UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

NEKA WELLS, as mother and next friend of ALIJAH HEYWARD and ALONZO HEYWARD, JR. and TANISHA JOHNSON as mother and next friend of ANIYAH HEYWARD,	*	
Plaintiffs,	*	
v.	*	**CIVIL ACTION NO. 1:09-CV-219**
CITY OF CHATTANOOGA, et al.,	*	**JUDGE COLLIER**
Defendants.	*	

AMENDED MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT OFFICERS' MOTION FOR SUMMARY JUDGMENT

COME NOW, the Defendant police officers, by through their attorneys of record, and hereby submit their Amended Memorandum of Law in support of their Amended Motion for summary judgment.

PROCEDURAL HISTORY

On August 20, 2009, four (4) Plaintiffs filed this complaint in the United States District Court for the Eastern District of Tennessee.[1] The Complaint named the City of Chattanooga ("Defendant City"), the Chattanooga Police Department ("CPD"), and six (6) of its police officers, individually and in their official capacities, as Defendants. The complaint arose after Alonzo Heyward was shot and killed on July 18, 2009 at 4316 7th Avenue after an encounter with these CPD officers.

[1] Complaint, Court File No. 1.

The complaint has three (3) counts. Count I asserts that the officers violated Plaintiffs' constitutional rights under 42 U.S.C. § 1983 by using excessive and unreasonable deadly force against Alonzo Heyward.

Count II alleges that the City and the CPD had an unconstitutional policy or custom of failing to adequately train officers in the use of deadly force at the time of this incident which was an underlying cause of Mr. Heyward's death. Count II further asserts alternatively that the Defendants violated the rules and regulations of the CPD and the United States and Tennessee constitutions regarding the use of deadly force.

Finally, Count III asserts that the City, the CPD and the officers were negligent in that they committed acts and/or omissions in the course and scope of their employment with the City and that as a direct and proximate result of the Defendants' acts and/or omissions, Mr. Heyward was killed under the Tennessee Governmental Tort Liability Act. Plaintiffs seek a declaratory judgment on CPD policies and practices complained herein as well as compensatory damages, punitive damages, and attorney fees and costs pursuant to 42 U.S.C. §1988.

On October 5, 2009, the officers filed an Answer.[2] On December 7, 2009, the City and the CPD filed an Answer.[3] All Defendants denied that they were liable for any injury or death to the Plaintiffs as a matter of law. All Defendants submitted that their actions were justified, reasonable and appropriate under Tennessee law pursuant to T.C.A. § 39-11-611 and/or 39-11-620 since the officers had probable cause to believe that Alonzo Heyward posed a threat of serious bodily injury and/or death to either them and/or to others. Both asserted various defenses of immunity. The City and CPD further denied any unconstitutional policy, custom or practice adopted by any official policymaker of the City of Chattanooga.

[2] Court File No. 12.
[3] Court File No. 22.

On November 24, 2009, this Court dismissed Plaintiffs, James L. Marine and Margie Marine, from the case on motion of the Defendants.[4] The only remaining Plaintiffs are Neka Wells and Tanisha Johnson, who are the mothers and next friends of three (3) minor children of the decedent, Alonzo Heyward.

The parties have conducted eighteen (18) depositions including Neka Wells, Tanisha Johnson, James Heyward, Otis Smartt, Lauren Bacha, Zachary Moody, Amanda Counts, T.E. "Skip" Vaughn, William Salyers, Debra Dennison Harden, George Romero, Pamela Millsap, Toran Madding, Darrell Turner, James Marine, James Holloway, Bill Phillips and Frank King.

Both the City, the CPD and the officers timely filed their Motions for Summary Judgment. By Court order dated April 13, 2011[5], the officers submit this Amended Memorandum of Law in support of their Amended Motion for Summary Judgment.

FACTS

On July 18, 2009, Officers Bacha, Dennison, Moody, Romero, Salyers and Wood were employed with the Chattanooga Police Department as patrol officers and were working third shift within the Fox District.[6] At 4:15 a.m., Officers Dennison, Salyers and Wood were dispatched to a disturbance of a man with a gun in the middle of Rossville Boulevard. Officers Salyers and Wood responded to the scene in different patrol cars along with Officer Romero who came in Officer Dennison's place.[7]

---

[4] Order on Motion to Dismiss, Court File No. 21.

[5] Court File No. 65.

[6] Deposition of T.E. Vaughn, Exhibit 7-5, Daily Assignment Roster, hereafter referred to as "Exhibit 1".

[7] Deposition of T.E. Vaughn, Exhibit 7-11, Hamilton County 911 Consolidated Incident Report, hereafter referred to as "Exhibit 2"; Deposition of T.E. Vaughn, Exhibit 6-2, Statement of Officer William Salyers, hereafter referred to as "Exhibit 3", pp. 3, 6; Deposition of T.E. Vaughn, Exhibit 6-8, Statement of Officer George Romero, hereafter referred to as "Exhibit 4", p. 3; Deposition of T.E. Vaughn, Exhibit 6-13, Statement of Officer Bryan Wood, here after

Upon Officer Salyers arrival, he pulled into the McDonald's parking lot and saw the deceased, Alonzo Heyward, standing in front of some bushes.[8] Heyward immediately picked up a long rifle that he had thrown in the bushes located in the McDonald's parking lot.[9] After retrieving the gun, Heyward pointed the barrel of the weapon at his chin and had his finger on the trigger.[10] Officers Romero, Salyers and Wood all parked their vehicles in the McDonald's parking lot at 4:20 a.m.[11] There were two (2) civilians with Alonzo Heyward, his brother, James Heyward, and a friend, Otis Smartt.[12]

Because Alonzo Heyward was armed with a long rifle, the three (3) officers drew their weapons.[13] All three (3) ordered Heyward to drop his gun. He refused to comply and stated the officers would have to kill him.[14] Even Heyward's brother, James, and his friend, Otis, were yelling at him to put his gun down. Still Heyward refused to comply.[15]

Alonzo Heyward began walking up a residential street with his loaded rifle. As he walked, the officers, as well as the citizens, kept telling him to drop his weapon. At all times, he refused to comply and kept walking away from the officers.[16] At times during the walk, Alonzo Heyward would turn and confront the officers. The officers kept their distance between

---

referred to as "Exhibit 5", p. 3; Deposition of T.E. Vaughn, Exhibit 6-14, Statement of Officer Deborah Dennison, hereafter referred to as "Exhibit 6", p. 5.

[8] Ex. 3, p. 8.

[9] Ex 3, p. 9; Deposition of James Heyward, hereafter referred to as "Exhibit 7", p. 52; Deposition of Otis Smartt, hereafter referred to as "Exhibit 8", p. 73.

[10] Ex. 3, p. 12; Ex. 4, p. 5; Ex. 5, p. 5; Ex. 8, p. 73.

[11] Ex. 2.

[12] Ex. 2; Ex. 4, p. 5; Ex. 3, p. 8-9; Ex. 5, p. 3; Ex. 7, p. 48; Ex. 8, pp. 57, 80.

[13] Ex. 3, p. 10; Ex. 4, p. 6; Ex. 5, p. 5.

[14] Ex. 3, p. 10; Ex. 4, p. 6; Ex. 5, p. 5; Ex. 4, p. 8; Ex. 5, pp. 5, 7; Deposition of James Holloway, hereafter referred to as "Exhibit 9", p. 17.

[15] Ex. 7, pp. 42, 49, 51, & 60; Ex. 8, pp. 67-68).

[16] Ex. 7, pp. 55, 56.

themselves and Alonzo Heyward. The officers began begging Mr. Heyward to put his gun down.[17]

During this walk, Officer Dennison arrived and joined Officers Romero, Salyers and Wood. She heard Heyward state that the police would have to kill him. Officer Dennison also begged him to drop his rifle.[18] At one point, Officer Wood said that someone should get out a taser.[19] At another point during the walk, Officer Romero thought about using his taser.[20] During the walk, at approximately 4:23 am, a hostage negotiator and SWAT team were requested on radio dispatch.[21]

After walking approximately two (2) blocks in approximately four (4) minutes, Mr. Heyward turned and walked into the yard of a residence.[22] There were several people outside this residence at the time.[23]

As Heyward, Officers Romero, Salyers, Wood, and Dennison, James Heyward, and Otis Smartt entered the front yard of the residence, Officers Bacha and Moody arrived on the scene.[24] James Heyward approached Officer Moody and stated that Alonzo Heyward was drunk, suicidal, and that his weapon was loaded.[25] Alonzo Heyward refused to comply with the officers orders by refusing to stop and refusing to put the gun down in the front yard of the residence. Against the police's orders, Mr. Heyward walked up onto the porch of the residence as if he was going to

---

[17] Ex. 7, p. 57; Ex. 3, pp. 11-13; Ex. 4, pp. 7-10; Ex. 5, p. 6-10.
[18] Ex. 3, p. 14; Ex. 6, pp. 7-8, 10.
[19] Ex. 6, p. 13.
[20] Ex. 4, p. 7.
[21] Ex. 2.
[22] Ex. 2; Ex. 3, pp. 15-17.
[23] Ex. 5, p. 10.
[24] Deposition of T.E. Vaughn, Exhibit 6-7, Statement of Officer Zachary Moody, hereafter referred to as "Exhibit 10", p. 6; Deposition of T.E. Vaughn, Exhibit 6-1, Statement of Officer Lauren Bacha, hereafter referred to as "Exhibit 11", pp. 8-9; Ex. 3, p. 14.
[25] Ex. 10, p. 5; Ex. 11, p. 8.

enter the house.[26] Officer Wood again asked for an officer to get out their taser. Officer Dennison holstered her pistol and drew her taser. The officers did not want Alonzo Heyward to enter a residence with a firearm. They did not know who was inside. They did not want to allow an armed fleeing suspect to take cover inside a house. He was a serious threat to himself, to others and to the officers and could have turned the gun on anyone in a split second. At this point, Heyward was actively resisting their commands by refusing to drop his weapon and walking away from them. Officer Dennison deployed her taser.[27]

One of the taser darts hit Alonzo Heyward in the front left bicep. The other dart missed.[28] According to an expert at Taser, if only one dart hits your body, you would receive a minimal amount of electricity and not the full dose.[29]

Heyward, upon being struck by a single taser dart, turned and lowered his gun towards the officers.[30] Officer Brian Wood yelled "no, no, no, no, no."[31] In fear for their lives and the lives of others, the officers fired their weapons.[32] At 4:25 a.m., the officers report to dispatch that shots had been fired.[33] The total time between the first officers arriving at McDonald's and shots fired was approximately five (5) minutes. *Id*. There was not enough time for a hostage negotiator or the SWAT team to arrive at the scene.

---

[26] Ex. 11, pp. 8-9; Ex. 3, pp. 10, 12, 13, 15, & 16; Ex. 10, p. 6; Ex. 4, pp. 6-9, 11-12; Ex. 5, pp. 5, 6, 8, & 11; Ex. 6, p. 14.
[27] Ex. 5, pp. 10, 20-21; Ex. 6, pp. 14-15.
[28] Deposition of Frank King, hereafter referred to as "Exhibit 13", pp. 51-53; Deposition of Frank King, Exhibit 2, Medical Examiners Report, hereafter referred to as "Exhibit 14", pp. 6, 16; Deposition of T.E. Vaughn, hereafter referred to as "Exhibit 15", pp. 70, 71, 73, & 75.
[29] Ex. 13, pp. 51- 53; Ex. 14, pp. 6, 16; Ex.15, pp. 70, 71, 73, & 75; Report from Rick Guibault, hereafter referred to as "Exhibit 22".
[30] Ex. 11, pp. 10-11; Ex. 3, pp. 19-20; Ex. 10, pp. 6-7; Ex. 4, pp. 11-12; Ex. 5, pp. 23-24; Ex. 6 , pp. 16-17.
[31] Ex. 11, p. 11; Ex. 5, p. 23.
[32] Ex. 11, pp. 10-11; Ex. 3, pp.19-20; Ex. 10, pp. 6-7; Ex. 4, pp. 11-12; Ex. 5, p. 23-24; Ex. 6, pp. 16-17.
[33] Exhibit 2.

Several rounds struck Mr. Heyward as he was standing.[34] Alonzo Heyward fell backwards, but the firearm was still pointed at the officers.[35] Alonzo Heyward fired his rifle at the officers.[36] Officers Romero and Moody both felt dirt, rocks, and debris kick up on their arms, shoes and watch.[37] Because the threat was still present in that Heyward's barrel of his rifle was still pointed towards the officers, the officers fired a subsequent volley.[38]

These officers were trained to fire and continue to fire their weapons until the threat is no longer present. In this case, the officers did not know if Alonzo Heyward was wearing a bullet proof vest or other armor under his clothing as the bullets appeared to have little effect on him.[39] Still Mr. Heyward did not release the gun.[40] Mr. Heyward still allowed the gun to be pointed towards the officers and they again fired because they each felt the threat was still present.[41]

With Heyward laying on the ground, the officers entered the porch. The officers attempted to secure the gun from Mr. Heyward's hand.[42] Still, Mr. Heyward refused to release the gun and had his finger on the trigger. Finally, after a few minutes, the officers were able to wrestle the gun away and secure it.[43] It took the officers close to two (2) minutes to take the gun away from Heyward according to reports to dispatch.[44]

Detective James Holloway testified that he was the lead Major Crimes investigator on this case. The Tennessee Bureau of Investigation also participated. Detective Holloway

---

[34] Ex. 13, pp. 59, 60, & 64.
[35] Ex. 11, p. 11; Ex. 3, pp. 20-21; Ex. 10, p. 7; Ex. 4, p. 12; Ex. 5, p. 25; Ex. 6, p. 18-19.
[36] Ex. 10, p. 27; Ex.4, p. 12.
[37] Ex. 10, p. 27; Ex. 4, p. 12; Ex. 9, p. 52.
[38] Ex. 11, p. 11; Ex. 3, pp. 20-21; Ex. 10, p. 7; Ex. 4, p. 12; Ex. 5, p. 26; Ex. 6, p. 19.
[39] Ex. 15, p. 95.
[40] Ex. 3, pp. 20-21; Ex. 5, pp. 26-27.
[41] Ex. 3, pp. 20-21; Ex. 5, pp. 26-27.
[42] Ex. 6, pp. 28-29.
[43] Ex. 6, pp. 28-29.
[44] Ex. 2.

contacted a number of witnesses at the scene that morning, including Amanda Counts, Alonzo Heyward's girlfriend, who reported seeing Alonzo lowered the weapon at the officers and approximated that he lowered the weapon to a 45 degree angle before police shot him.[45] She gave this statement to Det. Holloway at 5:27 a.m.[46] Det. Holloway took preliminary statements from the six officers involved in this shooting on the morning of July 18, 2009, and a recorded interview was obtained the following morning on July 19, 2009.[47]

Det. Holloway's investigation also found that Alonzo Heyward was in possession of a .44 caliber high powered rifle, that it was loaded and that it was in the ready to fire position with its hammer back when it was secured by crime scene.[48] Det. Holloway was advised that CPD Investigator Brian Russell had found a .44 Remington magnum rifle shell casing on the porch and a .44 magnum projectile in the front yard in the vicinity of Officer.[49] In a lab report dated June 24, 2010, a TBI firearms expert determined that this round found at Romero's footsteps had been fired by Alonzo Heyward's .44 caliber rifle.[50] On the TBI Report, Exhibit 82-A was the bullet fired through the barrel of Exhibit 24-A which was a Marlin .44 Remington Magnum Rifle.[51] After looking at photographs at the scene, Det. Holloway determined that evidence marker item 94 marks the location where the .44 bullet fragment was found which matched

[45] Ex. 9, pp. 26-27.
[46] Ex. 9, pp. 26-27.
[47] Ex. 9, p. 32.
[48] Ex. 9, p. 45, 53-54, 56 & 87; Deposition of Bill Phillips, Exhibit 1, Official Firearms Report hereafter referred to as "Exhibit 16", pp. 2-3.
[49] Ex. 9, pp. 48-52.
[50] Ex. 9, pp. 53, 87; Ex. 16, pp. 2-3.
[51] Ex. 9, p. 87.

Heyward's .44 caliber rifle.[52] Det. Holloway further corroborated that evidence marker 94 was where Officer Romero was standing during the encounter.[53]

Further, the investigation discovered that earlier in the evening, Alonzo Heyward had attended an event at the Bessie Smith Hall with his girlfriend, Amanda Counts, and alcohol was served. After leaving that event prior to midnight, Alonzo Heyward drove Counts' car and wrecked it. The investigation revealed that Alonzo Heyward had struck a telephone pole causing severe damage to the passenger side of Amanda Counts' vehicle. There was significant damage all along the passenger side of the vehicle, including a shattered passenger window and a broken side mirror.[54] Amanda Counts had been injured in the accident and was bleeding.[55]

In addition, the investigation revealed that when Counts and Heyward came home, that they drove into Heyward's driveway at a high rate of speed. The two were arguing. Counts went to tell a neighbor, Darrell Turner, and asked to be taken to the hospital.[56] Heyward, upon learning that Counts told Turner, got mad. He retrieved the .44 caliber rifle and began threatening suicide. This began at approximately midnight. Darrell Turner testified that Heyward shot his .44 caliber rifle up in the air while standing on his front porch.[57] While Darrell Turner was attempting to get Mr. Heyward to give him his rifle, Alonzo threatened Mr. Turner saying, "its going to be either you or me."[58] At one point, Darrell Turner felt so threatened by

---

[52] Ex. 9, pp. 90-91.
[53] Ex. 9, pp. 90-91.
[54] Deposition of Amanda Counts, here after referred to as "Exhibit 17", pp. 33, 58-59; Ex. 17, p. 64; Ex. 17, pp. 64, 113; Deposition of Amanda Counts, Exhibit 4, Photograph, hereafter referred to as "Exhibit 18".
[55] Deposition of Amanda Counts, Exhibit 8, photograph, here after referred to as "Exhibit 19"; Deposition of Darrell Turner, hereafter referred to as "Exhibit 20", pp. 136-137.
[56] Deposition of Pamela Millsap, hereafter referred to as "Exhibit 21", pp. 28-29; Ex. 20, p. 308.
[57] Ex. 20, pp. 142-143, 308-309.
[58] Ex. 20, p. 250.

Heyward that he called his sister and asked her to come get him.[59] At another point, Heyward asked to speak to his children and retrieved a bible.[60]

For the next four (4) hours, multiple people, family and friends, arrived and attempted to talk Mr. Heyward into putting the gun down.[61]

James Heyward testified that he stayed with his brother from approximately midnight or 12:30 am until the shooting around 4:15-4:20 am.[62] Alonzo Heyward told James on the porch that he had been thinking about doing this for a year.[63] Alonzo Heyward also told his brother the gun was loaded.[64] The gun was approximately 36 inches long.[65] James Heyward, Amanda Counts, Darrell Turner and Otis Smartt all attempted to persuade Alonzo Heyward to put the gun down without success before police arrived.[66]

On the walk back from the McDonald's, James Heyward testified that Alonzo would just turn around when he was walking and "I guess wanted them to shoot him."[67] Alonzo told James that the gun was loaded and James saw that the hammer on the gun was pulled back.[68]

According to James Heyward, after returning from the McDonald's, he observed Alonzo Heyward walking up the steps of the front porch of 4316 7th Avenue with the rifle still pointed at his chin and finger on trigger while everyone was trying to tell Alonzo to drop the gun.[69] James Heyward saw an officer step up on the first step and tase Alonzo Heyward just as he turned

---

[59] Ex. 20, p. 143.
[60] Ex. 20, p.143.
[61] Ex. 20, pp. 144 -145, 154-156.
[62] Ex. 7, pp. 33-34.
[63] Ex. 7, pp. 80-81.
[64] Ex. 7, p. 40.
[65] Ex. 15, p. 58.
[66] Ex. 7, pp. 44-46.
[67] Ex. 7, pp. 81-83.
[68] Ex. 7, pp. 108-109.
[69] Ex. 7, pp. 57-58.

around on the porch before shots rang out.[70] Alonzo Heyward's rifle moved out away from his chest after he was tased and he was shaking on the porch until they fired.[71]

Otis Smartt testified that he got a call from Alonzo at approximately 11 pm when he was in bed and Alonzo was over at the Bessie Smith Hall.[72] Darrell Turner then called Otis when he was asleep and he said "Alonzo's tripping, he got this gun out, man." Otis said he was on his way and hung up the phone.[73] Otis took his time getting dressed and got over there approximately 45 minutes to an hour later. Otis estimated his arrival time at approximately 4:45 or 5:00 am.[74] Otis saw Alonzo standing on the porch with a gun when he drove up.[75] What he saw on the porch at that time wasn't the Alonzo that Otis knew.[76]

Otis saw Alonzo jump off the porch and he started walking toward the McDonalds carrying the rifle.[77] Otis told Alonzo to put the gun down multiple times on this walk.[78] When the police arrived, Otis was standing in the parking lot of McDonalds and Alonzo was near the bushes.[79] Otis told police "please don't shoot. He is drunk. He is suicidal."[80] Otis said that he could smell alcohol on Alonzo and he talked slurrish.[81] On the way back to the house, the officers had their guns drawn and were hollering at Alonzo to just put the gun down, put the gun down.[82] After they got back to Alonzo's house, Alonzo walked up on the porch and turned

---

[70] Ex. 7, pp. 64-67.
[71] Ex. 7, pp. 64-66, 131-132.
[72] Ex. 8, pp. 122-123.
[73] Ex. 8, pp. 43-44.
[74] Ex. 8, pp. 44-45.
[75] Ex. 8, pp. 45-46.
[76] Ex. 8, pp. 52-53.
[77] Ex. 8, pp. 53-54.
[78] Ex. 8, pp. 67-68.
[79] Ex. 8, pp. 68-69.
[80] Ex. 8, pp. 70-71.
[81] Ex. 8, pp. 71-72.
[82] Ex. 8, pp. 78-80.

around and when Alonzo brought the gun to his right side, they tased him.[83] Otis Smartt has testified that when Alonzo was tased he went back and fell to the side and the gun was up under him when he fell.[84] Otis Smartt testified that Alonzo Heyward was laying on the ground on his right side when the first shot was fired.[85] Otis testified that Alonzo was not acting normally that evening and was doing things he would not expect him to do based on his knowledge of him for ten years.[86]

Amanda Counts was in the front yard of 4316 7th Avenue when the police pulled up.[87] The officers kept yelling for Alonzo to drop his weapon.[88] Amanda Counts told Alonzo just drop the weapon, just put it down but he turned and walked back up on the porch.[89] Amanda testified that the officers said drop your weapon and about that time they tased him and he fell but she did not know which way he was looking when they tased him.[90] Amanda testified that Alonzo fell toward the back wall of the house on the front porch.[91] Amanda testified that the gun never hit the porch except when he hit and that the officers opened fire while the gun was still on him.[92] Amanda backed up behind the officers when they started shooting and stayed there until the shooting was done right at the rear edge of the car.[93]

At approximately 5:27 a.m., on the morning of the shooting, Amanda Counts advised Detective James Holloway, that she saw Alonzo Heyward lower the weapon towards the officers

---

[83] Ex. 8, pp. 81-82.
[84] Ex. 8, pp. 81-82.
[85] Ex. 8, pp. 111-112.
[86] Ex. 8, pp. 166-167.
[87] Ex. 17, pp. 93-94.
[88] Ex. 17, pp. 94-95.
[89] Ex. 17, pp. 94-95.
[90] Ex. 17, pp. 96-97.
[91] Ex. 17, pp. 100-101.
[92] Ex. 17, pp. 100-101.
[93] Ex. 17, pp. 102-103.

and she actually gestured which hand he lowered his weapon with.[94] Less than two hours later, at approximately 7:00 a.m., Amanda Counts gave a second statement to Major Crimes at the police services center and omitted this important fact.[95] At her deposition, Amanda testified that she did not give a statement at 5:27 a.m. on the morning of the shooting to a law enforcement officer.[96]

The deposition of Frank King establishes that Alonzo Heyward received twenty-six (26) entrance gunshot wounds and also three (3) graze gunshot wounds.[97] Dr. King has been the Hamilton County Medical Examiner since July 1, 1986 and has completed more than 1,400 to 1,500 autopsies and general exams during his career to this point.[98] During his deposition, Dr. King reviewed all entrance wounds and graze gunshot wounds on the body of Alonzo Heyward.[99] Dr. King determined that only one taser dart struck Alonzo Heyward in the front of the left arm.[100] Dr. King indicated on charts B-1 and B-2 to his autopsy report all marks found on Alonzo Heyward's body.[101] Dr. King's autopsy examination established that Heyward only had one small puncture wound that was caused by a single taser dart. He didn't see any other puncture wounds or marks on the decedent that would suggest contact by the second taser dart or any other type of electrical injury.[102]

---

[94] Ex. 17, pp. 231-232.
[95] Ex. 17, pp. 112-113, 199-201.
[96] Ex. 17, pp. 231-232.
[97] Ex. 13, p. 11.
[98] Ex. 13, pp. 6-8.
[99] Ex. 13, pp. 11-45.
[100] Ex. 13, pp. 51-53.
[101] Ex. 13, pp. 55-56.
[102] Ex. 13, pp. 56-57.

Dr. King went through his chart and designated all gunshot wounds where he believes Alonzo Heyward would have been facing the direction of fire.[103] Dr. King counted 16 entrance wounds on the front of the body and if he included the injuries to his arm on wounds FF, GG, AA and II on the back of his left arm, there would be 20 entrance wounds out of 28 total wounds that could have entered his body while he was facing the officers.[104] Dr. King further testified that if Mr. Heyward were lying face down while all this shooting occurred, the shots could not have hit him in the direction on his body that he observed.[105]

Dr. King also determined that Heyward's blood alcohol at the time of death was 0.147.[106] Dr. King opined that Alonzo Heyward would have had seven (7) or eight (8) drinks of alcohol within about two (2) hours of his death in order to reach that level.[107] Because many lay witnesses testified that Alonzo Heyward did not drink anything after midnight, Dr. King was asked to calculate how much alcohol Mr. Heyward consumed prior to midnight. Dr. King testified that Heyward's blood alcohol would have been as high as a .22 four hours before his death (therefore, at around midnight).[108] Dr. Frank King further concluded for Heyward to have such a high BAC, he would have had to consume between twelve (12) to fifteen (15) alcoholic drinks to reach that level.[109]

---

[103] Ex. 13, pp. 60-64.
[104] Ex. 13, pp. 66-67.
[105] Ex. 13, p. 73.
[106] Ex. 13, pp. 67-68.
[107] Ex. 13, p. 69.
[108] Ex. 13, pp. 70-72.
[109] Ex. 13, pp. 68, 70-71, & 74.

This incident was reviewed by the Tennessee Bureau of Investigation and the Hamilton County District Attorney and no criminal charges were instituted against any police officer as a result of this incident.[110]

Lieutenant Danna Vaughn reviewed the relevant training records in the offices of the Training Division of the CPD concerning Officers Bacha, Dennison, Moody, Romero, Salyers and Wood on use of force in the Chattanooga Police Academy and in all annual in-service training she has attended since completion of her academy training.[111] Every year since completing the Academy on March 13, 2008, each of these six (6) officers has received annual update training.[112] All training provided to each of these six (6) officers on use of force met or exceeded training requirements of the Tennessee Post Commission and were approved by the Tennessee Post Commission prior to the time they were given.[113]

Lieutenant Vaughn is familiar with the training policies and procedures of the CPD.[114] In July of 2009, the City of Chattanooga did not have any policy, custom or practice of training its police officers to use any type of force on any person unless it was consistent with the use of force continuum provided in CPD Policy, ADM-5.[115] The practice of training officers further included training on hostage and barricade incidents as provided in Chattanooga Police Department Police OPS-5 and mental illness as provided in Chattanooga Police Department policy OPS-44.[116]

---

[110] Ex. 15, pp. 171-173; Ex. 16; Deposition of T.E. Vaughn, Ex. 7-6, Letter from D.A. to Skip Elrod, SA in charge of TBI, hereafter referred to as "Exhibit 27".
[111] Affidavit of Dana Vaughn, ¶¶ 2, 3, 4, 5, 6, and 7, hereafter referred to "Exhibit 23".
[112] Ex. 23, ¶¶ 2, 3, 4, 5, 6, and 7.
[113] Ex. 23, ¶¶ 2, 3, 4, 5, 6, and 7.
[114] Ex. 23, ¶ 8.
[115] Ex. 12; Ex. 23, ¶ 8.
[116] Ex. 23, ¶ 8.

To Lieutenant Vaughn's knowledge, no policymaking official of the City of Chattanooga has ever authorized or condoned any policy or custom of using excessive force, or improper use of deadly force, nor has the City of Chattanooga failed to properly train its police officers regarding use of force, including the use of electronic weapons and/or deadly force.[117] The City of Chattanooga conducts annual updates on the use of electronic weapons and deadly force.[118]

The records of the Training Division do not establish that the City of Chattanooga knowingly permitted or encouraged its officers by any official pattern, practice or custom to violate the constitutional rights of any citizens, including Alonzo Heyward.[119] The records of the Training Division establish that City policymakers adequately monitored supervised and evaluated the performance of its officers and their use of deadly force prior to July 18, 2009.[120] The records of the Training Division establish that police officers are disciplined for their actions and officers are not allowed to use deadly, excessive and/or unreasonable force without discipline when warranted.[121] The records of the Training Division do not establish that Officers Bacha, Dennison, Moody, Romero, Salyers or Wood were negligently trained in proper police tactics authorized by any official policies of the City of Chattanooga prior to July 18, 2009.[122]

Captain Susan Blaine is familiar with all written policies concerning investigations of complaints against Police Officers by the Internal Affairs Division of the Chattanooga Police

[117] Ex. 23, ¶ 9, Blaine Affidavit, ¶ 4.
[118] Ex. 23, ¶ 9.
[119] Ex. 23, ¶ 10.
[120] Ex. 23, ¶ 11.
[121] Ex. 23, ¶ 12.
[122] Ex. 23, ¶ 13.

Department as they existed on or about July 18, 2009.[123] Captain Blaine is also familiar with the customs and practices within the CPD as they existed on July 18, 2009.[124]

On July 18, 2009 and presently, the City of Chattanooga did not and does not have a policy, custom or practice of failing to investigate citizen complaints.[125] ADM-1 was the official policy concerning investigation of officer complaints in effect on July 18, 2009.[126] This official policy was implemented and followed by the Internal Affairs division of the CPD and Captain Blaine is not aware of any policymaker of the CPD, prior to July 18, 2009, who failed to properly train police officers on the proper basis for using force on a suspect; and the proper use of force in a manner which should not be excessive.[127] Captain Blaine is aware that prior to July 18, 2009, police officers were trained and disciplined if they did not properly use deadly force as required under Tennessee law.[128] Captain Blaine is aware that prior to July 18, 2009 numerous police officers have been investigated and disciplined where warranted regarding improper use of force by an officer where an officer was found to have used force or deadly force in a manner which was not reasonable under the circumstances.[129] Captain Blaine is aware that Chattanooga Police Officers have been trained and disciplined prior to July 18, 2009 to only use or threaten to use deadly force that is reasonably necessary where an officer has a reasonable belief that the officer, other officers or a third person are in imminent danger of death or serious bodily injury when deadly force is used.[130]

---

[123] Affidavit of Captain Susan Blaine, ¶ 2, hereafter referred to as "Exhibit 24".
[124] Ex. 24, ¶ 2.
[125] Ex. 24, ¶ 3.
[126] Ex. 24, ¶ 3.
[127] Ex. 24, ¶ 3.
[128] Ex. 24, ¶ 3.
[129] Ex. 24, ¶ 3.
[130] Ex. 24, ¶ 3.

Captain Blaine is not aware of any policymaking official of the City of Chattanooga who has authorized or condoned any policy, custom or practice in the CPD of allowing its police officers to be inadequately trained or supervised in the use of deadly force as authorized under Tennessee law; or to allow the use of excessive or unwarranted force against any person who is attempting suicide and who may constitute a threat of bodily injury to any officer or other citizens; or to engage in an abuse of power or to misuse their official positions prior to July 18, 2009.[131]

Captain Blaine reviewed the records of the Internal Affairs Division concerning Officers Bacha, Dennison, Moody, Romero, Salyers and Wood prior to July 18, 2009.[132] Captain Blaine is not aware of any founded or sustained Internal Affairs investigations concerning improper use of force or improper arrest procedures by any of these six officers prior to July 18, 2009.[133]

The records of the Internal Affairs Division do not establish that Officers Bacha, Dennison, Moody, Romero, Salyers or Wood had improperly used deadly force in any action as a police officer at any time prior to July 18, 2009 when they made independent decisions to fire their weapons at Alonzo Heyward.[134] The records of the Internal Affairs Division do not establish that the City of Chattanooga knowingly permitted or encouraged its officers by any official pattern, practice or custom to violate the constitutional rights of any citizens, including Alonzo Heyward.[135] The records of the Internal Affairs Division establish that City

[131] Ex. 24, ¶ 5; Affidavit of Lon Eilders, ¶¶ 5, 6, hereafter referred to "Exhibit 25".
[132] Ex. 24, ¶¶ 6, 7, 8, 9, 10 and 11.
[133] Ex. 24, ¶¶ 6, 7, 8, 9, 10 and 11.
[134] Ex. 24, ¶ 12.
[135] Ex. 24, ¶ 13.

policymakers adequately monitored, supervised and evaluated the performance of its officers and their use of deadly force prior to July 18, 2009.[136]

The records of the Internal Affairs Division establish that police officers are disciplined for their actions and officers are not allowed to use deadly, excessive and/or unreasonable force without discipline when warranted.[137] The records of the Internal Affairs Division do not establish that Officers Bacha, Dennison, Moody, Romero, Salyers or Wood were negligently supervised or negligently trained in proper police tactics authorized by any official policies of the City of Chattanooga prior to July 18, 2009.[138] The Internal Affairs investigation into the fatal shooting of Alonzo Heyward did not establish that any of these officers were negligent or in violation of department policy.[139] All six (6) of these officers were exonerated in this fatal shooting incident after consideration of the evidence collected at the scene and the firearms report provided by the Tennessee Bureau of Investigation which was issued on June 24, 2010.[140]

In July of 2009, the City of Chattanooga did not have any policy, custom, or practice of allowing its police officers to use excessive or unwarranted force on a person being taken into custody.[141] ADM-5 was the official policy of the CPD on use of force in effect on July 18, 2009.[142] ADM-32 was the official policy of the CPD on Post Shooting Incident Investigations and Procedures in effect on July 18, 2009.[143]

On July 18, 2009, the City of Chattanooga did not have any policy, custom or practice of allowing its police officers to deny medical attention to injured persons discovered by officers at

[136] Ex. 24, ¶ 14.
[137] Ex. 24, ¶ 15.
[138] Ex. 24, ¶ 16.
[139] Ex. 24, ¶ 16.
[140] Ex. 24, ¶ 16.
[141] Ex. 25, ¶ 2.
[142] Ex. 25, ¶ 2.
[143] Ex. 25, ¶ 2.

crime scenes in the course and scope of their employment.[144] Police officers are trained to immediately request trained medical attention for injured persons and care may be provided when emergency care professionals reach the scene.[145] Police officers have some emergency training in first aid and CPR but they are not trained emergency health care professionals.[146] OPS-5 was the official policy of the Chattanooga Police Department on Hostage and Barricade Incidents in effect on July 18, 2009.[147] OPS-12 was the official policy of the Chattanooga Police Department on Procedures for the Crime Scene Unit in effect on July 18, 2009.[148] OPS-36, the official policy of the Chattanooga Police Department on medical attention to injured persons at crime scenes in effect on July 18, 2009.[149] OPS-44 was the official policy of the Chattanooga Police Department for guidance to law enforcement officers when dealing with suspected mentally ill persons in effect on July 18, 2009.[150]

The City of Chattanooga does not now and did not on July 18, 2009 maintain a policy, custom or practice of employing police officers who are not properly trained or properly supervised.[151] Lon Eilders is aware that all Chattanooga police officers, including the officers who responded to the crime scene on July 18, 2009, receive training from an approved recruit training program which exceeds the qualification and certification requirements for police training required by the State of Tennessee at T.C.A. ''38-8-106, 38-8-107 and 38-8-111.[152]

---

[144] Ex. 25, ¶ 3.
[145] Ex. 25, ¶ 3.
[146] Ex. 25, ¶ 3.
[147] Ex. 25, ¶ 3.
[148] Ex. 25, ¶ 3.
[149] Ex. 25, ¶ 3.
[150] Ex. 25, ¶ 3.
[151] Ex. 25, ¶ 4.
[152] Ex. 25, ¶¶ 4, 6; Ex. 24, ¶ 4.

The policymakers of the CPD have maintained CALEA recognized standards on use of force, hostage and barricade incidents, crime scene unit procedures, medical attention to injured persons, and dealing with suspected mentally ill persons during all applicable periods since it was first accredited by that entity on March 24, 2001.[153] The CPD was in good standing and accredited by CALEA when this incident occurred on July 18, 2009, based on the adoption of recognized standards which are approved by CALEA and many other accredited police agencies in this country.[154]

Kelly Fite reviewed all reports contained in the major crimes files of the Chattanooga Major Crimes Division concerning this shooting incident as well as the Firearms Report of the Tennessee Bureau of Investigation concerning this incident.[155]

Kelly Fite has determined based upon Heyward's height and location on the front porch for the bullet to clear the front edge of the porch and impact the yard at evidence marker 94, the muzzle of the rifle must be 21 inches above the surface of the porch.[156] With the muzzle of the rifle at this minimum height, Mr. Hayward's right foot would be located approximately 6.38 feet from the North edge of the porch and 10.5 feet from the West edge of the porch.[157]

Officer Romero made a statement of feeling debris strike his leg while he was standing the front yard of the residence.[158] The TBI Crime Lab report states that the cartridge case collected at evidence marker 41 was fired from Officer Romero's firearm.[159] This would place Officer Romero in the vicinity of the bullet impact at evidence marker 94 based on the general

---

[153] Ex. 25, ¶ 7.
[154] Ex. 25, ¶ 7.
[155] Affidavit of Kelly Fite, ¶ 2, hereafter referred to "Exhibit 26".
[156] Ex. 26, ¶ 3.
[157] Ex. 26, ¶ 3.
[158] Ex. 26, ¶ 4.
[159] Ex, 26, ¶ 4.

ejection pattern of cartridge cases from a S&W .45A pistol.[160] It is Kelly Fite's opinion that the location of the bullet which was retrieved from under the ground at evidence marker 94 is a bullet which was fired from the .44 magnum rifle during the course of this incident.[161]

It is Kelly Fite's opinion that the movement of all the officers involved in this shooting incident can be approximated by the location of cartridge cases which have been identified by the TBI crime report as having been fired from each officer's pistol.[162] It is further Kelly Fite's opinion that the location of Alonzo Heyward and the direction of fire from the .44 magnum rifle during this incident can be estimated based upon the physical evidence which was present at the scene of this incident and which has been identified by the TBI crime report.[163]

The Plaintiffs have not timely provided any expert witness disclosures which could establish any policy, custom or practice violation. Expert witness policy, custom and practice reports have been submitted by Defendant City from Lou Reiter and Emmanuel Kapelsohn, both of whom determined that no unconstitutional policy, custom or practice existed in the training, supervision or policies of the City of Chattanooga prior to this incident.[164]

STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact issue is "material" only if it could "affect the outcome of the suit under the governing law." *Anderson*

[160] Ex. 26, ¶ 4.
[161] Ex, 26, ¶ 4.
[162] Ex. 26, ¶ 5.
[163] Ex. 26, ¶ 5.
[164] Reiter Report, Court File No. 34-5; Kapelsohn Report, Court File No. 40.

v. Liberty Lobby, Inc., 477 U.S. 242 (1986). A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the non moving party." *Id*.

The moving party must demonstrate no genuine issue of material fact exists and must provide grounds upon which it seeks summary judgment, but does not need to provide affidavits or other materials to negate a non-moving party's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). While the Court views the evidence in the light most favorable to the non-moving party, including all reasonable inferences, the non-movant is not entitled to a trial based solely on its allegations, and must submit significant probative evidence to support its claims. *Id*. at 324. The moving party is entitled to summary judgment if the non-movant fails to make a sufficient showing on an essential element for which it bears the burden of proof. *Id*. at 323. If this Court concludes that a "fair-minded jury could not return a verdict in favor of the non-movant based on the record," then the Court may enter summary judgment. *Anderson v. Liberty Lobby, Inc*. 477 U.S. 242, 251-52 (1986).

MEMORANDUM OF LAW

A. All claims against these officers in their official capacities should be treated as claims against the City of Chattanooga.

At the outset, as to the claims against the Officers in their official capacities, the 6th Circuit has held that claims against state officials in their official capacity should be treated as suits against the state itself. *Hafer v. Melo*, 502 U.S. 21 (1991); *Fox v. Van Oosterum*, 176 F.3d 342, 347 (6th Cir. 1999). Respectfully, all claims against these officers in their official capacity should be considered claims against the City of Chattanooga.

B. Count 3 state law claims for negligence against these officers in their individual capacity should be dismissed pursuant to T.C.A. § 29-20-310.

This Court should dismiss Count 3 of the Complaint against the Defendant Officers. Negligence claims against individual officers under the Tennessee Government Tort Liability Act are claims against the City of Chattanooga. Therefore, Count 3 should be dismissed.

Count 3 captioned "City of Chattanooga and CPD" states "the acts and/or omissions of the defendant officers were committed in the course and scope of their employment with the City of Chattanooga and CPD." *See* Complaint, ¶ 36. The next paragraph states, "the acts and/or omissions of the individual officers constitute negligence under the laws of the state of Tennessee." *Id*. at ¶ 37. Moreover, ¶ 38 states that "pursuant to the Tennessee Governmental Tort Liability Act, defendants, City of Chattanooga, Tennessee and CPD, are liable for the negligent acts of its agents and/or its employees who acted within the course and scope of their positions."

First, the language in the Complaint as to Count 3 clearly alleges that the acts and omissions by the officers themselves were negligence. *See* Complaint, ¶ 37. Count 3 does not allege any intentional tort of any kind.

Second, the Complaint, while it specifically mentions "negligence" does very little to put these officers on notice as to how they were negligent and fails to identify any negligent behavior or conduct. The actual allegation for negligence is conclusory and bare bones. Respectfully, more is needed.

Third, should this Court find that this Complaint does properly allege a negligence claim against these individual officers pursuant to the Governmental Liability Tort Act, T.C.A. §§ 29-20-101—29-20-407, the "GTLA" provides that the City of Chattanooga is immune from suit for the negligent acts or omissions of its employees if the injury arises out of specified torts such as

civil rights actions. T.C.A. § 29-20-205. However, if an employee is merely negligent and the Court finds that the acts of the governmental employee were the proximate cause of the plaintiff's injury, that the employee was acting within the course and scope of his employment and none of the exceptions to T.C.A. § 29-20-205 apply, then the City of Chattanooga may be liable. *Hale v. Randolph*, 2004 U.S. Dist. LEXIS 10173, 2004 WL 1854179 (E.D. Tenn. Jan. 30, 2004); *McKenna v. Memphis*, 544 F.Supp. 415, 419 (W.D. Tenn. 1982); *See Also*, T.C.A. § 29-20-310(c).

Therefore, pursuant to the GTLA, and because the Plaintiffs' claims in Count 3 only sound in negligence, then these officers cannot be held liable in their individual capacities for claims of negligence under the GTLA. These negligence claims are only proper against the City of Chattanooga. Therefore, summary judgment is appropriate to these officers, in their individual capacities, as to Count 3.

C. <u>These officers in their individual capacity are entitled to qualified immunity on the Plaintiffs' § 1983 claims.</u>

Count 1 alleges that these officers deprived Mr. Heyward of his constitutional rights as guaranteed to him by the Fourth and Fourteenth Amendment to the United States Constitution to be free from unreasonable seizure of his person, to be free from the use of deadly, unreasonable, unjustified and excessive force, to be free from the deprivation of liberty without due process of law and to be free from summary punishment.

The Sixth Circuit has stated that qualified immunity, if it applies, is a defense not just against liability, but against the suit itself. *Chappell v. City of Cleveland*, 585 F.3d 901, 910 (6th Cir. 2009) citing to *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808 (2009). The Sixth Circuit has stated that immunity questions "should be resolved as early in the litigation as possible." *Chappell*, 585 F.3d at 907.

Under the doctrine of qualified immunity, "governmental officials performing discretionary functions, generally are shielded from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzegerald*, 457 U.S. 800 (1982). Qualified immunity ordinarily applies unless it is obvious that no reasonably competent official would have concluded that the actions taken were unlawful. *Chappell*, 585 F.3d at 907. Qualified immunity "gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Id*. citing *Hunter v. Bryant*, 502 U.S. 224 (1991) quoting *Malley v. Briggs*, 475 U.S. 335 (1986). Qualified immunity applies irrespective of whether the official's error was a mistake of law, mistake of fact, or a mistake based upon a mixed question of law and fact. *Pearson*, 129 S.Ct. at 815.

The Sixth Circuit holds that the Plaintiffs bear the burden of showing that the defendants are not entitled to qualified immunity. *Chappell*, 585 F.3d at 907; *Untalan v. City of Lorain*, 430 F.3d 312, 314 (6th Cir. 2005). Plaintiff must show both that, viewing the evidence in the light most favorable to them, that a constitutional right was violated and that the right was clearly established at the time of the violation. *Chappell,* 585 F.3d at 907; *Scott v. Harris*, 550 U.S. 372, 377 (2007); *Harrison v. Ash*, 539 F.3d 510, 517 (6th Cir. 2008). If the Plaintiff fails to show either that a constitutional right was violated or that the right was clearly established, then the Plaintiff fails to meet their burden of proof. *Id*. To meet the 2nd prong, the Plaintiff must show that the right was clearly established in a "particulized sense" such "that a reasonable officer confronted with the same situation would have known that using deadly force would violate that right." *Chappell*, 558 F.3d at 907; *Brosseau v. Haugen*, 543 U.S. 194, 199-200 (2004). The Court may address either prong first. *Pearson v. Callahan*, 129 S.Ct. 808 (2009).

1. Constitutional Violation.

Excessive force claims require the Court to employ an "objective reasonableness" standard. *Graham v. Connor*, 490 U.S. 386 (1989). The force, used in making the arrest, must be reasonable under the circumstances. *Id*. This is a fact-based inquiry and requires the Court to focus on several factors such as "(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat of safety to the officers or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*. at 396. The Court must judge the reasonableness of the force "from the perspective of a reasonable officer on the scene," rather than 20/20 hindsight. *Id*. Further, the *Connor* court noted:

> not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. *Id*. at 396-97.

Both the United States Supreme Court and the Sixth Circuit have made clear that "the use of deadly force is constitutionally reasonable if the officer has probable cause to believe that the suspect poses a serious threat of physical harm either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1 (1985); *Sample v. Bailey*, 409 F.3d 689, 697 (6th Cir. 2005). While it is unreasonable for an officer to seize an unarmed, non-dangerous suspect by shooting him dead, the Sixth Circuit has held that un-contradicted evidence that the deceased came out of a closet in a dimly lit room with a knife in hand, refused officers command to drop the knife, and approached officers was sufficient to demonstrate reasonableness for officers claims of qualified immunity when the deceased was shot 10 times. *Chappell v. City of Cleveland*, 585 F.3d 901, 910 (6th Cir. 2009). Moreover, the Sixth Circuit has upheld the use of deadly force by a police officer where the situation revealed a perceived serious threat of physical harm to the officer or

others in the area from the perspective of a reasonable officer. *Boyd v. Baeppler*, 215 F.3d 594, 604 (6th Cir. 2000). In *Baeppler*, the Sixth Circuit reversed the District Court and found that the officers were entitled to qualified immunity in a situation in which two officers fired at an armed suspect. The Sixth Circuit has also upheld the use of deadly force and qualified immunity for police officers who used deadly force against a suspect who had a gun in his hand and pointed it at the officers and others. *Bell v. City of East Cleveland*, 1997 WL 640116 (6th Cir. Oct. 14, 1997). In *Rhodes v. McDaniel*, 945 F.2d 117, 120 (6th Cir. 1991), the Sixth Circuit upheld qualified immunity for a police officer who shot and killed a homeowner wielding a machete who had ignored repeated warnings to drop the weapon.

In the present case, these officers submit that they were entitled use deadly force due to the serious and dangerous actions of Mr. Heyward. Mr. Heyward was highly intoxicated and had consumed 12 to 15 alcoholic drinks according to medical examiner, Dr. Frank King. While in a highly intoxicated state, he decided to drive home with his girl friend. He wrecked causing significant damage to the vehicle and injured his girlfriend, Amanda Counts. Both the wrecked vehicle and the injured girlfriend were present on the scene. According to Daryl Turner, Counts was limping, and wanted to be taken to the hospital and was bleeding. Under Tennessee law, Mr. Heyward had not only committed a DUI (pursuant to T.C.A. § 55-10-401), but also a vehicular assault, a Class D felony, T.C.A. § 39-13-106 (defined as "[a] person commits vehicular assault who, as the proximate result of the person's intoxication as set forth in § 55-10-401, recklessly causes serious bodily injury to another person by the operation of a motor vehicle"). He then left the scene of the accident involving an injury, a violation of T.C.A. § 55-10-101, a class A misdemeanor. After turning into his driveway at a high rate of speed, he began arguing with Counts, who proceeded to seek medical assistance from a neighbor, Daryl Turner.

Angry that Counts told Turner about the wreck, Heyward grabbed a loaded .44 caliber high powered rifle. According to Turner, he fired the high powered rifle into the air. Respectfully, these Plaintiffs submit that firing a high powered rifle in a neighborhood such as those around Rossville Boulevard constitutes reckless endangerment which is a class E felony, as defined by T.C.A. § 39-13-103. Further, according to Turner, Heyward threatened him while holding the loaded .44 caliber rifle saying it was either going to be you or me. Again, the Plaintiffs contend that this amounted to an aggravated assault, a class C felony in violation of T.C.A. § 39-13-102. Turner was so afraid that he called his sister to come and get him. Heyward's closest family members over the next several hours could not talk him into dropping the gun. They believed he was suicidal, but he had threatened Turner. The Plaintiffs' assumption that Heyward was merely suicidal attempts to make rational, an irrational situation. The Plaintiffs' argument recklessly assumes that Heyward was telling the truth, a fact in which no reasonable officer would ever consider or entertain while in the heat of the moment. That assumption is precisely how law enforcement officers die in the line of duty.

Still drunk and armed with a high powered rifle, Heyward left his personal residence and proceeded to walk into the middle of Rossville Boulevard, a highly traveled and busy 5 lane highway between the City of Chattanooga and Rossville, Georgia. In Tennessee, possession of a firearm with the intent to go armed is a criminal offense, albeit a misdemeanor. T.C.A. § 39-17-1307. Possessing a high powered rifle while intoxicated out on the public street while in an argument with your brother and best friend could constitute felony reckless endangerment, a violation of T.C.A. § 39-13-103 or simply disorderly conduct, a misdemeanor.

Escalating an already dangerous situation, Heyward proceeded to take the loaded rifle to a business, McDonald's. He threw the gun down in the bushes in the parking lot, but of

particular concern, is why he picked the gun back up, effectively arming himself, as soon as he saw the officers pull into the parking lot. Officer Salyers witnessed this act by Heyward.

Any reasonable officer would draw their weapons and order Mr. Heyward to drop his weapon. They consistently did this by asking him, yelling at him, and ultimately begging him to drop his gun. While Heyward did have the gun pointed to his chin, his finger was on the trigger. What would it take for him to lower the barrel and fire? Respectfully, he could have accomplished this in less time than it would take these officers to process what was happening and fire themselves.[165] This was a dangerous situation involving a highly intoxicated man who refused their orders all while possessing a high powered rifle which could have killed these officers in less than a second if Heyward chose to lower the barrel of the weapon towards them. In addition, there were citizens present who were also in the zone of danger because they were in close proximity to this walking procession as it made its way back to Heyward's home. Heyward's statements that "you'll have to kill me" is a direct threat against these officers. Suicide by cop is a very real phenomenon and this statement would indicate to any reasonable officer that deadly force is imminent.

Even though the speed of this procession walking back to Heyward's residence was "walking," Heyward was fleeing these officers. His actions constitute flight in that he was moving away from the officers back towards his residence. During this "walk," Heyward would turn and confront the officers, again stating, "you'll have to kill me." At times, he would lower the gun from his chin, angling it towards the officers, albeit slightly.

This already fast paced and escalating situation grew even more intense when Heyward stepped foot onto the front yard of his residence. He ignored the officers commands regarding

[165] Ex. 15, pp. 143-147.

the gun and to stop, by walking up his front porch steps and onto his porch. These officers reasonably believed that he was going inside his house. Any reasonable officer would believe that if you follow someone for over 2 blocks, who walks through their yard, walks up the steps to the front porch and is going in the direction of the front door that it is very likely that Mr. Heyward intended on entering his residence. At this point, these officers had probable cause that Heyward constituted a serious threat of harm to themselves and others. Not one law enforcement officer would ever state that it would be reasonable to allow Mr. Heyward the opportunity to enter this house. He's drunk. He's armed. He's dangerous. He's threatened police and citizens. In order to prevent him from entering his house and potentially taking hostages, the officers, at that very moment, could have used deadly force. They didn't. They actually used non-lethal force by deploying a taser.

Unfortunately, one dart of the taser did not hit its target. And as Heyward was hit, his weapon lowered towards the officer. There is physical evidence to corroborate this testimony in the form of the bullet found at the feet of Officer Romero fired by Heyward's rifle. Nevertheless, this Court should conclude that these officers had probable cause prior to Heyward lowering his weapon and at the point the taser was deployed that Heyward constituted a threat of serious bodily harm to them and others. Respectfully, a reasonable officer confronting this exact same situation would not have realized that they were violating any of Heyward's rights. The best evidence of this is the fact that all six (6) officers fired simultaneously. They each saw the serious threat of harm and fired at the same time.

In addition, the number of bullets fired by these officers cannot be said to be excessive. As Officer Wood stated in his statement, he believed that Heyward had a bullet proof vest on because the bullets were not affecting him like he believed they should. As Skip Vaughn

testified, officers are trained to continue firing until the threat has been neutralized.[166] Events of this past week bring this point dramatically clear when Sgt. Tim Chapin of the Chatttanooga Police Department encountered a man with a bullet proof vest carrying two weapons. These six (6) officers did not know whether Heyward had a 2nd gun, a bullet proof vest or other weapon. It was incredibly dangerous for him to go out onto the public streets in the manner in which he did and then attempt to enter a residence, escalating an already dangerous situation, against the orders of the police.

Lastly, this incident involved six (6) officers firing their weapons. The number of officers, by itself, can reasonably explain the number of shots.

Respectfully, Count 1 should be dismissed against these officers in their individual capacity and this Court should find that qualified immunity applies.

2. Clearly Established Right.

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194 (2001). Since *Garner* in 1985, it has been clearly established that the use of deadly force is only constitutionally reasonable if "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U.S. at 11. This rule draws the line of deadly force well before a suspect actually points a weapon at an officer. In other words, there are situations in which a reasonable officer would use deadly force and a weapon not be pointing directly at them or even in their vicinity.

[166] Ex. 15, pp. 94-98, 105-11 & 113.

In the present case, these officers did not have fair warning that their conduct deprived the Plaintiff of a constitutional right. Can you shoot an armed, fleeing, and suicidal individual who has threatened civilians, has told the police that they were going to have to kill him, has gone to a business with a loaded, high powerful rifle and then attempted to enter a residence all while ignoring the repeated orders of law enforcement, family and friends to stop and to drop his weapon? Respectfully, there is no case law that Plaintiffs can identify that can fairly put these officers on notice to not shoot Mr. Heyward given the facts as they occurred that night. Had they not fired and Heyward had taken a child or other family member hostage inside the residence, these officers would have been criticized for their lack of use of force.

This Court should find that it was not clear to these officers that their decision to use deadly force was unconstitutional. Therefore, this Court should dismiss Count 1.

3. Objectively Unreasonable.

The last step in the qualified immunity analysis is whether the Plaintiffs offered sufficient evidence to indicate that what the police officer did was objectively unreasonable in light of the clearly established constitutional right. *Sample*, 409 F.3d at 700. The United States Supreme Court has explained, "an officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense." *Saucier*, 533 U.S. at 205.

In the event that this Court finds that these officers committed any mistake, whatever mistake they committed was reasonable given the facts of the case. Similar to the discussion above, Heyward had committed numerous misdemeanor and felony offenses, armed himself with a loaded .44 caliber high powerful rifle, threatened his friend, injured his girlfriend, and went out

into the public, armed and dangerous. Upon seeing the police, he armed himself again and fled back to his house and attempted to enter a residence which would have been a significant threat of safety to these officers and other citizens. Respectfully, the Plaintiffs are unable to provide any basis to suggest that these officers acted objectively unreasonably. This Court should find that their decision to use deadly force is entitled to qualified immunity and Count 1 should be dismissed.

CONCLUSION

This Court should find that Counts 1 and 3 against these officers should be dismissed and grant their Amended Motion for Summary Judgment.

Respectfully submitted,

DAVIS & HOSS, P.C.

s/Bryan Hoss
Bryan Hoss, TN BPR #021529
Lee Davis, TN BPR #15958
508 East 5th Street
Chattanooga, Tennessee 37403
(423) 266-0605
(423) 266-0687-Fax
bryan@davis-hoss.com
lee@davis-hoss.com

s/Johnny D. Houston
Johnny D. Houston, JR. TN BPR#013834
ATTORNEY FOR OFFICER DENNISON
Houston and Ziebold
707 Georgia Avenue, Suite 301
Chattanooga, Tennessee, 37402
(423) 267-6715
(423) 267-9271
john@houstonmarsa.com

CERTIFICATE OF SERVICE

I, Bryan H. Hoss, hereby certify that a true and accurate copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

This the 18th day of April, 2011.

s/Bryan H. Hoss