendants seek dismissal of the claims, but their argument, citing their statement of undisputed facts and requesting the Court to find the officers' actions objectively reasonable, is properly

analyzed under a summary judgment standard. For the reasons discussed above in Section IV.A.1, summary judgment should not be granted in the instant case based on a finding that the officers' actions were reasonable as a matter of law. Separate Defendants' Motion on the assault claims against the officers is DENIED.[7]

Defendants Ellis, Forthman, and Evans seek dismissal of the claims of battery against them because the Plaintiffs cannot show that these officers ever offensively touched Rickard or Allen. (Defs.' Memo 35.) In response, Plaintiffs argue that these arguments are premature because discovery is ongoing and they have yet to depose Ellis or Evans. (Rickard Pl.'s Resp. 35.) Because these Defendants do not cite to the record, the Court construes their request as a motion to dismiss based on the allegations in the Amended Complaints. *See Winget v. JP Morgan Chase Bank, N.A.,* 537 F.3d 565, 576 (6th Cir. 2008). A plaintiff need not have completed discovery before a court decides a motion to dismiss. *See Tucker v. Union of Needletrades, Indus. and Textile Emps.,* 407 F.3d 784, 787-88 (6th Cir. 2005). The allegations in the

[7] Granting Separate Defendants' Motion on these claims would also be improper under the language of Tennessee Code Annotated § 40-7-108, which states that an officer may use deadly force "only if all other reasonable means of apprehension have been exhausted or are unavailable" and "where feasible, the officer has . . . given a warning that deadly force may be used unless resistance or flight ceases." Tenn. Code Ann. § 40-7-108(b).

Amended Complaints do not plausibly suggest that Ellis, Forthman, or Evans intentionally inflicted harmful or offensive physical contact on Rickard or Allen. Therefore, Plaintiffs' battery claims against Ellis, Forthman, and Evans are DISMISSED. *See Iqbal,* 129 S. Ct. at 1949; *Hensley Mfg. v. ProPride, Inc.,* 579 F.3d 603, 609 (6th Cir. 2009); *Geeslin ex rel. Geeslin v. Bryant,* No. 06-2768-STA, 2010 WL 2365329, at *4 (W.D. Tenn. June 9, 2010).

Defendants Plumhoff, Gardner, and Galtelli assert that the claims of assault and battery against each of them should be dismissed because each's [sic] actions were justifiably in self-defense and in defense of third parties. (Defs.' Memo 35.) These Defendants seek dismissal, but their argument and the facts submitted are properly analyzed under a summary judgment standard. The Separate Defendants argue that these three officers had a reasonable basis to believe that the Rickard vehicle posed a threat to their safety, and, thus, the claims of assault and battery cannot stand. (Defs.' Memo 35-36); *see also* Tenn. Code Ann. § 40-7-108. For the reasons discussed above in Section IV.A.1 and footnote 7, that argument cannot prevail. Separate Defendants' Motion on the assault and battery claims against Plumhoff, Gardner, and Galtelli is DENIED.

6. Intentional Infliction of Emotional Distress and Outrage

Intentional infliction of emotional distress ("IIED") and the tort of outrage are the same tort under Tennessee law. *See Moorhead v. J.C. Penney Co.,* 555 S.W.2d 713, 717 (Tenn. 1977). To establish a claim of IIED under Tennessee law, a plaintiff must show that "(1) the defendant's conduct was intentional or reckless; (2) the defendant's conduct was so outrageous that it cannot be tolerated by civilized society; and (3) the defendant's conduct resulted in serious mental injury to the plaintiff." *Lourcey v. Estate of Scarlett,* 146 S.W.3d 48, 51 (Tenn. 2004) (citing *Bain v. Wells,* 936 S.W.2d 618, 622 (Tenn. 1997)). To satisfy those elements, it is not enough to show that a defendant "has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress." *Id.* (citation and internal quotation marks omitted). Rather, a plaintiff must also show that defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (citation and internal quotation marks omitted).

The Separate Defendants argue that these claims should be dismissed because no facts are asserted to support a claim of IIED, but cite their statement of material facts in support of their argument. (Defs.' Memo 38.) Therefore, the Court regards the Separate Defendants' motion on this issue as one for summary

judgment. Plaintiffs argue that these claims are premature and should not be addressed at this stage of the litigation. Plaintiffs have alleged facts sufficient to state a claim of IIED. At this stage, granting summary judgment in favor of the Separate Defendants would be improper. The Court DENIES Separate Defendants' Motion on the IIED claims without prejudice.

7. False Imprisonment and False Arrest

To bring a claim of false imprisonment under Tennessee law, a plaintiff must show: detention or restraint against his will and the unlawfulness of such detention or restraint. *Coffee v. Peterbilt of Nashville, Inc.,* 795 S.W.2d 656, 659 (Tenn. 1990). False arrest and false imprisonment are separate torts under Tennessee law. "A false arrest is one means of committing a false imprisonment, but a distinction has been drawn between the two in that a false arrest must be committed under assumption of legal authority." *Stubblefield v. Hawkins Cnty.,* No. 2:06-CV-129, 2007 WL 4365758, at *5 (E.D. Tenn. Dec. 11, 2007) (quoting 35 C.J.S. *False Imprisonment* § 2 (1960)). Where, as here, the alleged false imprisonment arises out of the arrest of plaintiffs, the two torts are essentially the same. *Id.*

Separate Defendants move to dismiss Plaintiffs' claims of false imprisonment and false arrest because the officers had probable cause to stop Donald Rickard.

(Defs.' Memo 40.) Because they cite to facts in the record beyond the pleadings, the Court construes their request as a motion for summary judgment. *See Hensley Mfg.,* 579 F.3d at 613. At this stage, granting summary judgment in favor of the Separate Defendants would be improper. The Court DENIES Separate Defendants' Motion on the false imprisonment and false arrest claims without prejudice.

8. Other Tennessee Claims

The Plaintiffs have alleged abuse of process under Tennessee law. "An action for abuse of process cannot be maintained where the process was employed to perform no other function than that intended by law." *Priest v. Union Agency,* 125 S.W.2d 142, 143 (Tenn. 1939). Plaintiffs do not state an abuse of process claim here. Therefore, Separate Defendants' Motion to Dismiss Plaintiffs' abuse of process claim is GRANTED.

Finally, the Separate Defendants argue that they are entitled to immunity on the wrongful death claims pursuant to the TGTLA. Because the TGLTA provides Defendants with no immunity, they are not entitled to immunity.

V. Conclusion

For the foregoing reasons, the Court GRANTS the Separate Defendants' Motion for Summary Judgment on the Allen Plaintiffs' Fourteenth

Amendment claims, GRANTS the Separate Defendants' Motion to Dismiss the Allen Plaintiffs' Fourth, Fifth and Sixth Amendment claims, and GRANTS the Separate Defendants' Motion to Dismiss the § 1983 claims against Paudert in his individual capacity, the malicious harassment claims, the claims under the Tennessee Constitution, the assault and battery claims against Paudert, the battery claims against Ellis, Forthman, and Evans, and the abuse of process claims. The Separate Defendants' Motion is DENIED as to all other claims.

So ordered this 19th day of January, 2011.

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

No. 11-5266

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ESTATE OF KELLY A. ALLEN, DECEASED, ET AL.,	)	
Plaintiffs-Appellees,	)	
v.	)	
CITY OF WEST MEMPHIS, ET AL.,	)	ORDER
	)	(Filed Dec. 13, 2012)
Defendants,	)	
OFFICER VANCE PLUMHOFF, ET AL.,	)	
Defendants-Appellants.	)	

BEFORE: GUY and CLAY, Circuit Judges; and HOOD,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

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* Hon. Denise Page Hood, United States District Judge for the Eastern District of Michigan, sitting by designation.

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

Deborah S. Hunt, Clerk