

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION
CASE NO. 22-CV-35-DLB-CJS**

HEATHER BRESSLER, et al.,

PLAINTIFFS

VS.

ZACHARY LUSK, Individually, et al.,

DEFENDANTS

TRIAL BRIEF

I. JURISDICTION OF THE COURT

The entirety of the events set forth below occurred in Grant County, Kentucky, within the jurisdictional boundaries of this Court. Jurisdiction over claims arising under 42 U.S.C. § 1983 from Defendants' violation of the Civil Rights Act is conferred upon this Court by 28 U.S.C. § 1331, 1343 (3) and (4). Jurisdiction over the state law claims is conferred upon this Court by 28 U.S.C. § 1367. Venue is proper in this district pursuant to 29 U.S.C. § 1391.

II. KIND OF ACTION

Plaintiff asserts several claims against Defendants as a result of the shooting death of her husband, Gary Bressler. Plaintiff contends that each Defendant used excessive deadly force in shooting and killing Gary Bressler on November 3, 2021, in violation of rights protected by the Fourth and Fourteenth Amendments to the United States Constitution giving rise to her action under 42 U.S.C. § 1983. The improper shooting death of Gary Bressler also gives rise to Plaintiff's claims of common law assault and battery and wrongful death. Plaintiff seeks both compensatory and punitive damages.

III. STATEMENT OF FACTS

a. Undisputed Facts

In the early morning hours of November 3, 2021, Kentucky State Police Troopers Douglas Holt and Zachary Lusk, the Defendants, shot and killed Gary Bressler. At 1:31 a.m., Gary Bressler called 911 asking police to respond to his home located at 855 Chipman Ridge Rd. in Grant County, Kentucky. After Gary Bressler hung up, his wife, Heather Bressler, called 911 and informed them Gary was depressed, had lost his job, and had been drinking. She also informed them he had a Katana sword with him in the front yard. Heather explained that Gary had not been violent or threatening and there was no immediate threat to the family. Trooper Holt was present at KSP Post 6 and heard the initial call from Gary and was aware of the information Heather relayed as he drove to the Bressler house.

It was approximately a 20-minute drive from the Post to the Bressler house. During the drive, Holt learned that Trooper Lusk was also dispatched to the home and Lusk would arrive a few minutes later. Lusk suggested they meet and discuss the situation prior to attempting to resolve the situation, but such a meeting did not occur.

Holt pulled over a few yards from the Bressler house, turned off his lights, and waited for Lusk to arrive. He recalls being far enough away from the home to hear Gary and Heather talking, but there did not appear to be any immediate danger. Holt saw Gary Bressler in the front yard holding a sword, so he pulled past the house and exited his cruiser. As Holt exited his cruiser, Lusk arrived from the opposite direction. Gary began walking towards the Troopers in a “steady walk” and never said anything. Lusk illuminated his light bars, creating a “wall of light” to conceal himself and Holt from Gary.

It is undisputed that from the time Trooper Lusk's feet hit the ground to when Gary Bressler was shot seven times was 20 to 25 seconds.

It is undisputed that neither Defendant attempted any less than lethal force prior to discharging their weapons. Seven shots were fired by the Defendants, all of which struck Bressler. Defendants carried Tasers, but made no effort to use them. Additionally, neither officer disputes that they had almost unlimited space in which to retreat and attempt to deescalate the situation, while Gary Bressler simply maintained a steady walk or pace. At no point did Bressler run at or charge the Defendants.

It is further undisputed that following the incident, key pieces of evidence were altered by Defendant Troopers, including the location of the sword and cruisers following the shooting of Gary Bressler. Further, the Troopers were not equipped with body worn cameras, nor did their cruisers have any video or audio equipment. Following such incidents, Kentucky State Police investigate their own Troopers. The investigators refer to themselves as the CIRT, or Critical Incident Response Team. There is no oversight by an outside agency. Defendants do not dispute these facts.

b. Disputed Facts

There are several factual issues surrounding the shooting of Gary Bressler by Defendants. These include: the distance the officers were from Mr. Bressler when they fired their weapons; whether Mr. Bressler was moving toward them or was standing still; even assuming *arguendo* Bressler was moving at the time of the shooting did his movement in any way pose an immediate threat of serious bodily injury to the officers or others; and whether Mr. Bressler had the sword raised or if it was pointing toward the ground; and whether Defendants or other officers manipulated or otherwise changed positioning of some of the forensic evidence at the scene. The

parties also disagree as to the measurements and the interpretation of measurements taken by KSP regarding bullet casings relative to the distance from which Mr. Bressler stood when he was shot. The parties also disagree on whether, at the time of the shooting, Bressler did anything that posed an immediate threat of serious bodily injury to the Defendants or any bystanders which could not have been avoided by less than deadly force. In sum, the parties disagree as to whether either officer had an objectively reasonable basis to believe the use of deadly force was justified in this case.

Finally, there may also be a dispute about the amount, nature and extent of injuries and damages suffered by the Estate and Plaintiff Heather Bressler.

IV. ISSUES OF LAW – SUBSTANTIVE

a. Use of deadly force

At its core, deadly force is a seizure falling within the purview of the Fourth Amendment’s reasonableness requirement. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). The severity of seizure by deadly force led the Supreme Court in *Garner* to find unreasonable the use of deadly force to seize nonviolent suspects or fleeing felons, especially where there is no immediate threat to the officer or others. *Id.* at 11. To judge the reasonableness of using force, the Supreme Court requires an objective standard: “[T]he question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motive.” *Graham v. Connor*, 490 U.S. 386, 397 (1989). Reasonableness is judged “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.* at 396.

Ultimately, evaluating whether force necessary to affect a seizure is reasonable requires balancing “the nature and quality of the intrusion on the individual’s Fourth Amendment interests’

against the countervailing governmental interests at stake.” *Id.* *Graham* requires a court to evaluate three factors in determining whether force was excessive: (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.* at 396.

The first and third *Graham* factors are easily satisfied. It is undisputed that defendants were not responding to a report of a crime, based on both Gary Bressler’s initial 911 call and Heather’s follow-up call. Additionally, Gary Bressler was not attempting to flee or evade arrest. As explained previously, Plaintiffs assert that Gary was standing still when he was shot, and Defendants made no attempt to arrest him. Thus, the critical question is whether Gary Bressler posed an immediate threat of **severe** physical injury to the Troopers or others. *Jacobs v. Alam*, 915 F.3d 1028, 1040 (6th Cir. 2021), (quoting *Mullins v. Cyranek*, 805 F.3d 760, 766 (6th Cir. 2015)).

i. Evidence of Absence of an Immediate Threat

Garner established that use of deadly force is unreasonable unless the officer has “probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officers or others.” *Garner*, 471 U.S. at 3. The Sixth Circuit has stated that mere possession of a weapon is not sufficient to justify use of deadly force if the officer does not have a reasonable belief “that the suspect poses a danger of serious physical harm to him or others...” *Bougeess v. Mattingly*, 482 F.3d 886, 896 (6th Cir. 2007). There must be “additional indicia that the safety of the officer or others is at risk.” *Campbell v. Cheatham Cnty. Sheriff’s Dep’t*, 47 F.4th 468, 480 (6th Cir. 2022).

As described above, there is considerable dispute regarding how far Gary Bressler was from the officers at the time of the shooting and the manner in which he was holding the sword. Based on various testimonies, Bressler was within approximately 20 feet of the Troopers (or farther) when he was shot. Gary came to a complete stop at the end of his driveway, and did not advance on the Troopers any further. (Pl’s Exhibit 17: Heather Bressler Depo., p. 14). Defendant

Lusk does not dispute this fact, and states that he does not remember whether Gary continued walking towards the Troopers. (Pl's Exhibit 8; Lusk Depo. p. 33). Moreover, neither officer disputes the fact that they had time and plenty of room to retreat or take cover behind their cruisers – both options eliminating any immediate threat.

Notably, both Defendants give conflicting accounts as to the way Bressler was handling the sword before they fired. Lusk testified that the sword was raised above Bressler's head, while Holt stated that Bressler never raised the sword above his head and was certain of such. (Pl's Exhibit 1; Holt Depo. p. 28). Overall, other than mere possession of the sword, Gary Bressler did not provide the necessary indicia that there was danger to the Troopers or to others required to justify the use of deadly force against him. Other than Gary's 911 call, which did not explain the reason he wanted the police at his residence, and Heather's follow-up call indicating Gary may have been suffering a mental health crisis, the Defendants can provide no other indication that Gary was a threat to himself, the Troopers, or his family. Gary was not belligerent or verbally defiant towards the Troopers, he made no verbal threats against anyone. The Troopers were not aware of any tendency to dislike police. These circumstances have been used by the Sixth Circuit to evaluate whether a person was a threat to officers or others, and here, the facts indicate that Gary Bressler was neither. See *Lee v. Russ*, 33 F.4th 860, 863-64 (6th Cir. 2022) (find no justifiable use of force when suspect was still for 20 seconds, lowered knife to waist height, and was roughly 30 feet away from officers when he took a step to the side and officers fired). *Reich v. City of Elizabethtown*, 945 F.3d 968, 979 (6th Cir. 2019) (finding objectively reasonable use of deadly force where suspect was known by officers to have severe schizophrenia and was not taking his medication, disliked police, and walked with a fast pace towards officers in defiance of their commands to stop and drop his weapon).

ii. Opportunity to Retreat

While officers generally do not have a formal duty to retreat, it does not mean that that the officer is free to use deadly force where retreat is readily available. Their actions must still be objectively reasonable considering the circumstances, including whether there was at minimum an opportunity to retreat. *Stewart v. City of Euclid, Ohio*, 970 F.3d 667, 673 (6th Cir. 2020). In fact, “[s]ometimes, the time or space available to an officer may mean that the reasonable thing to do is monitor the suspect, issue a warning, or take cover.” *Thomas v. City of Columbus, Ohio*, 854 F.3d 361, 366-67 (6th Cir. 2017).

Holt testified that he had the opportunity to take cover, and nothing prevented him from doing so while speaking to Bressler. (See Pl. Exhibits 2, 3, and 10 at pg. 2). Upon exiting their cruisers, both Troopers were protected by cover in what Lusk described as a “wall of light”, where the Troopers could still see Gary, but they were concealed from view due to the light. (Pl. Exhibit 8, Lusk Depo. Pg. 29). Plaintiff’s police procedures expert, Tomothy Longo, upon reviewing the record of events surrounding the shooting, stated: “Once on the scene, both troopers made the conscious and deliberate decision to step away from the cover of their vehicles and stand unobstructed as Gary Bressler approached with sword in hand.” (Pl. Exhibit 19, Longo Report and Declaration, pg. 14). Finally, Lusk testified that the entire interaction, from arrival at the Bressler home to shooting Gary Bressler, only lasted approximately 20 to 25 seconds. (Doc. 53-3); Lusk Affidavit: Pg. ID 405). Had the Troopers conferred with one another while in route to the home or upon their arrival, Longo explains that the officers would have had not only the opportunity to create distance between themselves and Gary, but also to use less lethal means. (Longo Report and Declaration, Pg. 14-15). *Compare, Hicks v. Scott*, 958 F.3d 421, 436 (6th Cir. 2020) (finding the lack of a ‘viable escape route’ contributed to the threat the officer perceived); *Palma v. Johns*, 27

F.4th 419, 439 (6th Cir. 2022) (finding the opportunity to take space or cover is “particularly important in cases involving mental health crises, where officers should use the least force necessary to subdue the person”).

Overall, the opportunity the Defendants would have had to retreat or otherwise use less lethal means in addressing Gary Bressler is a key consideration in finding that their use of deadly force was objectively unreasonable.

b. Federal Qualified Immunity Has Been Resolved

At its core, qualified immunity shields government officials performing discretionary acts so long as their conduct does not violate “clearly established statutory or constitutional rights or which a reasonable person should have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Analyzing a qualified immunity defense breaks into two parts: “the defendant violated a constitutional right”, and (2) “the right was clearly established at the time of the challenged conduct.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). Violation of a constitutional right occurs when “at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” *Zakora v. Chrisman*, 44 F.4th 452, 465 (6th Cir. 2022) (citing *Ashcroft*, 563 U.S. at 741). A right is clearly established “when they ‘have a sufficiently clear foundation in then-existing precedent,’” such to place the existence of the right beyond debate. *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018). Finally, the right must be defined with a level of specificity, especially in the Fourth Amendment context where factual situations can vary. *Mullenix v. Luna*, 577 U.S. 7, 11 (2015). Each prong of the qualified immunity analysis can be addressed in either order, in light of the facts of a particular case. *Zakora*, 44 F.4th at 465.

As discussed above, Defendants' use of deadly force was objectively unreasonable such that it violated Gary Bressler's Fourth Amendment rights, satisfying the first prong of the qualified immunity analysis. The next question, then, is whether the right was clearly established at the time the incident occurred. That issue has been previously resolved. This Court already established that at the time of the incident, the law regarding use of deadly force in the factual context of this case was clearly established. It follows that no factual issues relating to qualified immunity need be submitted to a jury at trial. (Opinion and Order, Doc. 64, Page ID: 857-58.)

This Court held that the Sixth Circuit has long recognized "that individuals have a right not to be shot unless they are perceived as posing a threat to officers or others." *Jacobs*, F.3d 915, at 1040, (collecting cases). Further, the Sixth Circuit abides by this standard even in "situations with diverse factual distinctions," where it may be tempting to define the right to be free from bodily harm more specifically. *Sample v. Bailey*, 409 F.3d 689 (6th Cir. 2005). Lastly, as discussed above, the premise that police may not use deadly force for mere possession of a weapon had been established prior to this case, including the requirement that there be a further indicium of serious threat of harm. *Bouggess*, 482 F.3d at 896. These specific articulations of the rights afforded to Gary Bressler at the time of the incident are more than sufficient to resolve any question of qualified immunity.

c. State Qualified Immunity

For similar reasons as discussed above, this Court has found that Defendants are not entitled to qualified immunity on Plaintiff's claims for assault, battery, and wrongful death.

Under Kentucky law, qualified immunity shields a police officer so long as (1) "he performed discretionary acts or functions...; (2) in good faith; and (3) within the scope of [his] authority." *Yanero v. Davis*, 65 S.W.3d 510, 521-22 (Ky. 2001). At issue here is whether the

Troopers' decision to use deadly force was made in good faith. Good faith analysis for the purposes of state law qualified immunity can be "predicated on a violation of constitutional, statutory, or other clearly established right which a person in the public employee's position presumptively would have known was afforded to a person in the plaintiff's position, *i.e.*, objective unreasonableness[.]" *Yanero*, 65 S.W.3d at 523. Therefore, "[i]f an officer 'knew or reasonably should have known that the action he took would violate a right of the plaintiff, bad faith may be found to exist.'" *Rowan Cnty. v. Sloas*, 201 S.W.3d 469, 485-86 (Ky. 2006).

Several considerations warrant a continued denial of Defendants' claim of qualified immunity on the state law claims presented. Bad faith could easily be found upon the finding of a clearly established right described above, and violation of such right by the Troopers' unreasonable use of deadly force. Heather Bressler testified that Gary was standing still with the sword pointed downwards when he was shot, Gary made no aggressive moves towards the police, and there were no facts to suggest that the Troopers were aware of any mental health conditions or disdain for police. Further, the Troopers had room to retreat and could have done so safely and had other less lethal means of de-escalating the situation before turning to lethal force.

All these considerations lend themselves to find that the Troopers acted in bad faith, and should be denied a qualified immunity defense relating to the state law claims.

V. ISSUES OF LAW – PROCEDURAL

Plaintiff does not anticipate any procedural issues that require resolution at this time.

VI. ISSUES OF LAW - EVIDENTIARY

There are two key evidentiary issues for this Court to address. First, Plaintiff seeks to exclude any and all testimony from Defendants' proposed expert, Sgt. William Howard. Second, Plaintiff seeks to exclude post-shooting witness statements and exclude body-worn camera footage as hearsay. Both issues will be taken up separately by Plaintiff's motions *in limine*, filed herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have, this 27th day of March, 2025, served a copy of the foregoing pleading through the Court's electronic filing system on the following:

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