Appeal No. 22-3193

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JENNIFER MORGAN-TYRA,

Plaintiff – Appellant

v.

CITY OF ST. LOUIS; ANDREI NIKOLOV,

Defendants – Appellees,

Appeal from the United States District Court Eastern District of Missouri, Eastern Division Hon. Matthew T. Schelp, United States District Judge

APPELLANT'S BRIEF

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SUMMARY OF THE CASE AND STATEMENT ON ORAL ARGUMENT

Plaintiff/Appellant Jennifer Morgan-Tyra and Plaintiff Michael Morgan brought claims against Defendants City of St. Louis and Police Officer Andrei Nikolov, alleging violations of Plaintiffs' Fourth Amendment and other civil rights under 42 U.S.C. § 1983 arising from Defendant Nikolov's use of excessive force in shooting and paralyzing Ms. Morgan-Tyra, as well as in instigating a subsequent criminal prosecution against her. Plaintiffs also brought related state law claims.

Defendants moved for summary judgment on all counts. The district court granted Defendants' motion as to all federal claims and declined supplemental jurisdiction as to the Plaintiffs' state law claims and dismissed them without prejudice. Plaintiff Jennifer Morgan-Tyra now appeals the grant of summary judgment to Defendant Nikolov on qualified immunity grounds as to Count I for excessive force

Appellant requests oral argument. If oral argument is granted, Appellant requests 20 minutes.

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JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of Missouri had original federal question jurisdiction over the underlying case, *Jennifer Morgan-Tyra*, *et al*. *v. City of St. Louis, et al*., Case no. 4:18-cv-01799-MTS, pursuant to 28 U.S.C. § 1331 because federal civil rights claims were brought under 42 U.S.C. § 1983. The district court entered an order in the underlying case on September 22, 2022 granting Defendant Nikolov qualified immunity.

Plaintiff-Appellant filed her Notice of Appeal on October 21, 2022 and therefore her appeal is timely under Rule 4 of the Federal Rules of Appellate Procedure. This Court has jurisdiction over the Plaintiff's appeal pursuant to 28 U.S.C. § 1291 because the district court issued its final decision and judgment granting Defendants summary judgment on all federal claims, dismissing them with prejudice, and declining supplemental jurisdiction over all state law claims and dismissing them without prejudice. Plaintiff does not appeal the trial court's decision to decline supplemental jurisdiction over the state law claims.

STATEMENT OF THE ISSUES

Whether the district court erred in granting summary judgment to Defendant Nikolov on the basis of qualified immunity as to Plaintiff's 42 U.S.C. § 1983 excessive force claim (Count I). The district court reversed its own prior summary judgment order denying Defendant Nikolov qualified immunity on the basis of disputed questions of fact as to whether Defendant Nikolov's use of force was unreasonable and in violation of clearly established law, but provided no explanation of why it reversed its prior ruling. The district court erroneously held that Defendant Nikolov's use of force was not in violation of clearly established law, despite the fact that Plaintiff had called for police assistance, was waiting for the police to arrive and was engaged in lawful self-defense against an armed intruder, and was then repeatedly shot by Nikolov in the back without a proper announcement of police authority, warning or command, despite the feasibility and opportunity to do so.

Most apposite cases:

Craighead v. Lee, 399 F.3d 954 (8th Cir. 2005)

Cole Estate of Richards v. Hutchins, 959 F.3d 1127 (8th Cir. 2020)

Atkinson v. City of Mountain View, Mo., 709 F.3d 1201 (8th Cir. 2013)

Cooper v. Sheehan, 735 F.3d 153 (4th Cir. 2013)

STATEMENT OF THE CASE

Plaintiff Morgan-Tyra appeals from a judgment rendered by the Honorable Matthew T. Schelp in the United States District Court for the Eastern District of Missouri, Case No. 4:18-cv-01799-MTS, granting Defendant Nikolov qualified immunity on her claim of excessive force in violation of the Fourth Amendment. App. 2280, R. Doc. 231 at 13.

Jennifer Morgan-Tyra filed her original complaint on October 23, 2018, and filed the operative Second Amended Complaint ("Complaint") on July 2, 2019. App. 0006, R. Doc. 5 at 6. Count I of the Complaint asserts a Fourth Amendment excessive force claim against Defendant Officer Nikolov, which is the subject of this appeal.

On May 8, 2015, Defendant Nikolov and his partner, Officer Buschart, both uniformed patrol officers with the St. Louis Metropolitan Police Department, were dispatched to 4241 Chippewa for a disturbance. App. 0212, R. Doc. 93-8 at 1. The dispatcher advised the officers that the caller, Karla Nicholson, was having a dispute with a roommate, who possibly had a gun and that the caller was locked in her bedroom. App. 0110, R. Doc. 93-1 at 1.

Jennifer Morgan-Tyra arrived at her brother's home at 4241 Chippewa shortly thereafter and was attacked from behind by Karla Nicholson with a screwdriver. App. 0146, R. Doc. 93-5 at 8. She tried to get Ms. Nicholson to leave

the house but Ms. Nicholson refused and continued to wield the screwdriver. Id. Ms. Morgan-Tyra then called 911 for help, telling the dispatcher she was defending herself with a licensed firearm, and she was directed by the dispatcher to wait for the police to arrive. App. 0147, R.Doc 93-5 at 9. The dispatcher relayed Ms. Morgan-Tyra's call for help over the District 2 radio channel that Defendant Nikolov was tuned to on the radio strapped to his shoulder, stating that a white female armed with a screwdriver was trying to attack the caller. App. 0561, R. Doc. 102-1 at 2; App. 0230, R. Doc. 93-12 at 9; App. 0268, R. Doc. 93-13 at 13.

Defendant Nikolov and his partner entered the front of the residence at 4241 Chippewa and encountered Richard Peterson, a resident of the home, who told them "I tried to calm the situation down, they are in the back." App. 1711, R. Doc. 211-2 at 16. Defendant Nikolov walked towards the back of the house, and peeked around a corner in the kitchen and saw Mr. Morgan with his back to them, and Ms. Morgan-Tyra standing in the hallway on the other side of Mr. Morgan, facing an open door. App. 0682, R. Doc. 102-15 at 2; App. 0263-0265, R. Doc. 93-13 at 9-11; App. 0699, R. Doc. 102-18. While Ms. Morgan-Tyra was in a verbal altercation with Nicholson, Defendant Nikolov shot her in the back rapidly at least nine times, leaving her with life-threatening and permanent injuries. App. 0147, R. Doc. 93-5 at 10.

Defendant Nikolov moved for summary judgment on May 8, 2020 asserting in relation to Count I that his use of force was objectively reasonable and that he was entitled to qualified immunity. App. 0098, R. Doc. 92 at 2. On March 24, 2021, the district Court denied the Motion for Summary Judgment without prejudice as to all counts, specifically finding that genuine disputes of material fact existed as to Plaintiff Jennifer Morgan-Tyra's claim in Count I for excessive force under Section 1983. App. 0880, R. Doc. 140 at 1.

Defendants Nikolov and City of St. Louis then took an interlocutory appeal of this denial of summary judgment to this Court. That appeal was dismissed for lack of jurisdiction on July 8, 2021.

Defendant Nikolov filed another Motion for Summary Judgment on April 20, 2022, and after briefing by the parties the District Court granted Defendant Nikolov summary judgment on the basis of qualified immunity as to Count I, and dismissed that claim with prejudice. App. 2276, R. Doc. 231 at 9.

The District Court erred in its ruling granting summary judgment on Count I because, among other things, the summary judgment record showed that Plaintiff had called for police assistance, was waiting for the police to arrive and was engaged in lawful self-defense against an armed intruder, and was then repeatedly shot by Nikolov in the back without a proper announcement that police were present, without giving proper commands or a warning of the officer's

intention to shoot, and without giving Morgan-Tyra any opportunity to comply. On this record, Officer Nikolov's use of force was objectively unreasonable and in violation of clearly established law.

SUMMARY OF THE ARGUMENT

The evidence presented by Plaintiff Ms. Jennifer Morgan-Tyra on summary judgment shows that she was shot in the back multiple times without a warning or opportunity to comply while engaged in lawful self-defense. Officer Nikolov received notice prior to the shooting that Ms. Morgan-Tyra had called 911 and was only armed because she was dealing with an armed intruder who had assaulted her with a screwdriver. All Nikolov had to do was properly announce that the police had arrived to help, as Ms. Morgan-Tyra had requested, so she could put the gun down as her law enforcement officer father had taught her. Instead, Officer Nikolov recklessly and unnecessarily shot her in the back **nine times**. The Court's Order granting summary judgment deprives Ms. Morgan-Tyra of any opportunity to have Nikolov's excessive, reckless and unreasonable force, which left her paralyzed and with life-altering injuries, decided by a jury of her peers.

As set forth herein, this result is not only unjust, it is inconsistent with established law and the trial court's own prior rulings. Indeed, the trial court previously denied a summary judgment motion brought on the same basis by Defendant Nikolov, finding and citing disputed questions of fact as to (1) whether

Nikolov had received a radio message from dispatch prior to the call alerting him that Ms. Morgan-Tyra was defending herself with a licensed handgun against an intruder armed with a screwdriver; (2) whether Nikolov had properly announced his authority and given commands prior to opening fire; and (3) whether Ms. Morgan-Tyra had inexplicably turned around and raised her weapon to threaten Defendant Nikolov, the police officer she was waiting for to help her, as he originally and implausibly claimed.

Yet the trial court turned 180 degrees and granted summary judgment on the same legal arguments raised by Defendant Nikolov and based on the same fundamental facts. Remarkably, the trial court not only failed to explain its change of heart from its prior ruling, the court **failed to even reference its prior order denying summary judgment**.

The trial court purported to accept Plaintiff's version of the facts as true and continued to acknowledge the existence of disputed questions of fact regarding whether Nikolov violated Ms. Morgan-Tyra's civil rights by shooting her in the back (although not fully reaching that issue). Nevertheless, the trial court concluded, on essentially the same facts as the prior motion, that the situation was "a tense and uncertain one with rapidly evolving circumstances" (this despite Officer Nikolov's testimony he was in the position he shot from for up to 12 seconds) and that existing

case law was insufficient to put Officer Nikolov on notice that his actions would violate Ms. Morgan-Tyra's rights. App. 2207, 2211-2212, R. Doc. 231 at 8, 12-13.

As explained herein, given the trial court's own finding of disputed questions of fact, if the trial court had properly viewed the remaining facts and reasonable inferences therefrom in the light most favorable to plaintiff and correctly applied existing case law governing the use of force, it would have found that Defendant Nikolov unloaded his firearm "as fast as he could" in the back of a person he knew had called 911 for help and was defending themselves from a disturbed individual armed with a screwdriver, all without announcing his authority as a police officer and without giving Morgan-Tyra a warning or any opportunity to comply. While the trial court focused on the fact that Plaintiff was at times directing her weapon at Nicholson to keep her on the bed and prevent her from advancing toward Ms. Morgan-Tyra with the screwdriver, this fact alone is not dispositive given that (a) Nikolov knew that Ms. Morgan-Tyra had called 911 and was defending herself from an armed attacker, and (b) there is a disputed question of fact as to whether Ms. Morgan-Tyra in fact had her weapon pointed down at the time Nikolov decided to open fire.

In short, despite claiming to adopt Plaintiff's version of the facts, the trial court disregarded substantial evidence showing that no objectively reasonable officer would have perceived Ms. Morgan-Tyra as an imminent threat to anyone at

the moment Nikolov opened fire, and then incorrectly found that existing cases would not have put Nikolov on notice that his actions violated clearly established law. If the facts had truly been viewed in favor of Plaintiff, as they should have been on summary judgment, then Nikolov's actions were indeed in violation of clearly established legal principles and case law regarding the use of deadly force. Therefore the trial court erred in granting Nikolov qualified immunity.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING DEFENDANT NIKOLOV QUALIFIED IMMUNITY ON PLAINTIFF'S EXCESSIVE FORCE CLAIM BECAUSE (1) THE COURT REVERSED ITS OWN PRIOR RULING DENYING SUMMARY JUDGMENT WITHOUT EXPLANATION; AND (2) DEFENDANT NIKOLOV'S UNREASONABLE USE OF FORCE WAS IN VIOLATION OF CLEARLY ESTABLISHED LAW.

A. STANDARD OF REVIEW.

This Honorable Court reviews de novo the grant of summary judgment on the basis of qualified immunity, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *Henderson as Trustee for Henderson v. City of Woodbury,* 909 F.3d 933, 938 (8th Cir. (Minn.) 2018). [Cit. omit.] In determining whether qualified immunity is appropriate in an excessive force case, the "question ... is whether a genuine question of material fact exists regarding whether [the officers'] actions—as defined by the plaintiff's version of the events—were objectively reasonable." *Id.* at 939, quoting

Ribbey v. Cox, 222 F.3d 1040, 1043 (8th Cir. 2000). In reviewing the record, a court must not weigh evidence at the summary judgment stage but instead should decide simply whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986).

B. LEGAL PRINCIPLES APPLICABLE TO DEFENDANT NIKOLOV'S AFFIRMATIVE DEFENSE OF QUALIFIED IMMUNITY.

The Fourth Amendment right to be free from unreasonable seizure protects against the use of excessive force in the apprehension or detention of a person. *Ward v. Olson*, 939 F. Supp. 2d 956, 961 (D. Minn. 2013), citing *Graham v. Connor*, 490 U.S. 386, 396 (U.S.1989). The affirmative defense of qualified immunity to an excessive force claim involves a two-step inquiry: (1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant's alleged misconduct. *See Saucier v. Katz,* 533 U.S. 194, 201 (2001); *Brown v. City of Golden Valley*, 574 F.3d 491, 496 (8th Cir. 2009).

Under the first element of the qualified immunity analysis, to establish a constitutional violation under the Fourth Amendment, the question is whether the amount of force used was objectively reasonable under the particular circumstances. *See Brown v. City of Golden Valley*, 574 F.3d 491, 496 (8th Cir. 2009). "The relevant, dispositive inquiry is whether it would be clear to a reasonable officer that

his conduct was unlawful in the situation he confronted." *Id*. at 499. Whether the use of deadly force is reasonable turns on "the totality of the circumstances, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officer or others, and [3] whether the suspect is actively fleeing or resisting arrest." *Wallace v. City of Alexander, Arkansas*, 843 F.3d 763, 768 (8th Cir. 2016). The test is an objective one, and an officer's good intentions will not make an objectively unreasonable use of force constitutional. *See Graham v. Connor*, 490 U.S. 386, 397 (1989).

In an excessive force suit predicated on the use of deadly force "**the court may not simply accept what may be a self-serving account by the police officer**." *O'Bert ex rel. Estate of O'Bert v. Vargo,* 331 F.3d 29, 37 (2d Cir. 2003). [Emphasis supplied.] Instead, it "must also consider circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably." *Id.* Courts have also noted that the severity of the injury the plaintiff suffered is relevant to the existence of a constitutional violation. *See Crumley v. City of St. Paul,* 324 F.3d 1003, 1007 (8th Cir. 2003) ("In addition to the circumstances surrounding the use of force, we may also consider the result of the force"); *Dormu v. D.C.,* 795 F. Supp. 2d 7, 22 (D.D.C. 2011) (stating in an excessive

force case that, although the severity of injury "is not by itself the basis for deciding whether the force used was excessive, ... it is a relevant factor").

Under the second element of qualified immunity, this Honorable Court has taken "a broad view of what constitutes 'clearly established' under the qualified immunity analysis." *Whisman Through Whisman v. Rinehart*, 119 F.3d 1303, 1309 (8th Cir. (Mo.) 1997). The right to be free from excessive force is a clearly established right under the Fourth Amendment's prohibition against unreasonable seizures of the person. *See Atkinson v. City of Mountain View, Mo.*, 709 F.3d 1201, 1212 (8th Cir. (Mo.) 2013). For a right to be deemed clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Id.* at 1211.

"[I]t is not necessary, of course, that the very action in question has previously been held unlawful." *Thompson v. Monticello, Arkansas, City of*, 894 F.3d 993, 999 (8th Cir. 2018). This Court has held that "[in] determining whether the legal right at issue is clearly established, this circuit applies a flexible standard, requiring some, but not precise factual correspondence with precedent, and demanding that officials apply general, well-developed legal principles." *Whisman*, 119 F.3d at 1309, citing *J.H.H. v. O'Hara,* 878 F.2d 240, 243 (8th Cir. 1989). Qualified immunity will only apply where an official's "conduct was objectively legally reasonable in light of the

information [the officer] possessed at the time of the alleged violation." *James ex rel. James v. Friend*, 458 F.3d 726, 730 (8th Cir. 2006).

C. THE TRIAL COURT IN ITS PRIOR RULINGS REPEATEDLY RECOGNIZED THE MATERIAL FACTUAL DISPUTES REGARDING THE REASONABLENESS OF OFFICER NIKOLOV SHOOTING MS. MORGAN-TYRA IN THE BACK AND PARALYZING HER, AND DENIED DEFENDANT'S PRIOR MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT ON THAT BASIS.

The Honorable Audrey G. Fleissig in her order denying Defendants' Motion to Dismiss, and the Honorable Matthew T. Schelp in his order denying Defendant's prior Motion for Summary Judgment, both recognized fundamental disputed questions of material fact as to the underlying circumstances of what occurred, and that the reasonableness of Defendant Nikolov's use of force and entitlement to qualified immunity required resolution of these fact questions.[1] See App. 0059-0060, R. Doc. 53 at 8-9. The trial court's prior rulings were correct, and the trial court's subsequent and sudden about-face in granting summary judgment shortly before trial ignored Plaintiff's evidence and was in error.

The Defendants' prior motion to dismiss Plaintiff's Second Amended Complaint, which raised the same qualified immunity defense relied on by Defendants in their subsequent motions for summary judgment, was denied by Judge

[1] The case was transferred from Judge Fleissig to Judge Schelp by Administrative Order dated August 7, 2020. R. Doc. 111.

Fleissig on October 30, 2019. App. 0053, R. Doc. 53. As Judge Fleissig noted with regard to Plaintiff's allegation of excessive force: "Morgan-Tyra alleges that Nikolov entered the premises and approached her from behind without announcing his presence or identifying himself as a police officer. Though it is unclear what, if any, commands were given by Nikolov, Morgan-Tyra alleges that Nikolov did not announce his authority or give her reasonable time to comply before firing nine shots into her body." App. 0058, R. Doc. 53 at 8.

The court cited Nikolov's argument that "based on Morgan-Tyra's own allegation that she was pointing a gun at Nicholson at the time of the shooting, a reasonable officer in Nikolov's position could have believed that Morgan-Tyra was the intruder and posed an imminent threat of serious harm to Nicholson[,]" the same defense Nikolov relied on in his summary judgment motions. App. 0058, R. Doc. 53 at 8. The trial court rejected Nikolov's argument, noting that "it is not clear from the complaint whether Nikolov saw or could have seen, given his position, Morgan-Tyra holding the gun, or Nicholson's position in relation to that gun. Nor is it clear whether Nikolov gave any warning before shooting or whether it was feasible to do so." App. 0059-0060, R. Doc. 53 at 8-9. The court rejected Nikolov's qualified immunity argument, holding that "at the time of shooting here, a reasonable officer in Nikolov's position would have known that shooting an individual who did not pose an imminent threat to the officer or anyone else, **particularly without first**

warning or identifying himself, violated a clearly established constitutional right." App. 0060, R. Doc. 53 at 9. [Emphasis supplied; cit. omit.]

The Defendants subsequently filed a Motion for Summary Judgment on May 8, 2020, which the parties' then briefed at great length citing extensive deposition testimony and dozens of exhibits. See App. 0100, R. Doc. 93; App. 0492, R. Doc. 94; App. 0525, R. Doc. 102; App. 0734, R. Doc. 104; App. 0826, R. Doc. 109; App. 0837, R. Doc. 112; App. 0875, R. Doc. 114.[2] The trial court entered its Order denying that motion on March 24, 2021. App. 0880, R. Doc. 140.

While the court in its order denying Nikolov's prior motion for summary judgment recognized that it would permit further discovery, the trial court did *not* deny the motion as merely premature. Instead, the court held that "**A genuine dispute of material fact exists about how the events that followed came to pass**, but after the police arrived, Defendant Officer Andrei Nikolov fired his Department-issued handgun at Plaintiff multiple times[,]" and that "**The Court finds on the record before it that a genuine dispute of material fact exists**." App. 0880, R. Doc. 140 at 1. [Emphasis supplied.] The Court further held:

> For example, **the parties offer dueling evidence on whether Defendant Officer Nikolov received or heard a radio call advising him that Plaintiff was defending herself with a licensed firearm, whether Defendant Officer**

[2] These materials have been included in the Joint Appendix because the parties cited to and relied on previously filed exhibits to this prior motion in the subsequent motion for summary judgment.

> **Nikolov ordered Plaintiff to drop her gun prior to opening fire, and whether Plaintiff pointed her gun at Defendant Officer Nikolov**.
>
> App. 880, R. Doc. 140. [Emphasis supplied.]

When Defendants filed another summary judgment motion and the parties briefed the new motion, each of these disputed material facts referenced by the trial court clearly remained in dispute and hotly contested. The first paragraph of Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, R. Doc. 210-1, specifically directed the trial court to its prior holding and the fact that, despite additional discovery, the fundamental factual and legal record regarding the circumstances of Nikolov's use of force had not substantively changed:

> Defendants previously filed a lengthy Motion for Summary Judgment in this case. This Honorable Court denied that Motion on March 24, 2021, correctly holding that "on the record before it a genuine dispute of material fact exists." R. Doc. 140. Defendants have now filed an even more extensive Motion for Summary Judgment, **but the fundamental underlying facts have not changed**, and Defendants' current motion should be denied as well.
>
> App. 1580, R. Doc. 210-1 at 6. [Emphasis supplied.]

Nevertheless, the trial court's order granting summary judgment makes no attempt to explain what new or additional evidence, which was not before the Court on the prior Motion for Summary Judgment, altered the trial court's view of the evidence and law. Indeed, **the Court completely failed to discuss its own prior denial of summary judgment on the basis of disputed questions of material fact on this precise issue**.

Because "inconsistency is the antithesis of the rule of law," *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (*en banc*), "the law of the case" doctrine holds that **"the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result.*"** *Id*. [Emphasis supplied; italics in original.] Thus "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Musacchio v. United States*, 577 U.S. 237, 244-245 (2016) quoting *Arizona v. California*, 460 U.S. 605, 618 (1983). It applies equally to the decisions of coordinate courts in the same case and to a court's own decisions. *Christianson v. Colt Indus. Oper. Corp.*, 486 U.S. 800, 816 (1988).

The issues referenced as disputed questions of fact by the trial court in its earlier order denying summary judgment clearly remained in dispute. Plaintiff respectfully submits that the lack of explanation or discussion of the trial court's prior order shows that the trial court overlooked and/or downplayed significant disputes of fact in concluding that Nikolov was entitled to qualified immunity.

D. PRIOR TO THE SHOOTING, NIKOLOV WAS NOTIFIED THAT MS. MORGAN-TYRA HAD CALLED 911, WAS WAITING FOR POLICE, AND WAS DEFENDING HERSELF FROM AN ARMED INTRUDER.

This Court has recognized that the reasonableness of an officer's use of force can turn on whether the officer has identified himself, because this very failure can become the cause of the use of force. *Atkinson v. City of Mountain View, Mo.*, 709

F.3d 1201, 1202 (8th Cir. 2013). *See also Hastings v. Barnes*, 252 Fed.Appx. 197, 203, 2007 WL 3046321, at *5 (10th Cir. (Okla.) 2007) (The reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment they used force but also on whether the officers' own conduct during the seizure unreasonably created the need to use such force).

As noted above, in its prior order denying summary judgment, the trial court found a disputed question as to "whether Defendant Officer Nikolov received or heard a radio call advising him that Plaintiff was defending herself with a licensed firearm[.]" App. 0880, R. Doc. 140 at 1. According to Defendants' own chronology, Ms. Morgan-Tyra called 911 approximately six minutes prior to being shot by Nikolov. See App. 1586, R. Doc. 210-1 at 12 (explaining chronology); App. 0117, R. Doc. 93-2 at 2; App. 0572, R. Doc. 102-2; App. 0648, R. Doc. 102-5 at 13. Ms. Morgan-Tyra told the dispatcher that she came over to her brother's house and that there was a girl who had broken in and was threatening to stab Ms. Morgan-Tyra with a screwdriver. App. 0147, R. Doc. 93-5 at 10. Ms. Morgan-Tyra told the dispatcher that she had a firearm and a license to carry. Ms. Morgan-Tyra also told her "**If I put it down she will come at me**." Id. The dispatcher told her to wait for police. Id. The information the dispatcher then conveyed to Nikolov by dispatch included the fact that the caller was "a female named Jennifer Tyra," that she was

armed with a firearm and that there was a "white female armed with a screwdriver trying to attack the caller." App. 0561, R. Doc. 102-1 at 3.

While Nikolov has suggested that he either didn't receive or didn't hear this information from dispatch because it was loud inside the house, there is no dispute that it came over his radio that was on his shoulder and the radio and dispatch evidence shows he received it. It is uncontroverted that Officers Nikolov and Bushart were wearing their radios on their shoulders during the entirety of this incident, the radios were on, and they themselves were communicating with dispatch over their radios before and after the shooting. Therefore the reasonable inference is that they received the radio communication from dispatch. App. 0268, R. Doc. 93-13 at 14; App. 0230, R. Doc. 93-12 at 10; App. 0650, R. Doc. 102-5 at 15. See also App. 1588 , R. Doc. 210-1 at 14 (summarizing evidence that Nikolov and Bushart's radios would have received the transmission). *See also Craighead v. Lee*, 399 F.3d 954, 961 (8th Cir. 2005) (finding a disputed question of fact as to whether officer knew individual holding weapon at the time of the shooting was in fact engaged in self-defense because "the facts, taken in the light most favorable to Craighead's heirs and next of kin, show that [the officer] either was still in his car or had his pack set on when the dispatcher broadcast the news that the gun had changed hands.")

Plaintiff also demonstrated that, based on Nikolov's own testimony regarding the timing of the incident, he would have received this transmission while still

outside the house where he was not close to any yelling. *See* App. 1588-1589, R. Doc. 210-1 at 14-15.[3]

The trial court acknowledged this fact was in dispute in its Order. See R. Doc. 231 at 5, App. 2272 ("Whether Defendant Nikolov had entered the residence at 4241 Chippewa prior to this second dispatch is disputed.") Based on the trial court's own finding, a reasonable officer in Defendant Nikolov's position would have known when he entered the premises that Plaintiff was holding a licensed firearm in legitimate self-defense against an armed intruder, a right which is guaranteed by the Second Amendment to the Constitution, and that the subject would be expected to comply with commands once she knew police had arrived, because she called the police for help.

As set forth in Section H, *infra*, these facts are of the greatest importance in demonstrating Nikolov's violation of established law. Nevertheless, the trial court failed to properly consider the import of Officer Nikolov's knowledge that a woman

[3] The defense contended that Nikolov was already inside the house at the time of the transmission based an attempt to "sync up" a surveillance video of the property (which had no sound) with Karla Nicholson's 911 call, claiming that Nikolov's partner Officer Bushart can be "heard banging on the closed metal screen door on Ms. Nicholson's 911 call which recorded the officer-involved shooting at issue in this case." However, this "sync up" has no foundation, is based on defense counsel's *ipse dixit* assertions, and is controverted by other evidence accounting for the sound. See App. 1589-1590, R. Doc. 210-1 at 15-16.

was defending herself and had called the police for help in its qualified immunity analysis.

E. PRIOR TO THE SHOOTING, NIKOLOV FAILED TO PROPERLY IDENTIFY HIMSELF AS A POLICE OFFICER, GIVE COMMANDS OR A WARNING OF HIS INTENTION TO SHOOT, OR GIVE MS. MORGAN-TYRA AN OPPORTUNITY TO COMPLY.

The trial court previously denied Defendants' earlier motion for summary judgment in part because it found a dispute of material fact as to "whether Defendant Officer Nikolov ordered Plaintiff to drop her gun prior to opening fire[.]" App. 0880, R. Doc. 140 at 1. This fact clearly remains disputed, as **Ms. Morgan-Tyra was not even aware that the police were on the premises at the time she was shot**. Ms. Morgan-Tyra never heard anyone announce that they were the police before she was shot. App. 0147, R. Doc. 93-5 at 10. The evidence shows that Nikolov failed to properly announce the presence of the police, failed to give any warning of his intention to shoot, and failed to give a proper command with any opportunity for Ms. Morgan-Tyra to comply.

1. THE TRIAL COURT ERRONEOUSLY FOUND THAT NIKOLOV COMMANDED MS. MORGAN-TYRA TO DROP THE GUN BEFORE OPENING FIRE.

The trial court in granting Nikolov qualified immunity erroneously concluded that "it is undisputed that Defendant Nikolov at least yelled at Ms. Morgan-Tyra to put the gun down[.]" App. 2273, R. Doc. 231 at 6. Plaintiff submits that the trial court overlooked substantial evidence creating a disputed question of fact as to

whether Nikolov in fact gave any command at all. Ms. Morgan-Tyra testified that she first heard the recording of the 911 call when the recording was played for her by Associate City Counselor Wheaton during her deposition.[4] App. 1061, R. Doc. 194-3 at 84. She unequivocally testified it was only her brother Michael Morgan telling her to drop the gun and the only voice she heard was her brother's, who was also in the hallway. App. 0171, R. Doc. 93-5 at 34 ("The last voice I heard was Michael's. There's no mistake about that, I know my brother.") Plaintiff has been deposed twice and on both occasions reiterated that she hears her brother, not Officer Nikolov, on the 911 recording. Id.; App. 1088, R. Doc. 194-3 at 111. At most there is evidence that Ms. Morgan-Tyra heard *someone* say "put the gun down," or words to that effect, although she is certain she only hears her brother who was also in the hallway. App. 0147, 0171, R. Doc. 93-5 at 10, 34. Ms. Morgan-Tyra was unequivocal that in the moments right before she was shot, not just in reviewing the 911 recording, she only heard **one** male voice, and it was her brother's.

The trial court, in finding Nikolov gave some command to drop the gun,[5] evidently accepted Defendants' argument that Plaintiff had admitted that fact in a

[4] Ms. Morgan-Tyra's first deposition was taken in May of 2019 for evidence preservation purposes as her body was suffering from a severe infection relating to the injuries caused by the shooting.

[5] Without regard to the issue of a command, there is *no* suggestion anywhere that Officer Nikolov in fact gave any Ms. Morgan-Tyra any *warning*, that he intended to

pre-suit affidavit attached to a settlement demand letter which included reference to the 911 call. This affidavit was prepared with the assistance of counsel at an early stage of counsel's representation and investigation and was attached to a RSMo. 408.040 prejudgment interest demand.[6] The erroneous identification of Nikolov as the individual on the recording was corrected less than three months later. See App. 0974, R. Doc. 194-2.

Defendants argued to the trial court that Plaintiff was bound by her earlier statement in the pre-suit affidavit and was now barred from explaining it in any way because the corrected affidavit and Ms. Morgan-Tyra's subsequent testimony in her two depositions was a "sham." See App. 0916-0917, R. Doc. 193 at 32-33. While the trial court evidently accepted this argument, neither the law nor the facts support it and the trial court's finding was in error.

The cases relied on by Nikolov relate to situations where a party has testified to facts in deposition and then provides a last-minute affidavit in opposition to summary judgment which contradicts their prior deposition testimony. *See Button v. Dakota,*

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shoot her if she did not comply, as required by clearly established law when feasible. *See Loch v. City of Litchfield*, 689 F.3d 961, 967 (8th Cir. (Minn.) 2012).

[6] Plaintiff pointed out to the trial court that this was a settlement communication. App. 1596, R. Doc. 210-1 at 22. Federal Rule of Evidence 408 bars use of a statement made during compromise negotiations about the claim to "impeach by a prior inconsistent statement or a contradiction." Therefore this prior statement was not admissible either on summary judgment or at trial.

Minn. & E. R.R. Corp., 963 F.3d 824, 830 (8th Cir. 2020) ("Typically, sham affidavits appear as a plaintiff's stratagem to defeat summary judgment.") In *Bass v. City of Sioux Falls*, 232 F.3d 615, 618 (8th Cir. 1999), cited by Defendants, this Court *reversed* a trial court's grant of summary judgment because the trial court improperly ignored an affidavit, precisely because "the affidavit testimony cannot be said to constitute a sudden and unexplained revision of the deposition testimony" offered in opposition to the summary judgment motion. *Button v. Dakota, Minn. & E. R.R. Corp*., 963 F.3d 824, 830 (8th Cir. 2020), also cited by Defendants, similarly rejected the argument that the affidavit in that case was a "sham" that the trial court should have ignored.

The Defendants failed to present the trial court with any legal authority under facts remotely resembling the ones here which would permit the trial court to completely ignore Plaintiff's subsequent affidavit and deposition testimony, as it did in its Order. The timing of Plaintiff's corrected affidavit alone negates Defendant's argument that this was a "stratagem to defeat summary judgment" through a "sudden and unexplained revision of testimony." Indeed, the court's Order failed to address this issue, instead assuming that no disputed question of material fact existed on the basis of the first affidavit. App. 2273, R. Doc. 231 at 6. The trial court was incorrect and instead this presents a classic question of fact: There is a recording and a jury can decide whether the voice belongs to Nikolov or to Michael Morgan.

2. REGARDLESS OF WHETHER NIKOLOV GAVE A COMMAND IMMEDIATELY BEFORE OPENING FIRE, HE FAILED TO NOTIFY MS. MORGAN-TYRA THAT POLICE WERE PRESENT OR GIVE A WARNING OF HIS INTENTION TO SHOOT.

Moreover, even though the trial court incorrectly assumed that a command was given prior to Nikolov opening fire, it importantly did *not* conclude (and the evidence does not demonstrate) that any proper announcement of police or warning of intent to shoot was ever given which would support Officer Nikolov's assertion of qualified immunity or render his use of force reasonable. The trial court recognized these issues and expressly "**stop[ped] short of determining the sufficiency of this warning**[.]" App. 2275, R. Doc. 231 at 8, note 11. Moreover, a reasonable officer knowing that Ms. Morgan-Tyra was defending herself and waiting for police would not expect her to obey a command to disarm herself from an unknown and unseen individual behind her.

Among other things, the trial court acknowledged there was evidence that Nikolov opened fire "**almost immediately**" after giving his purported command, App. 2273, R. Doc. 231 at 6, such that even if he had given one, it was of no practical or legal effect as Plaintiff would have had no opportunity to comply. In short, a command in which Nikolov neither (a) identified himself as a police officer; (b) warned that he intended to shoot; or (c) gave Ms. Morgan-Tyra any chance to comply

is of no legal effect at all, and certainly does not excuse Nikolov's unreasonable and excessive use of force.

F. THE TRIAL COURT IGNORED EVIDENCE DEMONSTRATING THAT A REASONABLE OFFICER WOULD NOT HAVE BELIEVED MS. MORGAN-TYRA WAS A THREAT TO EITHER NICHOLSON OR OFFICER NIKOLOV WHEN NIKOLOV OPENED FIRE.

Here, disregarding Nikolov's self-serving and incredible testimony and viewing the evidence in the light favorable to Plaintiff, Nikolov was not facing a "split-second" decision, where he had no opportunity to properly announce and give Ms. Morgan-Tyra an opportunity to comply. Indeed, Nikolov's current claim that he had to shoot Ms. Morgan-Tyra because she presented an imminent threat in that moment has always faced a significant hurdle: Nikolov can't decide whether he opened fire to protect Nicholson, a person in another room he couldn't see, or whether he did it to protect himself. Moreover, Nikolov has stated Ms. Morgan-Tyra was pointing her gun at the floor prior to him opening fire. Obviously these contradictions create a significant question of fact as to Nikolov's claim that he needed to shoot Ms. Morgan-Tyra because of an immediate "threat" she presented.

In its prior order denying Defendants' Motion for Summary Judgment, the trial court found that the question of "whether Plaintiff pointed her gun at Defendant Officer Nikolov" was a disputed question of material fact. App. 0880, R. Doc. 140 at 1. Among the ample evidence set forth in Plaintiff's opposition, Nikolov's claim

that Ms. Morgan-Tyra turned and threatened him with the weapon is disputed by the simple fact that he *shot her in the back*, as stated by Defendant's partner Officer Bushart to the dispatcher immediately after the shooting. See App. 0561, 0565; R. Doc. 102-1 at 3 and 7 ("Q. Victim shot inside the house, which part of her body? Which part? … A. **In the back**.") Indeed, this false claim of Nikolov's, which was his original justification for repeatedly shooting Plaintiff, has been so thoroughly discredited that the trial court did not rely on it in its order granting summary judgment.[7] Instead, the trial court focused on the purported threat to Nicholson presented by Ms. Morgan-Tyra, without addressing how this completely contradicts Nikolov's claim in his post shooting interview that he shot because Ms. Morgan-Tyra pointed the gun at him.

This Court in *Cole Estate of Richards v. Hutchins*, 959 F.3d 1127 (8th Cir. 2020) found that it was clearly established law as of 2016 (the date of the shooting in that case and little more than a year after the shooting here) that (1) **even in a case where the subject is holding a firearm**, "the requirement that the threat be reasonably perceived as 'immediate' means that if the threat has passed, so too has

[7] A criminal prosecution was instigated against Ms. Morgan-Tyra predicated on Nikolov's claim that Jennifer allegedly "assaulted" him by pointing a weapon at him. App. 0675, R. Doc. 102-9. Notably, when he was deposed in that matter Nikolov refused to reiterate this claim or to testify and instead asserted the Fifth Amendment. App. 2172, R. Doc. 211-16 at 6. That prosecution was later dismissed *nolle prosequi*. App. 0680, R. Doc. 102-11 at 1.

the justification for the use of deadly force"; (2) "a few seconds is enough time to determine an immediate threat has passed, extinguishing a preexisting justification for the use of deadly force"; and (3) that the failure to properly warn "militates against finding use of deadly force objectively reasonable." *See Id*.

The trial court distinguished Plaintiff's reliance on *Cole* specifically on the basis of Ms. Morgan-Tyra's purported threat to Nicholson. App. 2279-2280, R. Doc. 231 at 12-13. However, the trial court only reached this conclusion by ignoring evidence showing that there was no immediate threat such that the situation required the use of immediate and overwhelming lethal force from Nikolov. It is undisputed that Ms. Morgan-Tyra had held Ms. Nicholson at bay after being told to wait for the police after hanging up with the dispatcher and waiting for at least 3 minutes and 37 seconds. App. 2236, R. Doc. 227 at 6.

Officer Nikolov stated in his post-shooting interview with Sergeant Engelhardt that "As we passed the kitchen, Officer [Bushart] was in back of me. I *peeked* over the corner and I saw a lady with a gun in her hand." App. 0682, R. Doc. 102-16 at 2. Officer Nikolov also described his first position as "remaining hidden" by the refrigerator and the corner of the doorway leading to the back hallway. App. 0263, R. Doc. 93-13 at 9. At his deposition Officer Nikolov testified that he was in position 1 the "hidden position" by the corner of the doorway leading to the back hallway for approximately two to three seconds and in "position two"

where he fired the shots from for six, ten, twelve seconds, he didn't know exactly App. 0226, R. Doc. 93-13 at 12. See also App. 0669, R. Doc. 102-18 (Nikolov Diagram placing himself in positions 1 and 2) . Therefore Nikolov's own testimony shows he was in "firing position" for 6 to 12 seconds before deciding to shoot Ms. Morgan-Tyra in the back.

Moreover, Nikolov admitted that as he approached Ms. Morgan-Tyra from behind her from the kitchen down the hallway **he could not see Ms. Nicholson**, as Defendant Nikolov admits in his affidavit that he could not see the person he believed Ms. Morgan-Tyra was holding at bay with her gun. See App. 0112, R. Doc. 93-1 at 3. This is also evident from the locations he placed Michael Morgan and Jennifer Morgan-Tyra. App. 0669, R. Doc. 102-18. Therefore there are at least two profound disputed questions as to Nikolov's claim that he acted to stop an imminent threat: (1) he first claimed to be protecting himself, not Nicholson; and (2) he admittedly could not see Nicholson and did not know what she was doing at the time he opened fire.

On top of this, Plaintiff presented significant, probative evidence in the form of admissions from Defendant Nikolov himself that Plaintiff did *not* have her weapon pointed at Nicholson in the moments immediately before the shooting at the time that Nikolov, who had snuck up behind Plaintiff, decided to move into shooting position and open fire. Officer Nikolov testified and demonstrated that Ms. Morgan-

Tyra was "**pointing the gun down towards the floor,** and when she began to raise it up, I shot at her as fast as I could." App. 0270, R. Doc. 93-13 at 16. At his deposition Officer Nikolov demonstrated how Ms. Morgan-Tyra was pointing the gun down towards the floor moments before he shot her. See App. 700, R. Doc. 102-19; App. 0284, R. Doc. 93-13 at 30. Nikolov's testimony is consistent with Ms. Morgan-Tyra's own testimony that she would lower the weapon to point down when Nicholson would sit back down on the bed and presented less of a threat, and that she thought Nicholson was on the bed the weapon was pointing down at the time of the shooting. See App. 1113, R. Doc. 194-3 at 136. Plaintiff respectfully submits that the Court overlooked this significant and probative evidence in its Order granting Defendants' motion.

G. NIKOLOV VIOLATED CLEARLY ESTABLISHED LAW.

Here, the trial court held that Nikolov was entitled to qualified immunity because there were no cases which "squarely govern the specific facts at issue here[.]" App. 2280, R. Doc. 231 at 13. Plaintiff respectfully submits that the trial court mistakenly interpreted the "squarely govern" language to mean that a nearly-exact factual case was required to put Officer Nikolov on notice, and thereby took far too narrow a view of the relevant case law and established legal principles governing the use of force. *See Thompson v. Monticello, Arkansas, City of*, 894 F.3d

993, 999 (8th Cir. 2018)("[I]t is not necessary, of course, that the very action in question has previously been held unlawful.")

The Eighth Circuit takes "a broad view of what constitutes 'clearly established' under the qualified immunity analysis." *Whisman Through Whisman v. Rinehart*, 119 F.3d 1303, 1309 (8th Cir. (Mo.) 1997). For a right to be deemed clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Atkinson v. City of Mountain View, Mo.*, 709 F.3d 1201, 1211 (8th Cir. (Mo.) 2013).

Under clearly established law, a police officer may only deploy deadly force against an individual if the officer "has probable cause to believe that the [person] poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1 (1985). Furthermore, at the time of the shooting both the Supreme Court and the Eighth Circuit had clearly established that "**Before employing deadly force, an officer should give 'some warning' when it is 'feasible' to do so**." *Loch v. City of Litchfield*, 689 F.3d 961, 967 (8th Cir. (Minn.) 2012), citing *Tennessee v. Garner,* 471 U.S. 1 (1985). *See also Atkinson v. City of Mountain View, Mo.*, 709 F.3d 1201, 1212 (8th Cir. 2013) (Holding in an excessive force case that, "On August 31, 2007, Sanders had 'fair warning' that charging at a non-resisting individual without first identifying himself as a police officer was unconstitutional in the context of an arrest.") Again, Officer Nikolov admitted at his

deposition he had as many as 12 seconds to do so. This Court has recognized that the reasonableness of an officer's use of force can turn on whether the officer has identified himself, because **this very failure can become the cause of the use of force**. *See Atkinson,* 709 F.3d 1201 at 1202. [Emphasis supplied.]

Plaintiff respectfully submits that, given the facts set forth above when viewed in the light most favorable to Plaintiff, a reasonable officer would have understood that he was violating Ms. Morgan-Tyra's right to be free from excessive force. As shown above, by his own testimony Nikolov could not see that Ms. Morgan-Tyra was pointing a weapon at anyone, and the weapon was pointed at the ground shortly before the shooting. Ms. Morgan-Tyra, a United States Army Veteran, testified she did not want to shoot anyone. App. 0165, R. Doc. 93-5 at 28. Nikolov had reason to know the person with a firearm in the home was acting in self-defense based on the 911 call. A person acting in self-defense who has called 911 for help can reasonably be expected to comply with police instructions (and the evidence is that Ms. Morgan-Tyra as the daughter of a law enforcement officer would have complied if simply given the chance). Yet Nikolov, who by his own testimony had up to twelve seconds in shooting position before firing, either gave no warning of intent to kill, or at best failed to announce police and immediately opened fire after telling Ms. Morgan-Tyra to drop her weapon.

In *Craighead v. Lee*, 399 F.3d 954, 961 (8th Cir. 2005) an officer opened fire without warning on two subjects who were struggling over a firearm, knowing that at least one of the subjects was a victim who was engaged in self-defense. The trial court here in its Order acknowledged that "In *Craighead*, the United States Court of Appeals for the Eighth Circuit found an officer violated the Fourth Amendment when the officer shot his shotgun at two men wrestling, and fired without warning, knowing that the shot would hit *both* men, one of whom the officer **had to presume was a victim** rather than a suspect given the officer's knowledge of the dispute." R. Doc. 231 at 13, App. 2280, citing *Craighead*, 399 F.3d at 961. [Empahsis supplied.] The Eighth Circuit found that these facts, combined with the fact that a "**warning was feasible but not given**" showed a violation of clearly established rights. *Id.*

Given the disputed questions of fact in this case, including Nikolov's knowledge that the individual with the firearm was defending herself from an armed intruder and his admitted inability to see Nicholson, *Craighead* is directly on point. In *Craighead* the officer knew that one of the two individuals he opened fire on was engaged in self-defense. Here, Nikolov had reason to believe that the very person he opened fire on without warning or an opportunity to comply was also a victim engaged in legitimate self-defense to ward off an aggressor. The reasonable inference from his own admissions is that Nikolov had an opportunity to properly announce and give a warning, but did not. At bare minimum a disputed question of

fact exists, just as it did when the trial court denied Nikolov's prior summary judgment motion.

In the recent case of *Cole Estate of Richards v. Hutchins*, 959 F.3d 1127 (8th Cir. 2020) the decedent Richards and another individual had been in multiple altercations. *Id*. at 1130. When the police arrived the two subjects were fighting in the front yard. A neighbor informed them that police had arrived. *Id*. The subjects eventually ceased fighting and Richards then went to his car and retrieved a long gun. *Id*. The other subject had retreated to his porch and Richards approached him on the porch with the long gun. *Id.* The other subject retreated into his house and slammed the door. Richards then backed down the steps of the porch and turned away from the door. Roughly five seconds after Underwood had entered his home and slammed the door, Officer Hutchins fired on Richards five times without warning, striking and killing him. *Id.*

This Court found in *Cole* that this use of force was not objectively reasonable and violated clearly established law, such that qualified immunity did not apply. The court noted that an individual's mere possession of a firearm is not enough for an officer to have probable cause to believe that individual poses an immediate threat of death or serious bodily injury. *Id. at* 1132. That is particularly the case where, as here the person has waited several minutes for police assistance. Furthermore, "**the requirement that the threat be reasonably perceived as 'immediate' means that**

if the threat has passed, so too has the justification for the use of deadly force." *Id*. at 1132. [Emphasis supplied.] This Court also held that it was "**clearly established that a few seconds is enough time to determine an immediate threat has passed, extinguishing a preexisting justification for the use of deadly force**." *Id*. at 1131. [Emphasis supplied.] The Court noted that **the failure to properly warn where feasible "'exacerbate[s] the circumstances' and militates against finding use of deadly force objectively reasonable**." *Id*. at 1133. [Emphasis supplied.] Plaintiff respectfully submits that the trial court completely failed to properly apply these clearly established principles to the facts of this case.

In *Cooper v. Sheehan*, 735 F.3d 153 (4th Cir. 2013), a neighbor had called 911 to report that an altercation was occurring at the property and the officers were informed that two males were screaming at each other. When police arrived they saw a man standing on the porch who observed the police and then went inside the home. *Id.* at 155. As the officers approached on foot they heard people screaming and walking around inside the home. *Id.* One of the officers tapped on the window to announce their presence but the officers did not identify themselves as police. *Id.* In response to the sound at his window, Cooper uttered some obscenities, which the Officers heard. Cooper then peered out the back door and called out but no one responded. *Id.* Cooper then walked out the door holding a shotgun. Reacting to the sight of Cooper and his shotgun, the Officers drew their service weapons and

commenced firing without warning. *Id.* While the officers claimed that Cooper lifted the weapon to his hip and fired it, Cooper testified that it was pointed down. *See Id.* at Note 4.

On these facts, the Fourth Circuit held that the trial court had properly denied the officers qualified immunity. The court noted that "Importantly, the Officers never identified themselves—even when asked by Cooper. If the Officers had done so, they might have been safe in the assumption that a man who greets law enforcement with a firearm is likely to pose a deadly threat." *Id.* at 159. Instead, "**Cooper's 'perfectly reasonable' rationale for bearing a firearm while investigating a nocturnal disturbance on his own property 'should have been apparent to [the Officers] at the time of the shooting**.'" *Id.* at 160. [Emphasis supplied; cit. omit.] Here, and exactly as in *Cooper*, Nikolov had every reason to believe there was a white female in the home with a firearm for the "perfectly reasonable rationale" of defending herself from an armed intruder. Yet, just as in *Cooper* Nikolov had reason to believe she was unaware of his presence yet failed to announce the presence of police to Ms. Morgan-Tyra or give her a chance to acknowledge their presence and obey a command.

An identical set of facts is not required to put the police on notice. The trial court clearly erred in its application of the law by taking far too narrow a view of the case law. Under all of the above legal authority, Nikolov would have known that his

actions violated established law in that (a) Nikolov knew that Ms. Morgan-Tyra had a reasonable rationale for having a handgun and was engaged in self-defense; (b) this case does not involve a "split-second" decision, as Ms. Morgan-Tyra had called the police and had been waiting for them for several minutes, and Nikolov himself admitted he was in firing position ("position two") for up to 12 seconds before choosing to open fire; (c) Officer Nikolov had time and an opportunity to announce the presence of police and give commands, as he later claimed to have done in his post-shooting interview (where he also conceded that he gave no warning that he intended to shoot); (d) by his own testimony Nikolov could not see who, if anyone, Ms. Morgan-Tyra was pointing a weapon at; and (e) Officer Nikolov's admission in his deposition that Ms. Morgan-Tyra was pointing the weapon down (ignoring Nikolov's self-serving and impossible claim that she turned and pointed the weapon towards him) shows she was not pointing the weapon at Nicholson at the time Nikolov decided to open fire.

CONCLUSION

A reasonable juror could and would find that Defendant Nikolov unloaded his firearm in the back of a person he knew had called 911 for help and was defending themselves from a disturbed individual armed with a screwdriver (who Nikolov could not see at the time he opened fire), all without a proper announcement of authority, command and warning of intent to use deadly force, and without giving

Morgan-Tyra any actual opportunity to comply. Had Nikolov identified himself, there would have been no need for any use of force against Ms. Morgan-Tyra, who had called the police and was waiting for them to arrive to resolve the situation.

Morgan-Tyra called for help and would have unquestioningly complied if an announcement had been given along with an opportunity to acknowledge the officer's presence verbally or by putting the gun down, as she testified she would have done. Under these circumstances, a reasonable officer would know that they should announce their presence as a police officer and give Ms. Morgan-Tyra an actual opportunity to comply before shooting her in the back. This is why Nikolov claims to have done just that. An objectively reasonable officer would have known that he could not simply open fire under these circumstances without giving Ms. Morgan-Tyra a chance. As a result, she will be paralyzed for the rest of her life and suffer other life-altering and life-threatening conditions.

For all of these reasons, Plaintiff respectfully submits that the trial court overlooked Plaintiff's evidence and disputed questions of material fact, misinterpreted the law and erred in granting summary judgment on the basis of qualified immunity. Therefore Plaintiff requests that the trial court's order and judgment should be reversed as to Count I, and the case remanded for further proceedings.

Dated: December 20, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the above Appellants' Brief complies with Federal Rules of Appellate Procedure 27(d) and 32(g) and applicable type/volume limitations, and contains **9,685** words, excluding the cover, table of contents, and table of authorities. This Brief further complies with applicable type-face and type-style requirements because it has been prepared using Microsoft Word in Times New Roman 14 point font. I further certify that the electronic version of this brief has been scanned for viruses

/s/ Richard K. Dowd

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants are registered CM/ECF users and that service will be accomplished by that system.

/s/ Richard K. Dowd