No. _____

In the Supreme Court of the United States

FREDERICK MILLER,
Petitioner,
v.

MARY STAMM, Personal Representative
of the Estate of Carl A. Stamm, IV,
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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QUESTION PRESENTED

Does the Sixth Circuit's denial of qualified immunity directly conflict with this Court's decisions in *Scott v. Harris* and *Plumhoff v. Rickard* where Officer Miller did not violate Stamm's constitutional rights or clearly established law by entering the highway ahead of Stamm, activating his emergency equipment, and attempting to slow Stamm and gain his compliance even if it resulted in contact given that Stamm was traveling at a dangerous speed when Deputy Marino first encountered him, he accelerated to over 126 mph when officers attempted to stop him, he weaved in and out of vehicular traffic causing civilian motorists to leave the roadway, and narrowly missed striking a civilian vehicle before the contact occurred?

PARTIES TO THE PROCEEDINGS

Petitioner, Officer Frederick Miller, was the appellant in the court below. Respondent, Mary Stamm, as Personal Representative of the Estate of Carl A. Stamm, IV, was the appellee in the court below.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

CASES

CONSTITUTION

STATUTES

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is not reported but can be found at 657 Fed. Appx. 492. A copy is reproduced in the Appendix hereto at 1-11a. The district court decision is not reported but is reproduced at 22-55a.

JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1254(1) and 2106. The United States Court of Appeals for the Sixth Circuit issued its Opinion on September 16, 2016. Petitioner moved for rehearing *en banc* which was denied on December 19, 2016. *See* Appendices A and D. This Petition for Writ of Certiorari is filed within 90 days of that Order.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides that "The right of the people to be secure in their persons … against *unreasonable* searches and seizures shall not be violated ..." U.S. Const. amend. IV, emphasis added.

INTRODUCTION

The Sixth Circuit erred in denying Officer Miller qualified immunity in this police pursuit case by entirely ignoring this Court's precedent. The Sixth Circuit's decision directly conflicts with this Court's opinions in *Scott v. Harris*, 550 U.S. 372 (2007) and *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014). Based on their significance and application to this matter, both police pursuit cases were discussed at length in Officer Miller's briefing on appeal. The Sixth Circuit, however, wholly failed to consider either case in improperly denying qualified immunity. Instead, in contravention of such precedent, the Sixth Circuit concluded that factual disputes existed as to whether Officer Miller intentionally blocked Stamm (despite that intentional contact under the circumstances, for purposes of analyzing the legal issue, did not violate clearly established law) and whether Stamm posed an immediate threat to others because at the moment of impact no civilian vehicles were in the immediate vicinity (an argument expressly rejected by this Court in *Scott*).

Evidence gleaned from videos, vehicles involved, testimony, and accident reconstruction indisputably established that Stamm was traveling at an extremely high rate of speed, weaving in and out of vehicular traffic, forcing other motorists off of the roadway or into other lanes, and narrowly missing hitting a civilian motorist. Officer Miller entered the highway ahead of Stamm, activating his emergency equipment and flashing his brake lights in an effort to get him to slow down or stop. Stamm refused. Officer Miller – attempting to watch the roadway ahead and Stamm

behind – changed lanes at the same time as Stamm. As Stamm was upon him, Officer Miller accelerated and tried to move out of the way but Stamm collided with Officer Miller's vehicle. Stamm's dangerous and reckless conduct posed a significant, immediate threat to the officers and other motorists on the road that night. Assuming for purposes of appeal that the collision was intentional, it was constitutionally permissible under the circumstances. The Circuit's disregard and direct contravention of prevailing Supreme Court precedent warrants that review be granted.

STATEMENT OF THE CASE

It is undisputed that Plaintiff's decedent, Carl Stamm, had consumed alcohol at his friend's home on May 16-17, 2011 and became intoxicated. At around 4:00 a.m., Stamm left the friend's home and got on his 2001 Yamaha YZF 600R, a supersport motorcycle, eventually heading westbound on I-96. Livingston County Sheriff's Deputy Ray Marino observed Stamm speeding down I-96, clocking him at 104 mph westbound near Mason Road. Deputy Clayton, who was west of Officer Marino on westbound I-96 east of M-59, had a clear and steady tone on the motorcycle clocking him at 114 mph.

To the extent possible – given Stamm's speed, the pursuit is captured on Deputy Marino's in-car video beginning at 4:18:00. At 4:18:31, Deputy Marino activated his overhead lights. At 4:18:40, shortly after I-96 was reduced from a three-lane highway westbound to a *two-lane* highway, Deputy Marino pulled behind Stamm in the left lane. Stamm weaved in front of a semi-truck traveling westbound in the right lane and

then traveling at a high rate of speed passed a vehicle that was traveling in the left lane, barely missing striking that vehicle in the right rear. At 4:18:40, Deputy Marino's patrol vehicle was traveling at 109 mph. At 4:18:49-50, Marino activated his siren. Stamm then *accelerated away from* Marino who was traveling at **126 mph** at that point.

As the pursuit continued, vehicles, including semi-trucks, drove off of the roadway onto the shoulder. Both Deputies Marino and Sell testified that such a pursuit is dangerous for the officers and others on the roadway. At 4:19:28, Deputy Marino was following Stamm at 127 mph – and Stamm was pulling away.

Deputy Marino radioed 911 Dispatch and advised that he was in pursuit of a motorcycle going over 100 mph. Officer Frederick Miller advised that he was ahead at the ramp (exit 129) and asked if Marino wanted him to get on. Deputy Marino stated, "jump on now, get in the right lane and turn on your overheads." Deputy Marino testified that he told Officer Miller to get in the right lane because at that point the pursuit was in the left lane. Plaintiff does not contest that as the motorcycle approached Officer Miller, it was in the right lane.

At 4:20:20, Deputy Marino's video shows Miller's car ahead illuminating his overhead lights. Officer Miller's in-car video commences at 4:20:55. Because the vehicles' times are not synchronized, Miller's overhead lights are seen on his in-car video at 4:21:06. With his emergency lights activated, Officer Miller repeatedly tapped his brakes, repeatedly engaging his brake lights, which should have encouraged Stamm to slow down or stop. Undeterred, Stamm bore down on

Officer Miller who had slowed to approximately 45 mph. At 4:21:17, 11 seconds after Officer Miller illuminated his overheads, the crash occurred.

Officer Miller testified that when he saw the headlight bearing down on him in the right lane, he decided to yield that lane to the motorcyclist. However, Stamm almost simultaneously moved to the left lane. When Officer Miller, moving into the left lane, realized that Stamm was behind him, he accelerated and jerked his patrol vehicle to the right, as confirmed by evidence gleaned from his vehicle during the accident reconstruction. However, with Stamm traveling in excess of 126 mph, Officer Miller could not get out of the way in time and Stamm struck the left rear of Miller's police vehicle. Notably, while Stamm had the roadway in front of him in his sight, including Officer Miller's vehicle with its emergency lights illuminated, Officer Miller on the other hand was in the disadvantageous position of attempting to anticipate the approach of Stamm through rear and side-view mirrors while attempting to navigate the roadway ahead of him.

Pictures of Miller's patrol vehicle reveal that the impact occurred on the driver's side/left side rear taillight. Tragically, Stamm died following the impact. A drawing depicting the location of impact and where it took place in the roadway demonstrates that Stamm had 19 feet on one side to pass Officer Miller's vehicle and 13 feet on the other. Toxicology reports reveal that Stamm had a .10 blood alcohol level and .21 stomach alcohol content.

On May 15, 2014, Plaintiff filed a Complaint in the United States District Court for the Eastern District of

Michigan alleging an unreasonable use of force under the 4th Amendment and a violation of substantive due process under the 14th Amendment against Officer Frederick Miller and the Village of Fowlerville. Plaintiff brought the action pursuant to 42 U.S.C. §1983. The case was assigned to the Honorable Judith E. Levy.

The parties filed cross-motions for summary judgment. On March 5, 2015, Judge Levy conducted a hearing on the motions. On April 27, 2015, the district court issued an Opinion and Order denying Plaintiff's Motion for Summary Judgment and granting in part and denying in part Defendants' motion. The court dismissed the Village where Plaintiff failed to demonstrate a municipal liability claim and dismissed Plaintiff's 14th Amendment claim as abandoned, but denied Officer Miller qualified immunity.

Although the court expressly found that "in light of how quickly the events in this case unfolded, the Court is not persuaded that Officer Miller's failure to announce his decision to change lanes is indicative of his intent to cause Stamm to crash into his patrol vehicle," the court went on to conclude that a reasonable jury could find that Officer Miller seized Stamm through means intentionally applied. Then - despite the fact that Stamm weaved in and out of vehicular traffic on the highway while traveling at speeds over 126 mph, caused other motorists to drive off of the roadway to avoid him, and very nearly hit at least one other motorist - the lower court opined that there was a question of fact as to whether Stamm posed a significant threat to others thereby denying Officer Miller qualified immunity. Finally, the court

disregarded similar cases to conclude, based on a patently dissimilar case, that the law was clearly established that "deadly force" in a high speed pursuit is unconstitutional because Stamm posed little threat to others particularly where he was on a motorcycle and not in a car, suggesting that a motorcyclist traveling at 126 mph and weaving in and out of other vehicular traffic could not pose a significant danger to others so as to warrant qualified immunity. *See* Appendices B and C.

Officer Miller appealed the denial of qualified immunity to the United States Court of Appeals for the Sixth Circuit, relying on Supreme Court precedent by way of *Scott v. Harris*, 550 U.S. 372 (2007) and *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), demonstrating that his actions did not violate clearly established law given the circumstances presented. The panel dispensed with oral argument and affirmed the denial of qualified immunity. Unbelievably, the Court failed to even mention – much less discuss or distinguish – *Scott* or *Plumhoff*, which had been briefed throughout. Instead, the Sixth Circuit eschewed Supreme Court precedent in favor of reliance on an entirely inapposite circuit decision, issued *after* the incident in question, to suggest that Officer Miller violated clearly established law which the Court improperly defined at a high level of generality.

Further, although Officer Miller testified that the contact was unintentional, he conceded intent for purposes of analyzing the *legal* issue of whether such contact, if intentional, would violate clearly established law given this Court's decisions in *Scott* and *Plumhoff*. The panel improperly concluded that a construction of

the facts favorable to Stamm demonstrated a clearly established constitutionally violative use of deadly force, precluding qualified immunity.

In final contravention of *Scott*, the Sixth Circuit opined that it was impermissible to wait to intentionally block Stamm at a moment when no other motorists were in the immediate vicinity because that meant that the officers and civilians were no longer in danger and Stamm was no longer a threat. *See* Appendix A. That conclusion is in direct conflict with *Scott*. The panel also concluded that Stamm posed "little threat" to Officer Miller because Stamm was on a motorcycle (rocketing down the highway at speeds in excess of 126 mph) and Officer Miller was inside "a much-larger vehicle," his patrol car. Appendix, at 10a.

This matter presents an issue of exceptional importance, given the Sixth Circuit's disregard of Supreme Court precedent and the decision's certain application to future 42 U.S.C. §1983 actions, police pursuit cases, and matters involving qualified immunity. Review and reversal are warranted.

ARGUMENT FOR GRANTING WRIT

I. THE SIXTH CIRCUIT'S DENIAL OF QUALIFIED IMMUNITY DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN *SCOTT V. HARRIS* AND *PLUMHOFF V. RICKARD* WHERE OFFICER MILLER DID NOT VIOLATE STAMM'S CONSTITUTIONAL RIGHTS OR CLEARLY ESTABLISHED LAW BY ENTERING THE HIGHWAY AHEAD OF STAMM, ACTIVATING HIS EMERGENCY EQUIPMENT, AND ATTEMPTING TO SLOW STAMM AND GAIN HIS COMPLIANCE EVEN IF IT RESULTED IN CONTACT WHERE STAMM WAS TRAVELING AT A DANGEROUS SPEED WHEN DEPUTY MARINO FIRST ENCOUNTERED HIM, HE ACCELERATED TO OVER 126 MPH WHEN OFFICERS ATTEMPTED TO STOP HIM, HE WEAVED IN AND OUT OF VEHICULAR TRAFFIC CAUSING CIVILIAN MOTORISTS TO LEAVE THE ROADWAY, AND NARROWLY MISSED STRIKING A CIVILIAN VEHICLE BEFORE THE CONTACT OCCURRED.

A. Qualified Immunity

In *Plumhoff v. Rickard,* 134 S. Ct. 2012 (2014), this Court reiterated that "qualified immunity is '*an immunity from suit rather than a mere defense to liability*.'" Id., at 2018-2019, emphasis added. It is 'both important and completely separate from the merits of the action, and cannot be effectively reviewed on appeal from a final judgment because by that time the immunity from standing trial will have been irretrievably lost.' Id., citations omitted. As a result,

resolution of immunity issues "at the earliest possible stage" is favored to avoid erroneously permitting a case to proceed to trial. *Pearson v. Callahan*, 555 U.S. 223, 231-232 (2009).

Government officials performing discretionary functions generally are shielded from liability for 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 (1992). The contours of the right must be sufficiently clear so that an objectively reasonable officer would understand that what he or she is doing violates that right. *Anderson v. Creighton*, 483 U.S. 635, 639-640 (1987). Qualified immunity is broadly construed to shield "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In *Malley*, this Court extended the *Harlow* rule and held that government officials are entitled to qualified immunity unless, on an objective basis, it is obvious that no reasonably competent official would have concluded that the conduct was lawful; but if officials of reasonable competence could disagree on the legality of the action, immunity should be recognized. *Malley*, at 341.

Put another way "officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Rudlaff v. Gillispie*, 791 F.3d 638, 644 (6th Cir. 2015), quoting *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992).

In determining whether qualified immunity applies, our courts consider: (1) whether a constitutional right has been violated, and (2) whether that right was

clearly established such that the official's conduct was objectively unreasonable in light of such clearly established law. *Everson v. Leis*, 556 F.3d 484, 494 (6th Cir. 2009). Courts may address these prongs in any order, and any one may be dispositive. *Pearson*, *supra* at 236.

A right is "clearly established" when "it would be clear to a reasonable officer that his conduct was unlawful in the situation that he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). For qualified immunity to be surrendered, "pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*." *Cope v. Heltsley*, 128 F.3d 452, 459 (6th Cir. 1997). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right." *Anderson*, at 640; *Brosseau v. Haugen*, 543 U.S. 194, 198-200 (2004); see also, *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003). Our courts must determine whether the right has been recognized in a particularized, relevant sense. *Chappell v. City Of Cleveland*, 585 F.3d 901, 907 (6th Cir. 2009), *Anderson*, *supra*. In other words, while a generalized right to be free from unreasonable force is "clearly established," this Court requires a more particularized inquiry, probing "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, at 202.

When conduct is within the 'hazy border' of a constitutional right, it cannot be said that a

government officer violated a 'clearly established' right. *Brosseau*, *supra* at 198. Because "reasonable mistakes can be made as to the legal constraints on particular … conduct," qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." *Dorsey v. Barber*, 517 F.3d 389, 394 (6th Cir. 2008).

In *Pearson*, *supra*, this Court *unanimously* reiterated that "the protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" Id., at 231. In other words, *qualified immunity covers* "*mistakes in judgment, whether the mistake is one of fact or one of law.*" Id., emphasis added. "Qualified immunity shields an officer from suit when [he] makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances [he] confronted." *Brosseau*, *supra* at 198. The ultimate question is "whether a reasonable [officer] *could have believed* the [challenged action] to be lawful, in light of clearly established law and the information [he] possessed." *Anderson*, at 641.

The *plaintiff* bears the burden of showing that defendants are not entitled to qualified immunity. *Chappell*, *supra* at 907. The plaintiff must show "both that, viewing the evidence in the light most favorable to her, a constitutional right was violated and that the right was clearly established at the time of the violation." Id. "If the plaintiff fails to show either that a constitutional right was violated or that the right was clearly established, she will have failed to carry her burden." Id.

With respect to the "clearly established" nature of the right, this Court in *Plumhoff*, *supra*, stressed that "existing precedent must have placed the statutory or constitutional question confronted by the official *beyond debate*." Id., at 2023, emphasis added. See also, *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (denial of qualified immunity reversed where state trooper, who fatally shot fleeing motorist in attempting to disable vehicle, did not violate clearly established law).

B. Use of Force

In *Scott v. Harris*, 550 U.S. 372; 127 S. Ct. 1769 (2007), this Court considered whether an officer's actions in hitting a fleeing vehicle violated the driver's constitutional rights. There, the plaintiff attempted to liken the officer's action to shooting an unarmed fleeing felon. However, the Court rejected that analogy, stating: "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. Nor is the threat posed by the flight on foot of an unarmed suspect even remotely comparable to the extreme danger to human life posed by [the fleeing driver] in this case. Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the fact-bound morass of 'reasonableness.' Whether or not Scott's actions constituted application of 'deadly force,' all that matters is whether Scott's actions were reasonable." Id., at 1777-1778, emphasis added, internal citations omitted.

In determining whether an amount of force in a given instance was "reasonable" requires a balancing of the nature and quality of the intrusion of the

individual's 4th Amendment interests against the countervailing governmental interest at stake. *Graham v. Connor*, 490 U.S. 386 (1989). The *Graham* Court identified the following factors in evaluating "reasonableness" under the 4th Amendment:

> (a) The severity of the crime at issue;
>
> (b) Whether the suspect poses an immediate threat to the safety of an officer or others; and
>
> (c) Whether he or she is actively resisting or attempting to evade arrest by flight. *Graham*, *supra* at 396.

It is beyond cavil that police officers often face circumstances that are uncertain and quickly-developing, warranting deference in those cases:

> ***The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene*** rather than with 20/20 vision of hindsight ... the calculus of reasonableness must embody allowance for the fact that ***police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving*** -- about the amount of force that is necessary in a particular situation. *Graham*, at 396-397, emphasis added.

See also, *Plumhoff*, *supra* at 2020. The *Graham* Court cautioned against second-guessing an officer's on the spot judgment as to the amount of force to use "even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." Id., at 396.

Applying the *Graham* factors, the circumstances of speeding alone do not generally constitute a severe crime. However, Stamm then engaged in fleeing and eluding and drove recklessly and at dangerously high speeds. He actively attempted to evade arrest by flight and posed an immediate threat to the safety of the officers involved and civilian motorists on the roadway. Video evidence depicts other motorists driving off of the roadway, slowing, moving over, or nearly colliding with Stamm, who rocketed down the two-lane highway at speeds in excess of 126 mph while weaving around cars.

In *Scott*, *supra*, this Court considered whether an officer's actions in hitting a fleeing vehicle violated the driver's constitutional rights. Intentionally ramming the plaintiff's vehicle to compel him to stop was deemed constitutionally permissible. There, the plaintiff drove down narrow, two-lane roads in the dead of night at speeds that were considered "shockingly fast." He swerved around more than a dozen other cars (in the present case, there were at least 11), crossed the double-yellow line, and forced cars traveling in both directions to their respective shoulders to avoid being hit. He ran multiple red lights and traveled for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers to keep up. The Court concluded that this conduct placed police officers and innocent motorists alike "at great risk of serious injury. *Id*., at 1775-1776.

Importantly, instead of criticizing Officer Scott there for ramming the plaintiff when no other vehicles were in the vicinity – like the panel did here, ***the***

Court lauded that timing as it did not threaten other vehicles because the road was clear. Id., at 1776, n7.

Further, in considering the relative culpability of the parties, this Court distinguished *Brower v. County of Inyo*, 489 U.S. 593, 595; 109 S. Ct. 1378 (1989), for its refusal to "countenance the argument that by continuing to flee, a suspect absolves a pursuing police officer of any possible liability for all ensuing actions during the chase." The Court noted that the only question in *Brower* was whether a police roadblock constituted a seizure under the Fourth Amendment, regardless of the reason for the termination. However, it observed that culpability is relevant to the reasonableness of the seizure—to whether preventing possible harm to the innocent justifies exposing to possible harm the person threatening them. *Scott*, at 1769, n10.

Scott also rejected the plaintiff's argument that the innocent public could have been protected and the incident avoided if the police had simply ceased the pursuit:

> We think the police need not have taken that chance and hoped for the best. Whereas Scott's action—ramming respondent off the road—was *certain* to eliminate the risk that respondent posed to the public, ceasing pursuit was not. First of all, there would have been no way to convey convincingly to respondent that the chase was off, and that he was free to go. Had respondent looked in his rearview mirror and seen the police cars deactivate their flashing lights and turn around, he would have had no

> idea whether they were truly letting him get away, or simply devising a new strategy for capture. Perhaps the police knew a shortcut he didn't know, and would reappear down the road to intercept him; or perhaps they were setting up a roadblock in his path. Given such uncertainty, respondent might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow. Id., at 1778-1779, citation omitted.

Finally, this Court considered policy implications involved in establishing rules militating in favor of terminating pursuits:

> [W]e 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. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness. ***Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death***. Id., at 1779.

This Court concluded that the pursuit plaintiff initiated posed a substantial and immediate risk of

serious physical injury to others, and no reasonable jury could conclude otherwise. The officer's attempt to terminate the chase by forcing the plaintiff off the road was reasonable, and he was entitled to summary judgment. Id.

Here, it is undisputed and demonstrated by video evidence that Stamm fled at even greater speeds, exceeding 126 mph, while rapidly approaching and weaving around a number of other vehicles on the roadway, nearly striking another motorist. Instead of slowing when officers activated their emergency equipment, Stamm increased his speed. The video shows that other drivers were required to alter their course to avoid Stamm and/or the officers. Stamm was traveling in excess of 100 mph *before* the pursuit, when Deputy Marino first observed him. Video evidence shows how quickly Stamm approached and then swerved around other vehicles on the highway, nearly hitting another motorist who had not pulled over. The officers' lights and sirens served not only as an attempt to stop Stamm, but a warning to others traveling in the vicinity. Without that warning, Stamm would have been just as dangerous – if not more so – to other motorists oblivious to the rapidly approaching motorcycle, weaving around vehicles without warning and at recklessly high speeds. The video also depicts the number of vehicles passed in the seconds before impact. This Court in *Plumhoff* held that similar conduct posed a grave public safety risk as a matter of law.

Plumhoff reaffirmed *Scott* and reversed the Sixth Circuit's denial of qualified immunity, holding that the officers did not violate the Fourth Amendment nor

clearly established law. There, the driver (Rickard) was stopped near midnight on July 18, 2004 for operating a vehicle with only one headlight. Lt. Forthman noticed an indentation roughly the size of a head or a basketball in the car's windshield. He asked Rickard if he had been drinking, which Rickard denied. Because Rickard failed to produce his driver's license upon request and appeared nervous, the officer asked him to step out of the car. Rather than comply, Rickard sped away. Forthman gave chase and was soon joined by five other police cruisers driven by Sgt. Plumhoff and Officers Evans, Ellis, Galtelli, and Gardner. The officers pursued Rickard east on Interstate 40 toward Memphis, Tennessee. While on I–40, they attempted to stop Rickard using a "rolling roadblock" but were unsuccessful. The district court described the vehicles as "swerving through traffic at high speeds," and it was undisputed that the cars attained speeds over 100 mph. During the pursuit, Rickard and the officers passed more than two dozen vehicles (in the present case, there were at least 11 in a shorter amount of time).

Rickard eventually exited I–40 in Memphis and made a quick right turn, causing contact to occur between his car and Evans' cruiser. Rickard's car spun out into a parking lot and collided with Plumhoff's cruiser. Undaunted, Rickard put his car into reverse in an attempt to escape. As he did so, Evans and Plumhoff exited their cruisers and approached Rickard's car, and Evans, gun in hand, pounded on the passenger-side window. Rickard made contact with yet another police cruiser, with his tires spinning and his car rocking back and forth. At that point, Plumhoff fired three shots into Rickard's car. Rickard then

reversed and maneuvered onto another street, forcing Ellis to step to his right to avoid the vehicle. As Rickard continued fleeing down that street, Officers Gardner and Galtelli fired 12 shots toward Rickard's car. Rickard then lost control and crashed into a building. He and his passenger both died from some combination of gunshot wounds and injuries suffered in the crash that ended the chase. Id., at 2017-18.

In reversing a denial of qualified immunity, this Court noted that Rickard's outrageously reckless driving posed a grave public safety risk. Although Rickard's car eventually collided with a police car and came temporarily to a near standstill, that did not end the chase. Less than three seconds later, Rickard resumed maneuvering his car in an attempt to escape, disproving the respondent's claim that the chase was already over when petitioners began shooting. The Court held that under the circumstances, a reasonable police officer could have believed that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road. This Court concluded as a matter of law: "In light of the circumstances we have discussed, it is beyond serious dispute that Rickard's flight posed a grave public safety risk, and here, as in *Scott*, the police acted reasonably in using deadly force to end that risk." *Plumhoff*, at 2021-22 (2014).

As in *Scott* and *Plumhoff*, Officer Miller acted objectively reasonable in attempting to stop Stamm. No constitutional violation occurred, warranting reversal.

Moreover, the law was not clearly established so as to forewarn Officer Miller that his conduct was

somehow constitutionally violative. In *Mullenix*, *supra*, this Court reversed the Fifth Circuit's denial of qualified immunity, focusing on the "clearly established law" prong of the analysis. In considering this portion of the equation, the Supreme Court has repeatedly stated that courts should not "define clearly established law at a high level of generality." Id., at 308. Instead, the "dispositive question is whether the violative nature of *particular* conduct is clearly established." *Mullenix*, at 308, emphasis in original. The clearly established inquiry "must be undertaken in light of the specific conduct of the case," meaning the court must enunciate "a concrete, particularized description of the right." *Brosseau*, *supra* at 198.

In *Mullenix*, this Court instructed that where "none of our precedents 'squarely governs'" the specific set of facts at hand, qualified immunity is proper. Id., at 310.

Here, the Sixth Circuit relied on *Tennessee v. Garner*, 471 U.S. 1 (1985) to argue that the law with respect to deadly force and fleeing felons has been established for years. This exact argument was rejected in *Mullenix*:

> The Fifth Circuit held that Mullenix violated the clearly established rule that a police officer may not "'use deadly force against a fleeing felon who does not pose a sufficient threat of *309 harm to the officer or others.'" Yet this Court has previously considered—and rejected—almost that exact formulation of the qualified immunity question in the Fourth Amendment context. In *Brosseau,* which also involved the shooting of a suspect fleeing by car, the Ninth Circuit denied qualified immunity on the ground that the

> officer had violated the clearly established rule, set forth in *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), that "deadly force is only permissible where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Haugen v. Brosseau,* 339 F.3d 857, 873 (C.A.9 2003) (internal quotation marks omitted). This Court summarily reversed, holding that use of *Garner*'s "general" test for excessive force was "mistaken." *Brosseau,* 543 U.S., at 199, 125 S.Ct. 596. The correct inquiry, the Court explained, was whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the "'situation [she] confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Id.,* at 199–200, 125 S.Ct. 596. The Court considered three court of appeals cases discussed by the parties, noted that "this area is one in which the result depends very much on the facts of each case," and concluded that the officer was entitled to qualified immunity because "[n]one of [the cases] *squarely governs* the case here." *Id.,* at 201, 125 S.Ct. 596 (emphasis added).

Mullenix, at 308-09.

Further, as in *Mullenix*, "[t]he general principle that deadly force requires a sufficient threat hardly settles this matter." Id., at 309, 312; *Rush v. City of Lansing*, No. 15-1225, 2016 WL 787891, at *9 (6th Cir. Feb. 29, 2016). In *Rush*, the Court observed that the cases cited

by the district court and the plaintiff provided only general rules – rules just like the ones this Court rejected in per curiam, summary reversals. Id., citing *Mullenix,* at 311; *Brosseau,* at 199. Assessing qualified immunity in the context of deadly force, absent controlling authority, requires "a robust consensus of cases of persuasive authority" to constitute clearly established law. *Rush*, *supra*, citing *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011). In *Rush*, like the present case, controlling authority was lacking and any robust consensus of cases is manufactured at too high a level of generality.

The Sixth Circuit's reliance on *Walker v. Davis*, 649 F.3d 502 (6th Cir. 2011) was woefully misplaced. *Walker* cannot constitute "clearly established precedent" where it was decided *after* the within May 17, 2011 incident and relied on the general principle rejected in *Mullenix*. Moreover, it is patently distinct where the decedent in *Walker* posed no immediate threat to anyone as he rode his motorcycle across an *empty field* in the middle of the night in rural Kentucky, among numerous other distinguishing facts.

The lower court also opined that because Stamm was on a motorcycle instead of driving a car, he was somehow less dangerous. However, the damage to Officer Miller's patrol vehicle belies that theory. Moreover, the speed at which Stamm was traveling, on a smaller "vehicle" with only one headlight, arguably made him *more* dangerous because he was less visible to other motorists than an approaching larger vehicle with two headlights. A motorcycle traveling at well over 100 mph striking another vehicle at any angle could certainly cause death or serious injury to

innocent motorists. In fact, Stamm narrowly missed hitting Officer Miller's rear windshield which could have resulted in additional loss of life if he struck a smaller vehicle or one at a slightly different position.

The decision below also is in conflict with other circuits. See e.g., *Coker v. Arkansas State Police*, 734 F.3d 838, 840-41 (8th Cir. 2013) (upheld qualified immunity for officer hitting motorcyclist to end pursuit when he traveled at 2:30 a.m. at a high rate of speed on a divided highway and then drove the wrong direction on an onramp).

Likewise, in *Abney v. Coe*, 493 F.3d 412, 420 (4th Cir. 2007), the Fourth Circuit applied *Scott* and concluded that intentionally striking a motorcyclist to terminate a dangerous driving was constitutionally permissible, thereby dispensing with further qualified immunity analysis. In response to the plaintiff's argument that the officer should have ended the pursuit, the Court opined:

> We doubt that upon cessation of Coe's pursuit Abney would have been transformed into a model driver. Indeed, Deputy Coe *began* pursuing Abney *because* Abney was driving dangerously: When Coe first observed Abney, the motorcyclist had just passed three or four cars on a curve against the double yellow lines. The driver of the first car estimated Abney's speed at ten to fifteen miles per hour over the posted limit and testified that she was "literally scared to death." In sum, Abney's disregard for the rules of the road and lack of concern for the lives of fellow motorists needed no catalyst: Abney drove recklessly before anyone was giving

chase. And, even assuming that a post-chase Abney would have driven safely, there is no reason to believe that Abney would have seen Deputy Coe's abandonment of the chase as a true abandonment rather than the employment of a new pursuit tactic. *See Scott,* 127 S.Ct. at 1779. …

As *Scott* made clear, an officer's decision whether to let a suspect go in the hopes of catching him later is not governed by just how dangerous the suspect can make the pursuit. *Id.* To require an officer to end a chase whenever the suspect creates a sufficiently great risk to others is but an invitation to rash conduct. *See id.* There is, of course, no Fourth Amendment right to "impunity-earned-by-recklessness." *Id.*

Plaintiff's claim that the police should just have let Abney go amounts to an exhortation to let crime claim its victims. It also ignores the fact that Deputy Coe was faced with a dreadful choice. There are high costs to the use of intervention tactics to terminate a police pursuit: such tactics can place fleeing suspects at risk of serious harm—as the loss of human life here sadly illustrates. But the costs of inaction are also great: If innocent motorists, like the White family, had been the ones to lose their lives, that too would have been a tragedy. In such circumstances, it is "appropriate ... to take into account not only the number of lives at risk, but also their relative culpability." *Scott,* 127 S.Ct. at 1778. It was, after all, Abney "who intentionally placed himself and the public in

> danger by unlawfully engaging in the reckless ... flight that ultimately produced the choice between two evils that [Deputy Coe] confronted." *Id.*
>
> Plaintiff's suggestion that Deputy Coe should have done this or should have done that fails for an additional reason. Those who were not on Old Country Farm Road should be cautious in applying the very hindsight analysis which the Supreme Court has disfavored. It is fundamental that "[a]n officer's use of force is 'judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' " *Milstead,* 243 F.3d at 163 (quoting *Graham,* 490 U.S. at 396, 109 S.Ct. 1865). We thus decline plaintiff's invitation to second-guess the reasonableness of Deputy Coe's conduct based on what plaintiff later argues may have been a preferable course of action. *See Gooden,* 954 F.2d at 965.

By parity of reasoning, the officers did nothing to cause Stamm's high-speed driving in the first place. He was already rocketing the motorcycle at a shockingly fast speed when encountered by Deputy Marino. His subsequent increased speed and dangerous conduct posed an immediate threat to the safety of the officers involved and civilian motorists on the roadway. Stamm drove at speeds in excess of 126 mph while weaving around cars on a two-lane highway. The incident was captured on video showing Stamm fleeing officers at dangerously high speeds, weaving in and out of traffic while officers pursued, forcing other cars off of the road, and very nearly striking a civilian

vehicle. Officer Miller entered the highway ahead of Stamm, with his emergency lights activated, repeatedly braking to warn to Stamm to slow down or stop. Stamm failed or refused to do so and struck the back of Officer Miller's car. Under the authority of *Scott*, *Plumhoff*, and the other cases detailed, qualified immunity applies. Notwithstanding that Officer Miller did not violate the Fourth Amendment, qualified immunity applies where the law was not so clearly established that he "would have known, beyond debate, that his conduct was constitutionally violative."

This case implicates important federal interests and merits this Court's plenary review.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 20, 2017

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 16a0537n.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-1601

[Filed September 16, 2016]

MARY STAMM, Personal Representative of the Estate of Carl A. Stamm, IV,
Plaintiff-Appellee,

v.

FREDERICK MILLER,
Defendant-Appellant,

and

VILLAGE OF FOWLERVILLE,
Defendant.

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

BEFORE: SILER, GIBBONS, and COOK, Circuit Judges.

JULIA SMITH GIBBONS, Circuit Judge. Frederick Miller, an officer with the Fowlerville Police Department, challenges the district court's denial of his motion for summary judgment on the ground of qualified immunity. Mary Stamm brought this 28 U.S.C. § 1983 action on behalf of the estate of her son, Carl Stamm, who died after his motorcycle crashed into Miller's vehicle during a high-speed chase with police. The district court's decision to deny Miller qualified immunity relied on material disputed facts with respect to (1) whether Miller intended to block Stamm's motorcycle with his car when their vehicles collided or was attempting to get out of Stamm's way, and (2) whether Stamm posed an immediate threat to others. Because Miller's actions, viewed in the light most favorable to Mrs. Stamm, indicate a violation of Stamm's clearly established Fourth Amendment rights, and material facts are in dispute, we affirm the district court's denial of summary judgment.

I.

We adopt the district court's view of the facts in the light most favorable to Mrs. Stamm, *Walker v. Davis*, 649 F.3d 502, 503 (6th Cir. 2011), and the district court described the events in question as follows:

> On May 16, 2011, after spending an evening with his grandparents, Carl Stamm went to his friend Erik King's house in Brighton, Michigan. While at this house, Stamm was served alcohol and became intoxicated[, with his blood alcohol level after the accident determined to be .10]. He left King's house at around four in the morning on his motorcycle heading to his home in East

Lansing. (Dkt. 16-2.) These facts are not in dispute.

At about 4:20 a.m., on Interstate 96, near the Mason Road overpass in Livingston County, [Michigan] Livingston County Sheriff's Deputy Ray Marino recorded Stamm riding his motorcycle at 104 miles per hour. The speed limit along that stretch of road, which is a three-lane highway, is 70 miles per hour. Deputy Marino activated his overhead lights, but instead of slowing down, Stamm increased his speed. Deputy Marino notified his central dispatch that he was in pursuit of a vehicle that was not stopping. Central dispatch informed Ingham County law enforcement of the chase because the county line was just a few miles ahead of where Deputy Marino was on the highway.

The parties provided a video of the subsequent pursuit[, and the times used below reflect the times as they appear in Deputy Marino's video]. Video taken from Deputy Marino's vehicle shows Stamm maneuvering around several cars and trucks on the highway. About ten seconds into the chase, the highway changes from a six-lane to a four-lane highway. (Dkt. 16-5 at 14:18:37.) At one point during the chase, Deputy Marino was travelling 124 miles per hour, but Stamm was still able to accelerate away from the patrol car. (*See id.*)

After central dispatch contacted Ingham County, audio records reveal that Officer Miller, of the Fowlerville Police Department [],

responded that he was traveling down a ramp to the highway ahead of the pursuit. (Dkt. 16-8.) Deputy Marino testified that because Stamm was only being pursued for speeding, once he reached the Ingham County line, he would have terminated the pursuit. (Dkt. 18-10 at 14.) On the audio recording, Deputy Marino instructed Officer Miller to "jump on now, get in the right lane, and turn on your overheads." Officer Miller responded that he was "going to try and stay in front of him." (Dkt. 16-8 at 00:30-00:44).

Officer Miller's in-car camera switches on at approximately 4:20:14 a.m. Officer Miller turned his sirens and emergency lights on and travelled on the highway in the right lane at about 36 miles per hour. By 4:20:20, his vehicle reached a peak speed of 43 miles per hour and then began to slow down. At this point, video from Deputy Marino's car confirms that Stamm's motorcycle was also in the right lane and remained there for the next several seconds. At 4:20:24, Officer Miller's car began to move into the left lane just as Stamm began to occupy the left lane. For about the next five seconds, Officer Miller's vehicle straddled the line dividing the two lanes. About half way over into the left lane, at 4:20:30, Officer Miller pressed the brakes, and his vehicle shifted back to the right, at which point Stamm's motorcycle crashed into the back left side of the car. The video from Officer Miller's vehicle shows that he applied his brakes several times in the sixteen seconds he was involved in this incident. (Dkt. 16-6).

> The moment of impact cannot be seen from Deputy Marino's video. At approximately 4:20:23, Officer Miller's vehicle's lights appeared ahead. As Deputy Marino approached, he slowed down rapidly, coming to a stop behind skid marks and Stamm's motorcycle on the side of the road.
>
> Upon impact, Stamm was thrown from his motorcycle. His head struck the [metal portion of the patrol car between the rear windshield and the back-seat window] and he fell to the pavement eventually sliding on to the median on the left side of the highway. At the scene of the accident, Stamm appeared to be unconscious and barely breathing. He was declared dead shortly thereafter.

Stamm v. Miller, No. 5:14-cv-11951-JEL-MJH, at *2–*6 (E.D. Mich. Apr. 27, 2015).

Considering the parties' cross-motions for summary judgment, the district court denied Mrs. Stamm's motion and denied in part and granted in part the defendants' motion. The district court found an issue of material fact as to whether there was a constitutional violation because "[a] reasonable juror could conclude that Officer Miller . . . intended to stop plaintiff by use of physical force intentionally causing the collision" and that this use of "deadly force was not necessary under the circumstances." *Id.* at 18–19, 24. Regarding whether Miller's conduct violated a clearly established right of Stamm's, the court concluded that "[i]t has been clearly established that the use of deadly force in a high speed pursuit is unconstitutional where failing

to use such force poses little threat to the safety of others." *Id.* at 27.

II.

We review a district court's denial of a motion for summary judgment on qualified immunity grounds *de novo*. *Stoudemire v. Mich. Dep't. of Corr.*, 705 F.3d 560, 565 (6th Cir. 2013). A court properly grants summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

III.

Qualified immunity protects government officials from standing trial for civil liability in their performance of discretionary functions unless their actions violate clearly established rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To determine whether an officer is entitled to qualified immunity, we apply a two-prong test, asking (1) whether the facts, as alleged by the plaintiff, "make out a violation of a constitutional right," and (2) whether "the right at issue was clearly established at the time of the defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (internal quotation marks and citation omitted). If a district court determines that the plaintiff's evidence would reasonably support a jury's finding that the defendant violated a clearly established right, it must deny summary judgment. *DiLuzio v. Vill. of Yorkville*, 796 F.3d 604, 609 (6th Cir. 2015). Here, considering the facts in the light most favorable to Mrs. Stamm, the district court correctly denied Miller summary judgment.

A.

"The Fourth Amendment's prohibition against unreasonable seizures protects citizens from excessive use of force by law enforcement officers." *Godawa v. Byrd*, 798 F.3d 457, 463 (6th Cir. 2015). Claims alleging excessive force are subject to the Fourth Amendment's "objective reasonableness" standard. *Id.* at 464 (quoting *Graham v. Connor*, 490 U.S. 386, 388 (1989)). This standard requires a court to balance three factors: "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* (quoting *Martin v. City of Broadview Heights*, 712 F.3d 951, 958 (6th Cir. 2013)). For a seizure under the Fourth Amendment to occur at all, an officer must intend to stop someone. *See Cty. of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998).

The district court correctly determined that there were disputes of material fact regarding whether Miller intended to block Stamm and whether Stamm's conduct posed an immediate threat to others. These disputes concern the reasonableness of Miller's conduct, making them material, and because the evidence is such that a jury could return a verdict in Mrs. Stamm's favor, this material dispute is genuine. *See Stoudemire*, 705 F.3d at 565.

Regarding his intent to block Stamm, Miller argues that he attempted to move out of Stamm's way before the collision. As the district court found, however, the video reasonably supports Mrs. Stamm's version of the facts. The video shows that Miller's police vehicle was traveling, at most, 43 miles per hour on a highway with

a 70-mile-per-hour speed limit, when Miller knew Stamm's motorcycle was traveling at a speed of more than 100 miles per hour. The video also demonstrates that Miller's vehicle straddled the dividing line between the two lanes for about five seconds. Finally, the video shows that Miller got in front of Stamm while Stamm was changing lanes and braked several times while in front of Stamm. The recording of the radio communication between Miller and Marino, the deputy who originally responded, also indicates that Miller's plan was to stay in front of Stamm.

In terms of Stamm's potential danger to others, Miller argues that Stamm's high rate of speed and reckless driving threatened officers and other motorists. The record, however, supports Mrs. Stamm's version of the facts regarding the threat Stamm posed when his motorcycle and Miller's police vehicle collided. As the district court reasoned, "Stamm was being pursued at 4:20 a.m. along a highway six and then four lanes wide, with a large median dividing him from oncoming traffic and no pedestrians or businesses in sight." *Stamm*, No. 5:14-cv-11951-JEL-MJH, at *22. The district court further observed that "while the motorcycle passed other vehicles while Deputy Marino was pursuing him, at the time and place of the collision with Officer Miller, there are no vehicles to be seen in the immediate vicinity." *Id.* at *23–*24.

The district court correctly found that the record raised genuine issues of material fact as to whether Miller intended to block Stamm and whether Stamm was a threat to others at the time of the collision, inquiries which help determine whether Miller's conduct was reasonable under the Fourth Amendment.

A reasonable juror could conclude that Miller deliberately used deadly force against Stamm when he posed no immediate threat to others, and summary judgment to Miller was therefore inappropriate.

B.

In evaluating whether a constitutional right was clearly established, "[t]he key determination is whether a defendant moving for summary judgment on qualified immunity grounds was on notice that his alleged actions were unconstitutional." *Grawey v. Drury*, 567 F.3d 302, 313 (6th Cir. 2009). The Supreme Court has emphasized that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). This does not mean that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Id.* (citing *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985)). Rather, it means that "in the light of pre-existing law the unlawfulness must be apparent." *Id.* at 640 (collecting cases); *see also Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."). The "clearly established" prong must be applied "in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled on other grounds by Pearson*, 555 U.S. at 236.

We have held that "[i]t has been settled law for a generation that, under the Fourth Amendment, '[w]here a suspect poses no immediate threat to the officer and no threat to others, the harm resulting from

failing to apprehend him does not justify the use of deadly force to do so.'" *Walker*, 649 F.3d at 503 (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)). Though *Walker* was decided after the events giving rise to this case, its principle was not new, as we explicitly noted. In that case, which involved a collision similar to the one here, we noted that "[i]t is only common sense—and obviously so—that intentionally ramming a motorcycle with a police cruiser involves the application of potentially deadly force." *Id.* at 503–04. Thus, it is clearly established law that an officer may not use his police vehicle to intentionally hit a motorcycle unless the suspect on the motorcycle poses a threat to the officer or others.

The evidence, construed in the light most favorable to Mrs. Stamm, indicates a violation of a clearly established constitutional right. Under Mrs. Stamm's version of the facts, Miller intended to block Stamm's passage with his police cruiser, causing the deadly collision. As the district court observed, the risk to others at the time of Miller's use of force was minimal, as there were no other vehicles in sight, and Stamm's motorcycle posed little threat to Miller, who was inside a much-larger vehicle.

Because the facts as interpreted in the light most favorable to Mrs. Stamm indicate a violation of a clearly established constitutional right, and material facts are in dispute, the district court properly denied summary judgment to Miller.

IV.

Although Miller's appeal fails, we decline to impose sanctions because the appeal was not entirely frivolous.

See Fed. R. App. P. 38. Miller's appeal does not concede Mrs. Stamm's version of the facts with regard to Miller's intent or the threat Stamm posed to others when he struck Miller's car. Nonetheless, Miller did raise, albeit inartfully, a non-frivolous issue: whether, considering the facts in the light most favorable to Mrs. Stamm, Miller's conduct "violate[d] clearly established . . . rights of which a reasonable person would have known." *Barker v. Goodrich*, 649 F.3d 428, 433 (2011) (quoting *Harlow*, 457 U.S. at 818).

V.

We affirm the district court's denial of qualified immunity and deny Mrs. Stamm's request for sanctions.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 14-cv-11951

[Filed on July 30, 2015]

Mary Stamm, as personal representative of the Estate of Carl A. Stamm, IV,
Plaintiff,

v.

Frederick Miller, and the Village of Fowlerville,
Defendants.

Hon. Judith E. Levy
Mag. Judge Michael J. Hluchaniuk

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION [26]

This case is before the Court on plaintiff's motion for reconsideration of the Court's April 27, 2015 opinion and order denying plaintiff's motion for summary judgment and granting in part and denying in part defendants' motion for summary judgment. (Dkt. 25.)

For the reasons set forth below, the motion will be denied.

I. Standard of Review

To prevail on a motion for reconsideration, a movant must "not only demonstrate a palpable defect by which the court and the parties and other persons entitled to be heard on the motion have been misled but also show that correcting the defect will result in a different disposition of the case." E.D. Mich. L.R. 7.1(h)(3). "A palpable defect is a defect that is obvious, clear, unmistakable, manifest or plain." *Witzke v. Hiller*, 972 F. Supp. 426, 427 (E.D. Mich. 1997). The "palpable defect" standard is consistent with the standard for amending or altering a judgment under Fed. R. Civ. P. 59(e). *Henderson v. Walled Lake Consol. Schs.*, 469 F.3d 479, 496 (6th Cir. 2006).

Motions for reconsideration should not be granted if they "merely present the same issues ruled upon by the court, either expressly or by reasonable implication." E.D. Mich. L.R. 7.1(h)(3). A motion for reconsideration thus "is not a vehicle to re-hash old arguments, or to proffer new arguments or evidence that the movant could have presented earlier." *Gowens v. Tidwell*, No. 10-10518, 2012 WL 4475352, at *1 (E.D. Mich. Sept. 27, 2012) (citing *Sault St. Marie v. Engle*r, 146 F.3d 367, 374 (6th Cir.1998)); *accord Roger Miller Music, Inc. v. Sony/ATV Publ'g,* 477 F.3d 383, 395 (6th Cir.2007) (noting "[i]t is well-settled that parties cannot use a motion for reconsideration to raise new legal arguments that could have been raised before a judgment was issued"); *Owner–Operator Indep. Drivers v. Arctic Express, Inc.*, 288 F.Supp.2d 895, 900 (S.D. Ohio 2003) (stating that "[m]otions for reconsideration

do not allow the losing party ... to raise new legal theories that should have been raised earlier.").

"[A] party may not introduce evidence for the first time in a motion for reconsideration where that evidence could have been presented earlier." *Shah v. NXP Semiconductors USA, Inc.*, 507 F. App'x 483, 495 (6th Cir. 2012) (affirming denial of motion for reconsideration brought under local rules of Eastern District of Michigan); *accord Bank of Ann Arbor v. Everest Nat. Ins. Co.*, 563 F. App'x 473, 476 (6th Cir. 2014) (holding that a party may not introduce evidence for the first time in a Rule 59(e) motion that could have been presented earlier). "If district judges were required to consider evidence newly presented but not newly discovered after judgment, there would be two rounds of evidence in a great many cases." *Navarro v. Fuji Heavy Industries, Ltd.*, 117 F.3d 1027, 1032 (7th Cir. 1997).

II. Analysis

The factual background of this case is fully recounted in the Court's April 27, 2015 opinion and order (Dkt. 25) and will not be repeated here. Plaintiff argues that the Court erred when it determined that the Village of Fowlerville could not be held liable in this case because (1) Chief Couling's testimony shows that there was a policy in place that authorized Officer Miller's actions; (2) Fowlerville ratified Officer Miller's conduct after-the-fact by failing to convene a formal review as mandated by internal policy; and (3) Fowlerville was deliberately indifferent for failing to train and supervise Officer Miller. (Dkt. 26.)

Plaintiff raised these arguments in her response to defendants' motion for summary judgment, and the evidence referenced in this motion was considered by the Court either explicitly or by reasonable implication. For this reason, her motion will be denied. *See* E.D. Mich. L.R. 7.1(h)(3).

A. Whether Fowlerville's Policies Caused Plaintiff's Death[1]

The Court previously found that plaintiff failed to show that "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by that body's officers." *Monell v. Department of Social Services,* 436 U.S. 658, 690 (1978).

Plaintiff contends that "its argument is based on the express testimony of the chief of police," which indicates that Officer Miller was acting in a manner that he was expected to under Fowlerville's policy. This mischaracterizes the evidence. The relevant portion of Chief Couling's deposition is as follows:

---

[1] As a preliminary matter, plaintiff suggests that the Court was "confused" in its approach to this question and inappropriately relied on a deliberate indifference standard when analyzing whether Fowlerville's rolling roadblock policy led to Stamm's death. The Court reviewed Fowlerville's policies and the relevant deposition testimony and concluded that plaintiff failed to show that Fowlerville's policies were constitutionally deficient. Whether or not the development of those policies was "deliberate" or "deliberately indifferent" did not factor into the Court's analysis of this issue. The Court was not confused on this point.

> Q: Does your policy permit the use of rolling road blocks on motorcycles who are traveling at high speed when they are evading officers only for a speeding violation?
>
> A: The policy does not prohibit that.

(Dkt. 26 at 9.) There is nothing about this testimony that alters the Court's previous conclusion that Fowlerville's policy on the use of rolling roadblocks was not unconstitutional. The policy, as written, only permits rolling roadblocks as a "last resort," and "last resort" is defined as circumstances where "immediate and drastic maneuvers must be undertaken… in order to protect human life." (Id.) This policy is not inconsistent with Chief Couling's testimony, which suggests that there are limited circumstances when a rolling roadblock would be permitted during a high speed motorcycle chase. In other words, if the event that triggers police action is a motorcycle traveling far in excess of the speed limit, the speeding motorcycle could put others' lives at risk and necessitate the use of a rolling roadblock. For example, if a motorcycle is speeding in an uncontrolled and erratic manner towards a crowd of people or on a narrow street with a heavily traveled sidewalk, a rolling roadblock could be authorized by the Fowlerville policy to protect the lives of others without running afoul of the constitution.

As the Court previously noted, the evidence supports a finding that Officer Miller did not act according to Fowlerville's policy, but rather, he exceeded its scope.

B. Whether Fowlerville Ratified Officer Miller's Actions After-the-Fact

Plaintiff repeats her argument that Fowlerville ratified Officer Miller's actions after-the-fact, because it did not conduct its own internal review or fill out the proper forms in accordance with its own policies. Plaintiff argues that it was Chief Couling's "deliberate choice" not to conduct a meaningful investigation, and in doing so, he affirmed Officer Miller's conduct. Plaintiff appears to interpret relevant case law as holding that any failure to investigate police misconduct creates municipal liability. As the Sixth Circuit explained in *Tompkins v. Frost*, 655 F. Supp. 468, (6th Cir. 1987):

> Such an interpretation… is illogical. Wrongful conduct after an injury cannot be the proximate cause of the same injury. Moreover, *Monell,* forbids a finding of county liability except where the misconduct is pursuant to an official policy or custom and is also the "moving force" behind the plaintiff's injury. The misconduct by the county must also be either intentional or at the least, grossly negligent… [A] post-injury failure to investigate [is] a fact which may permit an inference that the misconduct which injured the plaintiff was pursuant to an official policy or custom. Any other reading would permit *respondeat superior* liability for the failure to undertake an investigation and would thus by-pass the stringent proximate cause requirements discussed in *Tuttle* and *Kibbe*, supra.

Id. at 472.

Plaintiff alleges that Chief Couling "elected not to convene any internal review." In fact, the Livingston County Sheriff's Department conducted an independent investigation of the entire incident, and Chief Couling cooperated with the investigation and was aware that it was being conducted. The investigation focused on whether Officer Miller engaged in criminal conduct, however there is no disagreement that the investigation was was thorough, reviewed the Department's policy, and went into a great detail about the incident. The constitution does not demand that an investigation be conducted or duplicated by a municipality where the municipality participates in and complies with a meaningful investigation conducted by a third party.

The alleged failure to investigate after-the-fact does not trigger municipal liability in this case.

C. Whether Fowlerville was Deliberately Indifferent in Failing to Train or Supervise Officer Miller

Plaintiff argues that the Court erred in determining that Fowlerville could not be held liable pursuant to a failure to train or failure to supervise theory.

With respect to Fowlerville's alleged failure to train, plaintiff cites a string of cases that describe situations where there is, in her words, an "obvious need" for some form of training on a particular situation that an officer encounters. (Dkt. 26 at 4.) Plaintiff's most instructive citation is *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992), which is distinguishable from this case. In *Russo*, the Sixth Circuit found that there was a material question of fact as to whether a

municipality failed to train its officers in the proper use of force against individuals with mentally illness. *Id.* The Court looked to three key factors to determine there was a question of fact: 1) the officers admitted that they were frequently called upon to deal with mentally ill individuals, but none of them could articulate the content of their training; 2) an Office of Municipal Investigations Report found the officers' training inadequate in certain respects and virtually nonexistent in others; and 3) plaintiffs' expert concluded that the content of the training was inadequate because none of the officers understood the proper procedures for reacting to individuals with mentally illness. *Id.* at 1046-47.

The facts in this case do not suggest such an inadequacy. There is no evidence that Fowlerville's officers either regularly engaged in high speed chases or failed to understand its policy on rolling roadblocks, and there is no independent report finding that its training was inadequate. Even if, relying solely on plaintiff's expert report (about which there is a dispute as to timeliness and admissibility), the Court were to find that the Department's training was inadequate, plaintiff has still failed to establish that Fowlerville was deliberately indifferent.

The Supreme Court has explicitly held that constitutional inadequacy cannot be shown by the mere fact that "an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct." *City of Canton Ohio v. Harris,* 489 U.S 378, 391 (1989). Deliberate indifference requires more than a negligent series of oversights; rather, the risk of a

constitutional violation must be "plainly obvious" and yet disregarded. *Stemler v. City of Florence,* 126 F.3d 856, 865 (6th Cir. 1997). Here, there is no evidence that Fowlerville knew or should have known that its training on the use of a rolling roadblock was inadequate.

With respect to the failure to supervise theory of liability, plaintiff argues that it is merely "luck" that Officer Miller did not engage in any behavior that demonstrated his lack of fitness from 2006 to 2011, and that the lack of a record of the Department's supervision is evidence of Fowlerville's indifference. Plaintiff fails to provide any evidence that Officer Miller's superiors were not supervising and/or evaluating him during this period of time, or how she has done anything more than "re-hash old arguments" that were previously rejected by the Court.[2]

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[2] Plaintiff states that "[t]he Court effectively white-washed Fowlerville's indifference" (Doc. 26, p. 12) regarding its alleged failure to supervise because the Court found that in a police department of four sworn officers and one Chief of Police, and where the Chief testified that he is in constant contact with the officers and addresses problems at they arise, plaintiff has failed to show a lack of supervision that can support municipal liability.

"Whitewash" means "to gloss over or cover up (as vices or crimes)" or "to exonerate by means of perfunctory investigation through biased presentation of the data." Merriam-Webster Dictionary Online, http://www.merriamwebster.com/dictionary/whitewash (last checked July 29, 2015). The Court has not approached this case, or any of its cases, with bias for or against any party. Indeed, the Court was very troubled by what happened in this case and spent a great deal of time and effort reading and re-reading the record and the applicable cases in order to reach a sound decision. Plaintiff and her counsel have every right to

III. Conclusion

For the reasons set forth above, plaintiff's motion for reconsideration (Dkt. 26) is DENIED.

IT IS SO ORDERED.

Dated: July 30, 2015
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on July 30, 2015.

s/Felicia M. Moses
FELICIA M. MOSES
Case Manager

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disagree with the Court's analysis and to assert that it is wrong and unsupported by facts or law, but asserting that it is biased or was undertaken as part of an effort to cover up evidence does not assist the Court in its understanding of plaintiff's arguments.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 14-cv-11951

[Filed on April 27, 2015]

Mary Stamm, as personal representative of the Estate of Carl A. Stamm, IV,
Plaintiff,

v.

Frederick Miller, and the Village of Fowlerville,
Defendants.

Hon. Judith E. Levy
Mag. Judge Michael J. Hluchaniuk

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [19] AND DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [16]

Mary Stamm, as personal representative of the Estate of Carl A. Stamm, IV, is suing the Village of Fowlerville and Frederick Miller, an officer in the Fowlerville Police Department (collectively the

"defendants"). The case arises out of a police chase, during which Carl Stamm was riding a motorcycle and died after he crashed into Officer Miller's vehicle. (Dkt. 1). Plaintiff brings claims of (1) unlawful use of deadly force in violation of the Fourth Amendment; (2) violation of the decedent's substantive due process rights; and (3) wrongful death under M.C.L § 600.2922.

Before the Court are the parties' cross-motions for summary judgment. Defendants argue that judgment should be entered in their favor because Officer Miller is entitled to qualified immunity and because liability cannot be imputed to the municipal defendant. They also seek summary judgment with respect to some of plaintiff's claims for damages. (Dkt. 16).

Plaintiff seeks summary judgment arguing that the facts, even construed in the light most favorable to defendant, show that Officer Miller used unconstitutional force and that Fowlerville is responsible for Officer Miller's wrongdoing. (Dkt. 18).

For the reasons set forth below, the Court denies plaintiff's motion for summary judgment and denies in part and grants in part defendants' motion for summary judgment

I. Facts

A. The Events of May 16, 2011

On May 16, 2011, after spending an evening with his grandparents, Carl Stamm went to his friend Erik King's house in Brighton, Michigan. While at this house, Stamm was served alcohol and became intoxicated. He left King's house at around four in the

morning on his motorcycle heading to his home in East Lansing. (Dkt. 16-2). These facts are not in dispute.

At about 4:20 a.m., on Interstate 96, near the Mason Road overpass in Livingston County, Livingston County Sheriff's Deputy Ray Marino recorded Stamm riding his motorcycle at 104 miles per hour. The speed limit along that stretch of road, which is a three-lane highway, is 70 miles per hour. Deputy Marino activated his overhead lights, but instead of slowing down, Stamm increased his speed. Deputy Marino notified his central dispatch that he was in pursuit of a vehicle that was not stopping. Central dispatch informed Ingham County law enforcement of the chase because the county line was just a few miles ahead of where Deputy Marino was on the highway.

The parties provided a video of the subsequent pursuit.[1] Video taken from Deputy Marino's vehicle shows Stamm maneuvering around several cars and trucks on the highway.[2] About ten seconds into the chase, the highway changes from a six-lane to a four-lane highway. (Dkt. 16-5 at 14:18:37). At one point during the chase, Deputy Marino was travelling 124 miles per hour, but Stamm was still able to accelerate away from the patrol car. (*See* id.)

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[1] While the time stamps from the two different videos do not match up, Deputy Chad Sell of the Livingston County Sheriff's Department determined how the times stamps in the two videos relate. To remain consistent, the Court will use the times as they appear in Deputy Marino's video.

[2] Deputy Sell testified that Deputy Marino's video shows Stamm passing approximately 11 vehicles.

After central dispatch contacted Ingham County, audio records reveal that Officer Miller, of the Fowlerville Police Department (the "Department"), responded that he was traveling down a ramp to the highway ahead of the pursuit. (Dkt. 16-8). Deputy Marino testified that because Stamm was only being pursued for speeding, once he reached the Ingham County line, he would have terminated the pursuit. (Dkt. 18-10 at 14). On the audio recording, Deputy Marino instructed Officer Miller to "jump on now, get in the right lane, and turn on your overheads." Officer Miller responded that he was "going to try and stay in front of him." (Dkt. 16-8 at 00:30-00:44).

Officer Miller's in-car camera switches on at approximately 4:20:14 a.m. Officer Miller turned his sirens and emergency lights on and travelled on the highway in the right lane at about 36 miles per hour. By 4:20:20, his vehicle reached a peak speed of 43 miles per hour and then began to slow down. At this point, video from Deputy Marino's car confirms that Stamm's motorcycle was also in the right lane and remained there for the next several seconds. At 4:20:24, Officer Miller's car began to move into the left lane just as Stamm began to occupy the left lane. For about the next five seconds, Officer Miller's vehicle straddled the line dividing the two lanes. About half way over into the left lane, at 4:20:30, Officer Miller pressed the brakes, and his vehicle shifted back to the right, at which point Stamm's motorcycle crashed into the back left side of the car. The video from Officer Miller's vehicle shows that he applied his brakes several times in the sixteen seconds he was involved in this incident. (Dkt. 16-6).

The moment of impact cannot be seen from Deputy Marino's video. At approximately 4:20:23, Officer Miller's vehicle's lights appeared ahead. As Deputy Marino approached, he slowed down rapidly, coming to a stop behind skid marks and Stamm's motorcycle on the side of the road.

Upon impact, Stamm was thrown from his motorcycle. His head struck the left "C Pillar"[3] of the patrol car and he fell to the pavement eventually sliding on to the median on the left side of the highway. At the scene of the accident, Stamm appeared to be unconscious and barely breathing. He was declared dead shortly thereafter.

Immediately following the accident, Deputy Chad Sell, of the Livingston County Sheriff's Department, was called to the scene to investigate. Deputy Sell concluded his investigation and issued a report on May 23, 2011. He noted that "based on the initial circumstances of the vehicle pursuit by Deputy Marino, the use of deadly force by Officer Miller was not warranted." (Dkt. 16-3 at 2). As part of this analysis, Deputy Sell determined that Stamm was about 1344 feet from Miller's vehicle when Officer Miller activated his lights. He calculated that if Stamm had begun to slow down upon seeing the lights, he would have needed 809.9 – 879.91 feet to potentially avoid contact with the patrol vehicle. (Id. at 24). In his investigation, Deputy Sell found no evidence that Stamm used his brakes in the several seconds leading up to the crash. (Dkt. 16-4 at 4).

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[3] The metal portion of the car between the rear windshield and the back-seat window.

Toxicology reports conducted after the accident show that Stamm had a blood alcohol level of .10 and a urine alcohol level of .21. (Dkt. 16-12). This is slightly greater than the amount of alcohol in the blood for him to be determined legally intoxicated.

B. Evidence of Officer Miller's Intent

Officer Miller's intent is in dispute. Officer Miller testified that at the time he entered the freeway, he did not know what the purpose of the pursuit was – just that a motorcycle was traveling over 100 miles per hour. He understood that Deputy Marino instructed him to remain in the right lane so the motorcycle moving at a high speed would be able to pass him, and he could then join the pursuit. (Dkt. 18-12 at 34-36).

Plaintiff argues that Officer Miller intended to physically block Stamm with his vehicle pointing to Officer Miller's final words before the crash, when he said that he was "going to try and stay in front of him," as well as video showing Officer Miller staying in the right lane for about ten seconds after he saw the motorcycle behind him, then braking and slowly moving to the left lane. (Dkt. 18-12 at 97-98; Dkt. 16-6). Plaintiff also argues that Officer Miller's deposition testimony that he intended to let Stamm go by is inconsistent with the fact that he did not communicate this change in plan (that he was no longer going to try to stay in front of Stamm) on the radio. (Dkt. 18-13 at 79-82).

Defendants argue that the evidence supports a finding that Officer Miller was attempting to get out of Stamm's way when the collision occurred. Their argument relies on Deputy Sell's findings that Officer

Miller and Stamm's decisions to move to the left lane could have occurred simultaneously given the speed they were traveling and their reaction time. (Dkt. 18-13 at 126-27). Defendants also point to Officer Miller's testimony, in which he states that he was moving to the left lane so he could yield the right lane to Stamm and join the pursuit, and that he didn't notice Stamm was behind him in the left lane until he had already moved. (Dkt. 16-9 at 3-4; Dkt. 18-14 at 13 & 17).

C. Evidence Regarding Officer Miller's Reasonableness

Plaintiff provides additional evidence to support the unreasonableness of Officer Miller's actions.[4] Deputy Marino, for example, testified that he believed a rolling blockade would not have been appropriate under the circumstances of the pursuit. (Dkt. 18-10 at 212. Geoffrey Alpert, a professor in criminology and use-of-force, reached the following conclusions:

- Officer Miller's involvement with the chase was against policy because he could not balance the need to apprehend the suspect

[4] Ernest Burwell, a former member of the Los Angeles County Sheriff's Department, submitted an affidavit stating that Officer Miller's actions "amounted to a rolling roadblock of a motor vehicle and should not have been used" since fatal injury was foreseeable. (Dkt. 18-8). His affidavit references an attached list of "qualifications and work on this matter," but no such attachment was provided to the Court. Defendants object to the use of Burwell's testimony because it was not disclosed to them until the filling of plaintiff's response to this motion. Regardless, the Court will not consider Burwell's statements in deciding this motion as plaintiff has failed to establish Burwell as an expert in the field of use-of-force tactics pursuant to Fed. R. Civ. P. 26(a)(2)(B).

with the risks of the pursuit given his lack of knowledge of the purpose of the chase.

- Officer Miller established a rolling road block driving at or under 40 mph which was an unreasonable tactic.
- Officer Miller's actions (and the County's failure to train) were the cause of the accident.

(Dkt. 18-9).[5]

D. Evidence Regarding the Village of Fowlerville's Alleged Liability

In February 2006, Officer Miller underwent a psychological evaluation which found he was "moderately deficient" in "judgment" (including life and death situations) and "problem solving." In an evaluation conducted by his supervisor at the time, Chief of Police Gary Goss noted he was unsure whether Officer Miller had the emotional stability to perform in stressful situations and he was concerned about whether Officer Miller could restrain himself from overreacting. In March 2006, Psychologist Linda Forsberg said that Officer Miller's problem-solving abilities were not adequate for complex situations and that he could not be fully rehabilitated. In one session with Forsberg, Officer Miller described the role of the

[5] Defendants also object to plaintiff's use of Professor Alpert's expert testimony because it was not disclosed to them until the filing of plaintiff's response brief. Even if the Court were to ignore Alpert's report in its entirety, it would still come to the same conclusion regarding the parties' motions for summary judgment.

police as "judge, jury, and executioner." (Dkts. 18-2 & 18-3).

Chief Thomas Couling, Chief Goss's successor, testified that the Department has only four officers, and he did not recall whether he had ever seen the above-mentioned performance evaluation conducted by Chief Goss. Chief Couling testified that he saw Forsberg's psychological evaluation. He testified that additional training would be appropriate following such conclusions and that there would be a record if any such training took place. Chief Couling also explained that the Fowlerville Police Department did not conduct annual performance reviews. Instead, given the small size of the Department, he monitored performance informally and would address problems as they arose. He never noticed a problem with Officer Miller that would have warranted the need for additional supervision or training. Chief Couling did not recall specifically addressing Officer Miller's statement about feeling that the police are "judge, jury, and executioner." (Dkt. 18-11 at 10-13, 19, 29-31).

Professor Alpert also reached the following conclusions regarding the County's alleged failure to train and supervise Officer Miller:

- If an officer does not possess the critical skills of decision making and tactics of pursuit driving and the chief officer does not provide appropriate training and allows an officer to perform those tasks, then the chief officer and government is deliberately indifferent.

- Chief Goss… was 'unsure' about Officer Miller's ability to exercise restraint and use the minimum amount of force to handle a given situation. [Chief Couling] was also aware or should have been aware… that Officer Miller had limited cognitive abilities in complex tasks.

- [O]fficers were provided a pursuit policy that was explained but the content was not tested.

(Dkt. 18-9 at 4).

The Department policy acknowledges that a rolling roadblock, in most situations, is a use of deadly force. (Dkt. 18-4). The policy defines a roadblock as:

> The establishment of a barrier across a part of the traveled portion of a roadway. This barrier may be moving (as in the case of vehicles placed in front of a fleeing vehicle) or stationary. Roadblocks are sometimes established using police vehicles as blocking devices.

(Id.) Such a tactic is only permissible as a "last resort measure [and] requires[s] the prior approval and/or direction of the supervisor on duty." The roadblock must be established "where it should not surprise the violator" as the violator should be given the time and space to bring the vehicle to a stop. "Rolling roadblocks are discouraged" yet still permissible under these policies. The policy also notes that motorcycles, in particular, require additional considerations because they are more easily de-stabilized. (Dkt. 18- 5 at 6; Dkt. 18-11 at 48-49). Chief Couling testified that in June 2009, officers read over the policy, were presented it

during training, and were asked if they understood it or had any questions. All of the officers responded that they understood the policy. (Dkt. 18-11 at 34-35).

Chief Couling testified that Fowlerville officers did not receive road training on high speed pursuits. (Id. at 59-61). Officer Miller testified that he received such training in 1972, and attended a 2010 Vehicle Operations Refresher Course that included high speed driving tests on a course with cones. He also testified that he never received on-the-road training from the Department on high speed pursuits. (Dkt. 18-12 at 60-62).

II. Legal Standard

Summary judgment is proper where "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 Court may not grant summary judgment if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248. The Court "views the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the nonmoving party." *Pure Tech Sys., Inc. v. Mt. Hawley Ins. Co.*, 95 F. App'x 132, 135 (6th Cir. 2004) (citing *Skousen v. Brighton High Sch.,* 305 F.3d 520, 526 (6th Cir. 2002)).

III. Analysis

A. Plaintiff's Motion For Partial Summary Judgment[6]

Plaintiff moves for summary judgment arguing that there is no issue of material fact as to whether (1) Officer Miller used unconstitutional force; or (2) whether Fowlerville is responsible for Miller's wrongdoing under *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978). Viewing the evidence in the light most favorable to defendants, given Officer Miller's testimony about his intent to stay in front of Stamm and Deputy Sell's conclusion that Officer Miller and Stamm could have decided to occupy the left lane at the same time, a reasonable juror could conclude that Officer Miller was attempting to get out of Stamm's way and, thus, no seizure occurred. *See supra* Section III(B)(i); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 844-45 (1998) (a seizure occurs "only when there is a governmental termination of freedom of movement through means intentionally applied.") If there was no seizure, there can be no constitutional violation, and with no constitutional violation, the municipality cannot be held liable. *See Monell*, 436 U.S. 658; *Wilson v. Morgan*, 477 F.3d 326, 340 (6th Cir. 2007) ("because the jury found no constitutional violation by the individual defendants, the county could

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[6] Plaintiff's motion for summary judgment addresses the complaint's Fourth Amendment excessive force claim and the municipal defendant's alleged liability under *Monell*. It does not address plaintiff's Fourteenth Amendment or wrongful death claims. The Court will construe plaintiff's motion as a motion for partial summary judgment.

not have been found liable under *Monell* for an allegedly unconstitutional custom or policy."); *Petty v. City of Chicago*, 754 F.3d 416, 424 (7th Cir. 2014) ("if no constitutional violation occurred in the first place, a *Monell* claim cannot be supported.")

Plaintiff's motion for partial summary judgment is denied because a material question of fact remains regarding whether Officer Miller intended to block Stamm.

B. Whether Officer Miller is Entitled to Qualified Immunity

Qualified immunity is an affirmative defense available to government officials performing discretionary functions. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Whether a defendant is entitled to qualified immunity "generally turns on the objective legal reasonableness of the action . . . assessed in light of the legal rules that were clearly established at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Courts must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The plaintiff bears the burden of proving that a defendant is not entitled to qualified immunity. *Gardenshire v. Schubert*, 205 F.3d 303, 311 (6th Cir. 2000).

Courts in this Circuit employ a two-step analysis to determine whether a defendant is entitled to qualified immunity. First, "viewing the facts in the light most favorable to plaintiff, we determine whether the allegations give rise to a constitutional violation."

Shreve v. Franklin Cty., 743 F.3d 126, 134 (6th Cir. 2014). Second, "we assess whether the right was clearly established at the time of the incident." *Id.* A court may undertake either step of the analysis first. *Pearson v. Callahan*, 555 U.S. 223 (2009).

The Court applies the same summary judgment standard to a motion based on qualified immunity as in other cases: the facts must be viewed in the light most favorable to the non-moving party and genuine disputes of material fact cannot be resolved in favor of the movant. *See Tolan v. Cotton*, 134 S.Ct. 1861, 1866 (2014).

1. Whether the Facts Give Rise to a Constitutional Violation

a) Whether a Seizure Occurred

To prevail on a claim alleging a violation of the Fourth Amendment due to an unreasonable seizure, plaintiff must first show that a seizure, an intentional acquisition of physical control, occurred. *See Lewis*, 523 U.S. at 844-45 (1998). "A seizure occurs even when an unintended person or thing is the object of the detention or taking, but the detention or taking must be willful." *Horta v. Sullivan*, 4 F.3d 2, 9-10 (1st Cir. 1993). The Fourth Amendment "only protects individuals against 'unreasonable' seizures, not seizures conducted in a 'negligent' manner." *Dodd v. City of Norwich*, 827 F.2d 1, 7-8 (2d Cir. 1987) (citing *Daniels v. Williams*, 474 U.S. 327 (1986) and *Davidson v. Cannon*, 474 U.S. 344 (1986)).

No seizure has occurred, for example, "where a 'pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights

and continuing pursuit' but accidentally stopped the suspect by crashing into him. *Lewis*, 523 U.S. at 844-45 (quoting *Brower v. Cnty. of Inyo*, 489 U.S. 593, 597 (1989)). A roadblock that completely blocks the road, on the other hand, constitutes a seizure even if it is designed to give the driver an opportunity to stop before crashing. *Brower*, 489 U.S. at 598-99. As the Court in *Brower* noted:

> It is clear, in other words, that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied*.

Id. at 596-97 (emphasis in original). The Court further determined that:

> We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result. It was enough here, therefore, that, according to the allegations of the complaint, Brower was meant to be stopped by the physical obstacle of the roadblock—and that he was so stopped.

Id. at 599.

At oral argument, the defendants directed the Court to *White v. Tamlyn*, 961 F. Supp. 1047 (E.D. Mich.

1997), where the district court found the use of a rolling roadblock was not a seizure but rather an attempt to "stop the suspect through a display of authority." *Id.* at 1058. In *Tamlyn*, plaintiff testified that she was being pursued by police on the highway with one police car on her left and another on her right. *Id.* A third police car passed the car already on plaintiff's left and pulled in front of plaintiff's vehicle, at which point plaintiff struck the vehicle in front of her. *Id.*

This case is distinguishable from *Tamlyn*. In the light most favorable to plaintiff, a reasonable juror could conclude that Officer Miller did not merely attempt to stop plaintiff by a show of authority, but intended to stop plaintiff by use of physical force intentionally causing the collision. Deploying a rolling roadblock, where a police vehicle gets in front of the subject, *and travels roughly the same speed as*, a pursued vehicle, would not necessarily constitute a seizure. *See Carter v. Lucas*, 30 F.3d 128 at *2-4 (4th Cir. 1994) ("[a] rolling roadblock is a procedure whereby a police vehicle takes up a position in front of, traveling in the same direction and at roughly the same speed as, the pursued vehicle… [this tactic] is not designed to cause a physical impact.") Here, the evidence shows Officer Miller was travelling, *at his fastest*, 43 miles per hour on a highway with a 70 mile per hour speed limit and in front of vehicle he knew was traveling in excess of 100 miles per hour. Evidence from Officer Miller's vehicle shows that Miller got in

front of Stamm while Stamm was changing lanes and that Miller braked several times while doing so.[7]

Viewing the facts in the light most favorable to the non-moving party, plaintiff has raised an issue of material fact. A reasonable juror could conclude that Officer Miller terminated Stamm's freedom of movement through means intentionally applied and that Stamm was "stopped by the very instrumentality set in motion or put in place to achieve that result." *Brower*, 489 U.S. at 599; *see also Hawkins v. City of Farmington*, 189 F.3d 695, 701-02 (8th Cir. 1999) (holding that a reasonable jury could find that the use of a rolling roadblock in pursuit of a motorcycle constituted an intentional seizure).

b) Whether Officer Miller's Actions Were Unreasonable

In analyzing the reasonableness of an officer's seizure, the Court must examine the "totality of the circumstances" and must judge the actions from the perspective of a reasonable officer on the scene without regard to underlying intent or motivation. *See Tennessee v. Garner*, 471 U.S. 1, 7 (1985); *Graham*, 490 U.S. at 396-97. Primary among the factors courts consider in making this determination are "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or

[7] In light of how quickly the events in this case unfolded, the Court is not persuaded that Officer Miller's failure to announce his decision to change lanes is indicative of his intent to cause Stamm to crash into his patrol vehicle.

attempting to evade arrest by flight." *Graham*, 490 U.S. at 396.

"[Deadly force] may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or physical injury to the officer or others." *Garner*, 471 U.S. at 11; *see also Terranova v. New York*, 144 Fed. App'x 143, 146 (2d Cir. 2005) ("the use of deadly force to stop an individual who does not pose a threat of serious injury to others constitutes an unreasonable seizure under the Fourth Amendment."); *Brower*, 489 U.S. 593.

Defendants argue this case is similar to *Scott v. Harris*, 550 U.S. 372 (2007), where a high speed chase of a car concluded when a police vehicle rammed the car from behind causing it to leave the road and crash. *See id.* That chase took place on a two-lane highway with businesses along the side of the road. *Id.* at 375. The Supreme Court ruled that "a police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Id.* at 386.

Defendants also point to *Abney v. Coe*, 493 F.3d 412 (4th Cir. 2007), where the court ruled that an officer in pursuit of a motorcyclist acted reasonably when he struck him to protect the safety of others. *Id.* at 414, 420-21. In *Abney*, the motorcyclist was speeding down a two-lane road and passing vehicles while crossing the double lines into oncoming traffic, running at least one vehicle off the road in the process. *Id.* at 414.

In both *Abney* and *Scott*, the threat of serious injury to others was clearly established. In both of those cases, the pursued vehicle was fleeing along a two-lane road with traffic coming in the opposite direction. *Id.*; *Harris*, 550 U.S. at 375. In *Harris*, the pursuit also took place in a business area where there was pedestrian traffic. *Harris*, 550 U.S. at 375. Here, Stamm was being pursued at 4:20 a.m. along a highway six and then four lanes wide, with a large median dividing him from oncoming traffic and no pedestrians or businesses in sight. During this pursuit, the greatest risk was to Stamm, who was on a motorcycle which is less stable and significantly lighter than the cars and trucks on the highway. Indeed, when Stamm's motorcycle crashed into Officer Miller's patrol car, Officer Miller was uninjured.

Plaintiff points to *Walker v. Davis*, 649 F.3d 502, 503 (6th Cir. 2011). In *Walker*, a police vehicle intentionally rammed a motorcycle from behind while pursuing it more than 200 feet into an open field. *Id.* The Sixth Circuit found that such a pursuit was "patently distinguishable" from *Harris*, and the officer's actions were unreasonable because the fleeing motorist posed no threat of serious harm to the officers or others. *Id.* at 503. Here, the motorcyclist was still on the road when the crash occurred, having maneuvered around approximately eleven vehicles, potentially putting those drivers at risk.

This case is most analogous to *Hawkins*, 189 F.3d 695. In *Hawkins*, an officer positioned himself on the median of a highway awaiting a motorcycle that was being pursued by other officers. *Id.* 698. The officer admitted that when he saw an approaching motorcycle

(which, it turns out, might not have been the motorcycle being pursued), he intended to get the driver of the motorcycle to slow down or stop by pulling slowly into the passing lane with his emergency lights on. *Id.* at 699. As the officer was moving into that lane, he lost sight of the motorcycle, and a collision occurred. *Id.* at 700. The court concluded that because the defendant acted intentionally and because there were no other vehicles near the site of the crash, there was sufficient evidence for a reasonable juror to find that an officer using a rolling roadblock acted unreasonably. *Id.* at 702. Here, while the motorcycle passed other vehicles while Deputy Marino was pursuing him, at the time and place of the collision with Officer Miller, there are no vehicles to be seen in the immediate vicinity. Deputy Marino testified that under these circumstances he believed the use of deadly force was unreasonable. Deputy Sell's report also notes that the use of deadly force was unreasonable under the circumstances.

Viewing the evidence in the light most favorable to plaintiff, there is a question of fact as to whether Stamm posed a significant threat to others, and a reasonable juror could conclude that deadly force was not necessary under the circumstances and that Officer Miller's actions were unreasonable.

2. Whether Officer Miller's conduct was clearly established as unreasonable

Defendants argue that even if Officer Miller's actions were unreasonable, he did not violate a clearly established right because the case law has never established that using a rolling roadblock under these circumstances constitutes unreasonable use of force.

In order to determine whether a constitutional right is clearly established, the Court is limited to relying on decisions from the United States Supreme Court, the Sixth Circuit, district courts within the Sixth Circuit, and finally, decisions from other circuits. *Higgason v. Stephens*, 288 F.3d 868, 876 (6th Cir. 2002). Lower courts must not define the right at "a high level of generality." *Ashcroft v. Kidd*, 131 S.Ct. 2074, 2084 (2011). Rather, courts must define the right "on the basis of the specific context of the case." *Tolan*, 134 S.Ct. at 1866. But "courts must take care not to define a case's context in a manner that imports genuinely disputed factual propositions." *Id.* (internal citations and quotations omitted).

While statements of general applicability typically do not apply in determining whether a constitutional violation was clearly established, "in an obvious case, [general] standards can 'clearly establish' the answer, even without a body of relevant case law." *Brosseau v. Haugen*, 543 U.S. 194, 199. (2004) (citations omitted). The Supreme Court has held that such general statements regarding unconstitutional conduct can put officials "on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). The determinative issue is whether the officer had "fair warning that his conduct deprived [the plaintiff] of a constitutional right." *Id.* at 740.

In *Smith v. Cupp*, 430 F.3d 766 (6th Cir. 2005), the Sixth Circuit held that "a suspect fleeing in a car that has never posed a danger to anyone has the clearly established right not to be seized with deadly force." *Id.* at 777. In a separate case, the Sixth Circuit found,

albeit months after the accident in this case, that it has been "*settled for a generation* that, under the Fourth Amendment, 'where a suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.'" *Walker*, 649 F.3d at 503 (quoting *Garner*, 471 U.S. 1 (1985) (emphasis added).

The court in *Walker* explained:

> Nor does it matter that, at the time of [the fleeing motorist's] actions, there were few, if any, reported cases in which police cruisers intentionally rammed motorcycles. It is only common sense—and obviously so—that intentionally ramming a motorcycle with a police cruiser involves the application of potentially deadly force. This case is thus governed by the rule that "general statements of the law are capable of giving clear and fair warning to officers even where the very action in question has not previously been held unlawful."

Walker, 649 F.3d at 503-04 (quoting *Cupp*, 430 F.3d at 776-77 (internal quotation marks omitted)).

At the time of Officer Miller's use of force, there were no other vehicles in sight. Here, the risk of harm to others is not significant, particularly where Stamm is on a motorcycle and not in a car. It has been clearly established that the use of deadly force in a high speed pursuit is unconstitutional where failing to use such force poses little threat to the safety of others. *See Cupp*, 430 F.3d 777; *Lytle v. Bexar Cnty., Tex.,* 560 F.3d 404, 417 (5th Cir. 2009) ("It has long been clearly

established that… it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others."); *see also Sample v. Bailey*, 409 F.3d 689, 699-700 (6th Cir. 2005) ("regardless of whether the incident took place at day or night, in a building or outside, whether the suspect is fleeing or found, armed or unarmed, intoxicated or sober, mentally unbalanced or sane, it is clearly established that a reasonable police officer may not shoot the suspect unless the suspect poses a perceived threat of serious physical harm to the officer or others.")

For these reasons, defendants' motion for summary judgment on the basis of qualified immunity is denied as there remain issues of material fact to be resolved by the jury.

C. Whether Plaintiff's Fourteenth Amendment Substantive Due Process Claim Should be Dismissed

Defendants argue that, as a matter of law, plaintiff has failed to show that Officer Miller's actions "rise to the conscience-shocking level" and, thus, do not give rise to a substantive due process claim. (Dkt. 16 at 21). Plaintiff concedes that since she is proceeding on an alleged violation of the Fourth Amendment claim, there is no basis to consider a substantive due process claim. If plaintiff is pursuing a substantive due process claim, the test established in *Darrah v. City of Oak Park*, 255 F.3d 301 (6th Cir. 2001), is whether the alleged conduct "shocks the conscience." *Id.* (quoting *Lewis*, 523 U.S. at 846). Nonetheless, plaintiff has waived her Fourteenth Amendment claim because she abandoned it in her responsive brief and at oral argument. *See Salehpour*

v. Univ. of Tennessee, 159 F.3d 199, 205-06 (6th Cir. 1998); *Sanders v. Village of Dixmoor, III*, 178 F.3d 869, 870 ("Because [plaintiff did not notify the trial court of the theory he now advances… he has waived any such claim there and on appeal.") And even if she did not, plaintiff has failed to point to any facts that show Officer Miller's actions shocked the conscience.

Accordingly, plaintiff's Fourteenth Amendment substantive due process claim will be dismissed.

D. Whether the Municipality Can be Held Liable for Officer Miller's Actions

1. Whether the Municipality Ratified Plaintiff's Actions

"Local governing bodies… can be sued directly under § 1983… where… the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by that body's officers." *Monell*, 436 U.S. at 690. Plaintiff argues that there was an explicit policy in place that plaintiff was following the night of this incident. This is not consistent with the facts in this case. The Department's policy, for example, expressly states that rolling roadblocks, while permitted, are discouraged and only to be used as a "last resort."

Plaintiff compares this case to one in which a court found a municipality liable because it had a policy of tasering verbally non-compliant prisoners and the officer tased a verbally non-compliant prisoner. (Dkt. 42 at 17) (citing *Hublick v. Cnty. of Ostego*, 2014 WL 495403). That case is easily distinguished from this one. In *Hublick*, the defendant officer was following an

explicit policy of tasering non-compliant prisoners. *Id.* at *9. Here, the Department's "last resort" policy is not *per se* unconstitutional because of the manner in which it limits the use of a rolling roadblock.[8]

Plaintiff also argues that defendants ratified Miller's actions after the fact, because the Department did not conduct an internal review or fill out the proper forms in accordance with its own policies. This argument is not supported by either the facts or the law. First, the record of Deputy Sell's post-accident report shows that the Department complied with a meaningful after-the-fact investigation. Furthermore, to find *Monell* liability, it is not enough to show a violation of internal policy or a failure to investigate after-the-fact. Rather, the plaintiff must also demonstrate that such a failure "[was] either intentional or at the least, grossly negligent" and, therefore, ratified the unconstitutional conduct. *See Tompkins v. Frost*, 655 F.Supp. 468, 472 (6th Cir. 1987). Plaintiff has failed to provide any legal support for the proposition that a failure to follow internal policies is evidence of ratification, and she has failed to provide any evidence that shows the municipality's actions were willful or grossly negligent.

For these reasons, plaintiff has failed to raise a question of fact as to whether the Department ratified Officer Miller's actions through a pre-existing policy or by a failure to investigate the incident.

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[8] Plaintiff also suggests that the failure to define "last resort" in its rolling roadblock policy indicates an explicit endorsement of Officer Miller's actions. Plaintiff provides no support for this argument.

2. Failure to Train

Municipal liability need not be based on an explicitly articulated official policy or a post-incident ratification:

> [A]lthough the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.

Monell, 536 U.S. at 690-91.

In *City of Canton v. Harris*, 489 U.S. 378 (1989), the Supreme Court clarified this further, explaining that failure to train could constitute an official policy when it "evidences a deliberate indifference to the rights of its inhabitants." *Id*. at 389. The Court explained:

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which

> the city may be held liable if it actually causes injury.

Id. at 390.

"[A] systematic failure to train police officers adequately is a custom or policy which can lead to municipal liability." *Gregory v. City of Louisville,* 444 F.3d 725, 753 (6th Cir. 2006) (citing *City of Canton v. Harris,* 489 U.S. 378, 388 (1989)). Under a "failure to train" theory of municipal liability, plaintiff must show that (1) a training program is inadequate to the tasks that the officers must perform; (2) the inadequacy is the result of the municipality's deliberate indifference; and (3) the inadequacy is closely related to or actually caused the plaintiff's injury. *Plinton v. Cnty. of Summit,* 540 F.3d 459, 464 (6th Cir. 2008) (citing *City of Canton,* 489 U.S. at 389-91).

First, plaintiff has failed to establish that the Department's creation and distribution of its policy on pursuits was inadequate. Plaintiff argues erroneously that "Miller had no training for freeway pursuits." (Dkt. 18 at 20). The record shows, to the contrary, that in 2009, officers in the Department were provided the policy on high speed pursuits. It was presented during training, and the officers were required to read the policy. They were then asked if they understood it or had any questions. All of the officers, including Officer Miller, responded that they understood the policy. (Dkt. 18-11. at 34-35). The officers were told to only use rolling roadblocks in a way that would give the pursued vehicle an opportunity to stop and were instructed to only use such a tactic as a "last resort." They were also instructed to seek approval from a supervisor before initiating any type of roadblock.

Even if the Court were to rely on Professor Alpert's testimony, while he notes that training on high-speed pursuits is necessary, he does not establish or explain how the training the Department provided was inadequate. (Dkt. 18-9). Interestingly, he testified that the Department's pursuit policy was "balanced." (Id. at 4). He also believes that periodic testing is necessary, but this policy was provided about two years prior to this incident, and he reaches no conclusion about whether the training needed to be more frequent than that. Plaintiff has failed to set forth any legal authority to show that the Department's training was inadequate.

Even if the Court were to find that defendant's training was inadequate, plaintiff has still failed to establish that the Department was deliberately indifferent.

"[D]eliberate indifference can be demonstrated in two ways: through evidence of prior instances of unconstitutional conduct demonstrating that the municipality had notice that the training was deficient and likely to cause injury but ignored it, or through evidence of a single violation of federal rights, accompanied by a showing that the municipality had failed to train its employees to handle recurring situations presenting an obvious potential for such a violation." *Okolo v. Metro. Gov't of Nashville*, 892 F. Supp. 2d 931, 942 (M.D. Tenn. 2012) (citing *Harvey v. Campbell Cnty., Tenn.*, 453 Fed. App'x 557, 562-63 (6th Cir. 2011)). Plaintiff has not alleged that there have been any prior instances of unconstitutional conduct at the Fowlerville Police Department. "Deliberate indifference based on a single violation of rights

requires a complete failure to train the police force, training that is so reckless or grossly negligent that future police misconduct is almost inevitable or would properly be characterized as substantially certain to result." *Okolo*, 892 F.Supp. 2d at 943. Plaintiff has provided the Court with *no* legal authority to support the argument that defendant's training was reckless or grossly negligent.

For these reasons, defendant Fowlerville cannot be found liable based on a failure-to-train theory.

3. Failure to Supervise

Failure to supervise, as with failure to train, triggers municipal liability where "the need for more adequate supervision was so obvious and the likelihood that the inadequacy would result in the violation of constitutional rights was so great that the [municipality] as an entity can be held liable." *Leach v. Shelby Cnty. Sheriff*, 891 F.2d 1241, 1248 (6th Cir. 1989).

Here, Officer Miller was evaluated and found to be lacking in key judgment that would be necessary in life or death situations. He also made concerning statements about the police being "judge, jury, and executioner." However, this statement was made and these evaluations were conducted in 2006, about five years prior to the incident in this case. (Dkts. 18-2 & 18-3). Chief Couling acknowledged that those kinds of statements and reviews would warrant additional supervision. Given the small size of the Department, Chief Couling would conduct evaluations informally and would only intervene with more formal supervision if there were a reason to do so. In the five years since

the evaluations in the record, there is no evidence that Officer Miller showed signs of lacking judgment nor is there any evidence that additional supervision was required.

Plaintiff has failed to demonstrate that the Department's supervision of Officer Miller was constitutionally inadequate. All federal claims against the Village of Fowlerville will be dismissed because plaintiff has failed to raise a material question of fact such that a reasonable juror could find it liable.

E. Whether Plaintiff Can Recover Damages for Pain and Suffering, Loss of Society and Companionship, and Punitive Damages.

1. Pain & Suffering

Defendants argue that under Michigan law, damages for pain and suffering may only be recovered to the extent the decedent experienced conscious pain between the time of injury and the time of death. MCL § 600.2922(6). Michigan state law for damages applies in a § 1983 case. *See Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 598-99 (6th Cir. 2006) (applying Michigan state law to damages following a default judgment in a § 1983 case).

Plaintiff makes a series of erroneous policy arguments that state law should not apply in a case of this nature. Plaintiff appears to argue that if there are no pain and suffering damages then there are no damages at all. In the Tenth Circuit case plaintiff cites, the court found that pain and suffering damages were appropriate but only *to the extent they occurred before death*. *Berry v. City of Muskogee, Okl.*, 900 F.2d 1489, 1507 (10th Cir. 1990).

Here, the undisputed evidence is that following the crash, Stamm was found to be unconscious and barely breathing and was declared dead shortly thereafter. Because plaintiff has provided the Court with no evidence of conscious pain and suffering and because Michigan law and §1983 only permit injuries for damages that occurred while conscious, the Court will not permit plaintiff to recover pain and suffering damages. *See* MCL § 600.2922(6); *Blaty*, 454 F.3d at 598-99

2. Loss of Society and Companionship

Defendants also argue that plaintiff is not entitled to any loss of society and companionship damages. While there is a split in the circuits, the Sixth Circuit has made it clear that § 1983 "provides a cause of action which is *personal* to the injured party." *Purnell v. City of Akron*, 925 F.2d 941, 948 n. 6 (6th Cir. 1991); *see also Jaco v. Bloechle*, 739 F.2d 239, 241 (6th Cir. 1984) ("[b]y its own terminology, the statute grants the cause of action to the party injured."); *Broadnax v. Webb*, 892 F. Supp. 188, 190 (E.D. Mich. 1995) (acknowledging that the Sixth Circuit did not recognize a loss of companionship claim by the children of a parent who suffered a constitutional deprivation under § 1983).

Plaintiff, however, has also brought a wrongful death claim under Michigan law which *does* permit damages for the loss of companionship. *See Thorn v. Mercy Memorial Hosp. Corp.*, 281 Mich. App. 644, 666 (2008); *Lamson v. Martin*, 182 Mich. App. 233 (1990).

3. Punitive Damages

Finally, defendants argue that plaintiff is not entitled to punitive damages. Punitive damages in a § 1983 case are only available "if defendants conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 US 30, 56 (1983). It is within the discretion of the fact-finder to determine "the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent." *Gordon v. Norman*, 788 F.2d 1194, 1199 (6th Cir. 1986). For the reasons set forth in further detail above, plaintiff has raised a material question of fact as to whether Officer Miller had ill-motive or whether his conduct was recklessly indifferent to Stamm's federally protected rights.

Punitive or exemplary damages, however, are not available under Michigan's wrongful death law. *Fellows v. Superior Prods. Co.*, 201 Mich. App. 155, 157-58 (1993) (quoting *In re Disaster at Detroit Metro. Airport on Aug. 16, 1987,* 750 F. Supp. 793, 805 (E.D. Mich. 1989).

At this stage in the case, plaintiff may pursue punitive damages on her surviving constitutional claim against Officer Miller.

IV. Conclusion

Accordingly, for the reasons set forth above, IT IS HEREBY ORDERED that:

Plaintiff's motion for partial summary judgment (Dkt. 19) is DENIED.

Defendants' motion for summary judgment is DENIED IN PART and GRANTED IN PART. (Dkt. 16).

Defendant Officer Miller is not entitled to qualified immunity because there remain issues of material fact to be resolved by a jury.

Plaintiff's Fourteenth Amendment claim is DISMISSED as abandoned.

Plaintiff's constitutional claims against defendant Village of Fowlerville are DISMISSED.

Plaintiff shall not be permitted to pursue pain and suffering damages under either her state or federal claims pursuant to MCL § 600.2922(6) and *Blaty*, 454 F.3d at 598-99. Plaintiff may continue to seek loss of companionship damages under her wrongful death claim and punitive damages under her § 1983 claim.

IT IS SO ORDERED.

Dated: April 27, 2015
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on April 27, 2015.

s/Felicia M. Moses
FELICIA M. MOSES
Case Manager

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-1601

[Filed December 19, 2016]

MARY STAMM, PERSONAL REPRESENTATIVE OF THE ESTATE OF CARL A. STAMM, IV,
Plaintiff-Appellee,

v.

FREDERICK MILLER,
Defendant-Appellant,

O R D E R

BEFORE: SILER, GIBBONS, and COOK, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Further, the appellee's motion for leave to file a response to the

petition for rehearing en banc and for sanctions is denied.

ENTERED BY ORDER OF THE COURT
/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk