

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

HEATHER BRESSLER, <i>et al.</i>	)	
	)	
PLAINTIFFS,	)	
	)	
V.	)	CIVIL ACTION NO: 2:22-CV-35-CJS
	)	
ZACHARY LUSK, <i>et al.</i>	)	
	)	
DEFENDANTS.	)	
	)	

DEFENDANTS' PRETRIAL MEMORANDUM

Come the Defendants, Trooper Zachary Lusk and Trooper Douglas Holt, by counsel, and in compliance with the Court's Order of February 27, 2025 (R. 70) for their Pretrial Memorandum, hereby state as follows:

I. JURISDICTION OF THE COURT.

The Court has jurisdiction of the claims brought by Plaintiffs as a federal question, pursuant to 28 U.S.C. §1331, by virtue of 42 U.S.C. §§1983. The Court has jurisdiction over Plaintiff's state law claims under 28 U.S.C. §1367.

II. KIND OF ACTION.

This is a wrongful death action and excessive force action arising out of the shooting death of Gary Bressler by Kentucky State Troopers on November 2, 2021.

III. STATEMENT OF FACTS.

In its Memorandum Opinion and Order of September 30, 2024 [R. 64], the Court has already set out a statement of facts, with an indication of which facts are disputed and which are undisputed. The Defendants repeat the Court's recitation of facts from R. 64 with citations to the

record omitted and with some editing for brevity. The Court indicated that “[u]nless indicated otherwise, the following facts are undisputed.” [R. 64 at 2].

At around 1:30 a.m. on November 3, 2021, [Gary] Bressler called 911 and requested law enforcement to respond to his residence in Williamstown, Kentucky. He refused to explain why he needed law enforcement and then hung up. At the time the call came in, Trooper Holt was in the dispatch room at Post #6 in Dry Ridge, Kentucky; Trooper Lusk was out on patrol. Trooper Holt overheard the brief conversation between Bressler and the dispatcher. After Gary Bressler’s call, Plaintiff Heather Bressler called 911 and informed the dispatcher that Bressler was depressed, had recently lost his job, and had been drinking. She also informed dispatch that Bressler was in the front yard with a sword, but she clarified that he had not been violent or threatening toward the family. The dispatcher provided these updates to the Troopers.

Trooper Holt arrived at the scene before Trooper Lusk and parked his vehicle down the street. Trooper Holt later testified that he rolled down his window while waiting and could hear Bressler and Plaintiff talking but that there did not appear to be an immediate danger at that time. Once Trooper Lusk indicated that he was within a half mile of the residence, Trooper Holt approached the home in his marked police cruiser.

When Trooper Holt approached the residence, Heather and Gary Bressler were standing in the front yard, Mr. Bressler with sword in hand. Trooper Holt pulled past the residence, parked his cruiser in the westward lane, and then exited the vehicle. Bressler, without saying a word, began to walk toward Trooper Holt's cruiser.

As Trooper Holt exited his vehicle, Trooper Lusk arrived on the scene, parked his cruiser in the eastward lane adjacent to Trooper Holt's, and then exited the vehicle. The Troopers drew their weapons and commanded Bressler to halt and to drop the sword. Trooper Holt fired a single

round and Trooper Lusk fired six shots in rapid succession.

The disputed material facts, as the Court found them, are as follows:

The Plaintiff initially stated in her CIRT interview the same day as the incident that the kids were inside the residence sleeping and that the gunfire woke them up. She later told the CIRT officers that her children did in fact witness the incident. Plaintiff later testified that the kids were in the yard at the time of the shooting and that she did not realize they were outside when she first spoke to the investigating officers. In various statements, Troopers Holt and Lusk agreed that some or all of the children may have been witnesses.

There is also disagreement about the manner in which Bressler held the sword. In his CIRT interview, Trooper Holt stated that Bressler had his elbow at a 90-degree angle such that the hilt of the sword was pointed toward the ground and the tip was pointed toward the sky. Trooper Holt confirmed during his CIRT interview and his deposition that Bressler did not raise the sword above his head. On the other hand, Trooper Lusk stated in his CIRT interview that Bressler initially had the sword "down to his side" with the pointed end facing downward, but that he later raised it "up in the air" when he was walking toward the Troopers such that the tip of the sword was pointed toward the sky. Trooper Lusk later testified that Bressler raised the sword above his head while he walked toward the Troopers. Contrary to the Defendant Troopers' accounts, Plaintiff stated in her CIRT interview that her husband "just had [the sword] in hand" and that "he wasn't threatening anybody with it." She later testified that her husband had the sword pointed toward the ground during the entire incident. Plaintiff and some of her children also submitted Affidavits disagreeing with both Troopers' versions. According to Plaintiff, "[d]uring the entire incident, Gary never raised his sword. He always carried it with the sharp tip pointed at the ground and his hand to his side." As two of the Bressler children recall, their father "was in the street

holding a sword to his side" and "[t]he sharp side was pointed in the ground." The third child remembers that her father "never raised the sword higher than ... past his waist."

Another disagreement is: how close Bressler got to the Troopers and whether he ever stopped approaching the Troopers prior to being shot. In his CIRT interview, Trooper Holt stated that Bressler was initially "maybe 30, 40" feet away from the Troopers, that he "continued to walk the entire time," and that he did not "pause or stop." According to Trooper Holt, Bressler had enough time to "walk maybe a couple hundred feet" and ultimately got within 6 to 7 feet, "at the most, 10 feet away" when he fired his only shot. Trooper Lusk stated in his CIRT interview that Bressler was initially "20, 25 feet" away from the Troopers when he first arrived, but that Bressler advanced to "less than 10 feet away" when shots were fired. He later testified that he could not recall whether Bressler stopped walking during the incident, but that Bressler got within 10 feet of the Troopers. Plaintiff states that the Troopers were "at least 20 feet" from her husband when they shot him. One child stated that her father had "stopped a good distance from the police." She clarifies that since the time of the shooting she has "gone back and paced the distance between where [her] father was and where the officers were and it was 6 to 8 steps," such that her father "would have to run to be able to reach where the officers were." Another child similarly states that his father "stopped a good distance from the police," and provides a "best estimate" that his father and the Troopers were "at least 60 feet apart when he was shot." The last child provides a "best estimate" that the Troopers were "at least 30 feet away from [his] dad when he was shot" and that his dad "could not have reached the officers."

The parties disagree about how the Troopers were positioned when they shot Bressler. In both his CIRT interview and his deposition, Trooper Holt stated that he advanced to the rear of his vehicle (which was facing Bressler) and stood next to the bumper during the incident. Trooper

Lusk testified that he stayed between the two vehicles, but that he could not recall whether he stood behind the vehicle or the door for cover. On the other hand, Plaintiff and her children each recall the Troopers standing next to or behind the open doors of their cruisers.

Finally, the parties disagree about whether Plaintiff interposed prior to the shots being fired. Both Troopers claim that Plaintiff ran from the front yard and stood in between Bressler and the Troopers. Trooper Holt stated in his CIRT interview and in his deposition that he recalled grabbing Plaintiff with his open hand and pushing her back behind the Troopers to get her out of the way. Plaintiff maintains, however, that she remained in the front yard and away from the Troopers during the incident and that she only approached the Troopers after her husband was shot and in order to assist with life-saving measures.

IV. ISSUES OF LAW (SUBSTANTIVE).

Was the use of deadly force in self-defense by Defendants Holt and Lusk reasonable under the Fourth Amendment, when viewed “from the perspective of a reasonable officer on the scene”? *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

Under Kentucky law, did the Defendants use deadly physical force because they believed it was necessary to protect themselves or others against the use or imminent use of unlawful deadly physical force by Gary Bressler, so that the Defendants’ use of force was justified under KRS 503.050-.080, rendering the Defendants immune from civil suit for the use of that force, according to KRS 503.085?

V. ISSUES OF LAW (PROCEDURAL).

The Defendants have not identified any particular procedural issues other than the issues of fact and law regarding immunities, set out above.

VI. ISSUES OF LAW (EVIDENTIARY).

In its Memorandum Opinion and Order of September 30, 2024 [R. 64], the Court has resolved the issue of whether the Plaintiffs could proceed on claims of intentional infliction of emotional distress and negligent infliction of emotional distress.

Plaintiff's previously filed a motion in limine, asking the Court to exclude all expert opinion testimony of Kentucky State Police Sgt. William Howard on the ground that he had not submitted an expert report and was unqualified. [Motion in Limine, R. 52]. The Defendants responded by pointing out that Sgt. Howard was fully qualified and was an expert who was not required to submit a report, according to Fed. R. Civ. P. 26(a)(2)(C). [R. 56]. The Court denied the Defendants motion without prejudice, leading to the expectation that they will raise the issue again before trial.

Respectfully submitted,

/s/ Brenn O. Combs

Brenn O. Combs,
Samantha A. Bevins,
Matt Bowling,
Legal Services Branch
Kentucky State Police
919 Versailles Road
Frankfort, KY 40601
(502) 782-1775 (office)
(502) 573-1636 (fax)
Brenn.combs@ky.gov
*Attorneys for KSP Defendants, Trooper
Zachary Lusk and Trooper Douglas Holt, in
their individual capacities*

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2025, I electronically filed this document with the clerk of the court by using the CM/ECF System, which will provide service to all counsel of record.

/s/ Brenn O. Combs

Brenn O. Combs