UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SARA KNOWLTON, *as Administrator of the estate of Brian Garber*,	)	**CASE NO. 1:15-cv-00210-DAP**
Plaintiff,	)	**JUDGE DAN AARON POLSTER**
vs.	)	**OPINION AND ORDER**
RICHLAND COUNTY, OHIO, et al.,	)	
Defendants.	)	

I. Background

On March 16, 2014, Brian Garber was shot and killed by three deputies of the Richland County Sheriff's Office. Am. Compl. ¶ 1, Doc #: 3. Plaintiff Sara Knowlton, as the administrator of Brian Garber's estate, filed the above-captioned civil rights suit against Richland County, Ohio; Richland County Board of Commissioners; Richland County Sheriff's Office; Steve Sheldon, sheriff, in his individual and official capacities; Raymond Frazier, in his individual and official capacities; Andrew Knee, in his individual and official capacities; James Nicholson, in his individual and official capacities; and Donald Zehner, in his individual and official capacities (collectively, "Defendants"). Am. Compl. ¶¶ 6–13. Therein, Knowlton alleges ten claims:

1. Excessive force, brought pursuant to 42 U.S.C. § 1983, against all Defendants;
2. Ohio state law assault and battery, against Frazier, Knee, and Nicholson;
3. Ohio state law wrongful death, against all Defendants;
4. Excessive force, brought pursuant to § 1983 and *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978), on the basis of custom, against Richland County;
5. Excessive force, brought pursuant to § 1983, on the basis of failure to supervise, against Sheldon and Zehner;
6. Ohio state law negligent supervision, against Sheldon;
7. Ohio state law negligent hiring and retention, against Richland County, Richland County Board of Commissioners, Richland County Sheriff's Office, and Steve Sheldon;
8. Excessive force, brought pursuant to § 1983, on the basis of ratification, against Richland County, Richland County Board of Commissioners, Richland County Sheriff's Office, and Sheldon;
9. Survivorship action, against all Defendants; and
10. Willful, wanton, and reckless conduct, brought pursuant to Ohio Rev. Code 2744.01 *et seq.*, against all Defendants.

Am. Compl. 59–90.

On January 16, 2017, Defendants moved for summary judgment. Doc #: 31. The matter is fully briefed.[1] On March 17, Plaintiff filed a "Motion to Strike Defendants' Arguments That The Report of Expert Melvin Tucker Is Inadmissible At Summary Judgment." Doc #: 37.

II. Summary Judgment Framework

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "On the other hand, if a reasonable jury could return a verdict for the nonmoving party, summary judgment for the moving party is inappropriate." *Baynes v. Cleland*, 799 F.3d 600, 606 (6th Cir. 2015) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The movant bears the initial burden

[1] The Court notes that the briefing would have been more beneficial to the Court had each side used less hyperbole.

of showing that there is no material issue in dispute. *Id*. at 607 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "A fact is deemed material only if it might affect the outcome of the lawsuit under the governing substantive law." *Id*. (citing *Wiley v. United States*, 20 F.3d 222, 224 (6th Cir. 1994)). In reviewing a motion for summary judgment, the court must view the facts and any inferences reasonably drawn from them in the light most favorable to the nonmoving party. *Id*. (citing *Kalamazoo Acquisitions, LLC v. Westfield Ins. Co*., 395 F.3d 338, 342 (6th Cir. 2005)).

III. Factual Background

For purposes of this motion, disputes of fact are resolved, and reasonable inferences made, in favor of the non-moving party.

A. Medical and Behavior Backgrounds

1. Brian Garber

Brian Garber, the deceased, had some history of mental health issues. He was diagnosed with ADHD at around age five or six, was later diagnosed with depression, anxiety, and bipolar disorder, and had been prescribed medication. In February 2012, Brian Garber had been suicidal following the loss of his daughter to SIDS. It is unclear what medication he may have taken on the day of the incident at issue.

2. Raymond Frazier

Deputy Frazier had been diagnosed with mild depression and anxiety and had been prescribed medication for this at the time of the incident. His anxiety and use of medication was known commonly throughout the Sheriff's Office.

In 2007, Frazier had been involved in a lawsuit related to his use of deadly force against

Gilbert Rush. Frazier also had "two, maybe three" complaints for use of force. Frazier Dep. 97:9–13. In an August 2013 incident, which resulting in an internal and a criminal investigation, Frazier was accused of throwing an individual to the ground and handcuffing that individual to a chair. Frazier received either an "instruction in caution" or an "unsatisfactory work performance" related to that incident. Frazier Dep. 99:1–12, 108–109. According to a Voluntary Statement in Frazier's personnel file given by an individual in September 2013, Frazier allegedly arrived at an individual's house, pointed his gun at the individual, and threatened to kill him if he did not open the door. He then allegedly kicked the door open, put his gun to the individual's head, and then punched him a few times.

In May 2013, Frazier became upset when his canine partner was taken away from him, and had an outburst involving kicking chairs and speaking angrily at other officers. Frazier then elected to take a sick day for the rest of the day. Frazier was put on administrative leave pending a psychological examination:

> Reason for Referral
> Deputy Raymond J. Frazier was referred for Psychological Evaluation by Major Dale" Fortney of Richland County Sheriffs Office. The referral reads "Please advise if Deputy Frazier is fully capable, psychologically and emotionally, of fulfilling all the duties of a Deputy Sheriff." This referral came about after Deputy Frazier responded by kicking chairs, making angry (but not threatening) statements and became emotionally distraught and tearful following the removal of his canine from his possession for some retraining. In addition, there was a recent complaint from a mechanic service used by the Sheriffs Office stating that Deputy Frazier had threatened to "arrest" someone if his car was not fixed.

Fitness for Duty Evaluation 1. The psychologist concluded,

> 1. Results of this Psychological Fitness for Duty Evaluation provide no evidence that Raymond Frazier meets criteria for mental health diagnosis. He does currently take antidepressant medication for treatment of some

> symptoms which appear to be controlled at this time.
> 2. In regard to the referral question as to whether Deputy Frazier is capable of psychologically and emotionally fulfilling duties of Deputy Sheriff, conclusion of this evaluation is that he could be returned to full duty immediately.
> 3. However, Mr. Frazier openly admits that he has low frustration tolerance and sometimes responds to stressors in a maladaptive manner. Therefore, it is strongly recommended that he seek mental health intervention to learn some more appropriate coping, interpersonal, self-control, and patience skills.

Id. at 6. Frazier was disciplined with an "Instruction of Caution" for "Unsatisfactory Work Performance and Failing to Maintain a Required Standard of Performance." Inter-Office Communication from Captain Bosko to Sheriff Sheldon 2.

B. Prior to the Incident

March 16, 2014, at approximately 7:10 p.m., Deputy Knee and Lieutenant Zehner responded to a domestic violence call at Brian Garber's residence, 3425 Mill Run Road. Brian Garber had pushed his wife, Sara Knowlton, down, holding her onto the bed at her collarbone and shoulder area near her neck, and had pushed his mother, Connie Garber, when she tried to stop him. Sara Knowlton was scared for herself and her children and contacted law enforcement. When Knee and Zehner arrived, Brian Garber had already left the house. Richland County Sheriff's Office and Lexington Police Department officers searched for Brian Garber, but were unable to locate him. Sara Knowlton and Connie Garber eventually, albeit reluctantly, signed domestic violence packets. They expressed to the deputies that they wanted to get help for Brian Garber.

Subsequently, Matthew Garber (Brian Garber's father) and Connie Garber returned to their home (Brian Garber's childhood home) at 3400 Mill Run Road, which was across the street and up the hill from 3425 Mill Run Road. Matthew and Connie Garber found Brian Garber

upstairs in his his childhood bedroom. Brian Garber strongly implied that he had a gun and did not deny it when his mother asked whether he had a gun. In her deposition, Connie Garber said,

> [Brian Garber] didn't say he had a gun, he just said, you won't like what's under my shirt. He had his hand under his shirt, and I'm the one that said really, Brian, now you're trying to tell us you have a gun? And he goes like this (indicating). Yeah. And I knew he was -- I just knew it, I knew he was just saying that because he wanted to be left alone. He's never handled a gun in his life.

C. Garber Dep. 42:6–13. Matthew and Connie Garber went downstairs, whereupon they discussed the matter.

> I [Connie Garber] said, you know he doesn't have a gun, He [Matthew Garber] goes, well, probably not but what if. I go, where would he get it? He said, you never know, but what if and he might harm himself. Then that shook me up and I thought, okay, what if. Because I knew he would never hurt us or anyone, I knew he wouldn't.

Id. 42:22–43:5. Brian Garber also sent text messages to Sara Knowlton indicating, among other things, that he had a gun. Connie Garber also communicated to Sara Knowlton that Brian Garber had a gun. Sara Knowlton called 911:

> Sara states, "Hi, I just called about my husband and the police were here. My husband is now up at my in-laws where my kids are and he has a gun."
> The dispatcher asks, "Where are you at now, where is your husband with the gun?"
> Sara replies, "He's up at 3400 Mill Run. My mother-in-law took the kids in the car and left, but my father-in-law is up there and he has a gun." (Begins to cry)
> The dispatcher gains further information and informs Sara that officers are in the area and they are responding.
> Sara states, "(crying) Oh my god, okay I'm going to put something in front of this door that he broke."
> The dispatcher informs Sara to stay on the line and Sara responds, "Oh my god (crying) he's crazy, I can't move this washing machine." (Panting trying to push machine)
> The dispatcher asks, "Can you see the residence from the house?"
> Sara responds, "Yes, they're up there, um, they uh live up the hill across the

> street from us. Oh my god where did he get a gun? (crying) Okay well I can't put anything in front of this door."
> Dispatcher asks, "Okay, how do you know that he has a gun?"
> Sara responds, "He just text and said he had one, and then he went up there and showed his parents, so my mother-in-law took our kids, put them in the car and ran."
> Dispatcher asks, "How do you know he showed it to the parents?"
> Sara responds, "My mother-in-law just came down here, knocked on the door, and said he's got a gun and I've got the kids."
> Dispatcher states, "Okay."
> Sara states, "I'm gonna barricade this door he broke in. I'm not leaving, I'm not going outside."
> Sara informs the dispatcher that Connie took her kids and they all got in a car and ran off. The dispatcher then asks, "Okay, where is your mother-in-law and kids at?"
> Sara states, "She's in the house right now, the kids are locked in the car, she's going out in the car with them right now. We don't know if he's lying or not."
> Dispatcher asks, "Your mother-in-law never saw the gun?"
> Sara responds, "He said he showed it to them and now she's saying she doesn't know if he really does. So I don't know."
> Sara then informs the dispatcher that she had told Connie to take her kids somewhere because, "they don't need to see this or be here."
> Sara then informs the dispatcher that she is receiving text messages from Brian. Sara states, "He's texting me now I'm going to put you on speaker so I can know what he's saying." "Oh god, those pussy cops can throw me in jail put me in prison it doesn't matter what they do because once I am out you're dead."
> The dispatcher asks, "Is he there now or who you talking to?"
> Sara responds, "No he's texting me, I'm telling you he just said. When he gets out of jail, and believe me I'm not afraid of prison, I wouldn't mind finding some poor young victim to anally rape."
> A short time later the dispatcher informs Sara that deputies are in the area and advises her to stay in her house. Sara informs the dispatcher that she still has something in front of the door that was kicked in by Brian earlier.
> Later the dispatcher is heard in the background saying, "911 responding –inaudible-dispatch they need down at Mill Run Road ASAP shots fired."
> The dispatcher informs Sara that deputies will be down to speak with her.

911 Call For Report Number 14-1097, Ohio Attorney General's Office Bureau of Criminal Investigation 1–3, Investigative Report 4/3/2014, Doc #: 32-11. Contemporaneously, at about

8:14 p.m., Richland County dispatch radioed its deputies that Brian Garber had returned and was in possession of a firearm.

C. The Incident

After arriving at 3400 Mill Run Road, Richland County Sergeant Nicholson, Deputy Knee, Lieutenant Zehner, and Deputy Frazier entered the house. Lexington city officers Weaver and Beasley also entered the house. Nicholson, Knee, and Frazier were equipped with, among other things, firearms with magazines, pepper spray, Tasers, and handcuffs. Nicholson was the supervisor in charge of the operation.

Matthew Garber indicated Brian Garber was on the second floor at the second door to the left. Nicholson entered the hallway on the second story first, Knee was second, and Frazier was third. Zehner stopped about mid-way up the stairs. At some point after when Nicholson, Knee, and Frazier made initial contact with Brian Garber, Weaver took a position at the bottom of the stairs, behind Zehner, and Beasley was behind Weaver.

As Nicholson, Knee, and Frazier reached the bedroom occupied by Brian Garber, Brian Garber announced he had a gun. Brian Garber was seated in a bed and was facing, roughly, the door. Nicholson took a position at the right of the door. Knee took a position at the left. Nicholson ordered Brian Garber to show his hands, to which Garber said "No." Nicholson attempted to verbally de-escalate the situation.

During this exchange, Nicholson turned on the light in the bedroom. Frazier moved between Knee and Nicholson and entered the bedroom. The deputies were roughly five or six feet away from the bed in which Brian Garber sat. The deputies gave orders, such as directing Brian Garber to show his hands, with which he did not comply. Nicholson indicated they could

help Brian Garber, but Brian Garber said "You can't help me." Nicholson Dep. 56:11–21. While Brian Garber appeared agitated, he did not verbally threaten the deputies. Brian Garber told the deputies "shoot me," and Nicholson responded, "That's not going to happen tonight. We're going to get you some help." *Id.* 63:19–22.

Nicholson's attempts to de-escalate were unsuccessful; the deputies testified that Brian Garber refused help and said the deputies would have to shoot him. Less than a minute after making contact with Brian Garber, the three deputies each heard a "pop" that sounded like a gunshot and fired upon Brian Garber sixteen times, killing him. The individual deputies' testimony related to what he saw, heard, and did at the time of the gunshots is broken out separately.

1. Knee

Knee testified that Frazier entered the room between himself and Nicholson and took a position directly in front of Brian Garber. Knee Dep. 49:16–25. Knee could see Brian Garber's left hand but not his right hand, as that was concealed under his shirt.

Knee could see that "Brian Garber had a very distinct rectangular-shaped impression underneath his shirt in the center area of his chest." *Id.* 54:22–24. He believed it looked like the front end of the barrel of a gun. Knee did not observe the rectangular object move. Knee testified that he was in fear he might be shot, but that he did not decide to shoot based on seeing the rectangular object under Brian Garber's shirt. *Id.* 56.

Knee testified that while Frazier and Nicholson were giving Brian Garber commands, he heard a sound:

> I heard a very loud, distinctive bang go off from [Brian Garber's] area.

Q. Okay. And what did that bang sound like to you?
A. I thought he fired a shot.

Id. 57:1–4. Knee, however, did not see the gun flash, the "burst of fire from the end of the barrel" which all guns emit when fired. *Id.* 57–58. Knee testified that he fired his weapon because he heard what he thought was a gunshot coming from Brian Garber, that he was trained to use deadly force as a last resort, and that prior to the sound of the gunshot from Brian Garber he had not needed to use deadly force. *Id.* 62–63.

Knee did not see Brian Garber move when he heard the sound and never saw Brian Garber's hand come out of the shirt. Knee fired within a second of hearing the sound. Knee believed Frazier fired before he did but was unsure when Nicholson fired.

2. Nicholson

After Nicholson and Knee took positions at opposite sides of the door, Frazier entered the room between Nicholson and Knee, although Nicholson had not asked him to do so, and in fact did not want him to do so. Nicholson Dep. 54–55.

Nicholson saw a protrusion under Brian Garber's shirt, and described the protrusion as being "fully extended in the shirt to where it looked almost like a teepee." *Id.* 58:23–59:6. He "perceived it to be a firearm 100 percent. It wasn't like a finger or a sharp object or a pencil." *Id.* 62:9–13. Nicholson did not feel the need to use his weapon while he was communicating with Brian Garber and trying to de-escalate the situation.

Nicholson saw the object under Brian Garber's shirt slightly move. Nicholson heard a pop that sounded like a gunshot. *Id.* 59, 66–67. At the time of the pop, Nicholson saw Brian Garber jerk the object under his shirt. Nicholson was confident the sound was a gunshot, and

believed it was coming from the direction of Brian Garber. Nicholson did not see a flash. Once Nicholson heard the sound he believed to be a gunshot from Brian Garber, he raised his weapon and fired. Nicholson testified that he fired his weapon "because" he heard the shot from Brian Garber. *Id.* 77:10–22. Nicholson believed that both Frazier and Knee fired before he did but after Brian Garber had fired.

3. Frazier

In evidence are three statements made by Frazier: an unsworn written statement dated November 6, 2014; his November 14, 2014, grand jury testimony; and his December 16, 2015, deposition.

Frazier said Brian Garber's left hand was between his legs holding a can, and his right hand was holding something under his shirt. Frazier described the object as appearing "to be the front end of a Glock-style firearm, a squared front end firearm." Frazier Statement 5; *accord* Frazier Test. 21–22; Frazier Dep. 51–51.

According to Frazier's unsworn statement, "[Brian Garber] lifted his shirt up slightly with the fingers of his left hand and with his right hand he pulled out what appeared to be a firearm from under his shirt. As he started to extend his right and out toward me, I heard a loud popping sound. . . . When Garber brought what I thought was a weapon from underneath his shirt and the pop went off, I honestly thought I was going to die." Frazier Statement 6–7. According to his Grand Jury Testimony, Brian Garber "all at once moves his shirt up and he raises his hand and there's a pop. . . . He was bringing his hand out of his shirt and moving it forward." Frazier Test. 23–24. Frazier, however, testified that it was "not possible" that either he nor his fellow deputies could have fired in response to Brian Garber's movement. *Id.* 27. At deposition, Frazier's version

of the facts changed. Frazier testified that Brian Garber's hand did not come out from under his shirt, that Brian Garber did not extend his arm, and that he did not lift his shirt and present a firearm. Frazier Dep. 55–56. Frazier also discounted some of his unsworn statements. *Id.* 59–63.

Frazier saw Brian Garber flinch first, then heard the pop which he identified as a gunshot. Frazier stated unequivocally that the pop he heard could not have come from his fellow deputies, that it came from Brain Garber. Frazier Test. 25–26. Frazier did not see a flash. Until he heard the pop, Frazier did not see the need to use deadly force; the pop was "the reason [he] fired [his] weapon." Frazier Dep. 65:4–8.

D. After the Incident

After the shooting, Knee entered the bedroom to check Frazier, because there was concern Frazier may have been shot. Nobody checked to see if Brian Garber had a gun. Neither Knee, Nicholson, nor Frazier saw a dark object, remote control, or anything that could have looked like a gun on the bed. Knee Dep. 66, 70–71; Nicholson Dep. 74, 76–77, 79–83, 85. The deputies did see a beer can between Brian Garber's legs. Nicholson Dep. 74; Frazier Test. 41–42. At Nicholson's direction, Knee retrieved a camera from a police car. Zehner entered the room and took the pictures of the scene.

Several minutes after the incident, Knee, Nicholson, and Frazier went downstairs to the kitchen and waited together for approximately one hour. There, the deputies discussed Frazier possibly being hit and checked Frazier's shirt and vest. The deputies discussed that the object Brian Garber had appeared to look like a Glock. They also discussed that Knee had handled himself professionally. The deputies had been instructed not to discuss their observations with each other, and Knee acknowledged in his deposition that the discussion about the Glock

violated that instruction. Knee Dep. 75–76. Later that night, the deputies participated together in a critical incident debriefing counseling session, where they talked further about the incident.

No gun was ever found in the bedroom. Bureau of Criminal Investigations ("BCI") agent Cory Momchilov testified that investigators were unable to identify another source that could have created the gunshot "pop" sound Knee, Nicholson, and Frazier described. Momchilov Dep. 67–70, 88.

E. Investigation

Sheriff Sheldon is the highest policy-maker for the Sheriff's Office. Major Joseph Masi is Sheldon's chief deputy. Masi recommended to Sheldon that BCI handle the crime scene and investigation. Sheldon felt an independent agency should do an investigation. Sheldon Dep. 31. Masi conducted an administrative investigation, and Sheldon did not have hands-on involvement with the investigation.

BCI Agent Momchilov served as lead investigator for the criminal investigation. Momchilov investigated the scene the night (early A.M.) of the incident. At various times over the course of the investigation, he interviewed the officers involved as well as Mathew Garber, Connie Garber, and Sara Knowlton. Momchilov's investigation included reviewing the relevant 911 calls, radio traffic, crime scene logs, the autopsy report, and cell phone records. Momchilov also reviewed photographs of the scene, which showed a remote control located in the bed next to Brian Garber, but he was unaware of when the photographs were taken. At the request of the prosecutor, the remote was tested for prints and DNA; no latent prints were suitable for comparison and the DNA swab collected was not sufficient for inclusion regarding Brian Garber. Momchilov Dep. 40–42. Momchilov was aware that some witnesses had no recollection of

seeing the remote control on the bed.

Momchilov prepared an investigative report and presented that report to the prosecutors. The prosecutors presented the case to a grand jury and it was no-billed. At that point the BCI case was closed.

Masi also conducted an internal investigation after which the Richland County Sheriff's Office's Use of Force/Firearms Review Board ultimately concluded the use of force was reasonable.

IV. Discussion

We all can agree that what happened on March 16, 2014, was a tragedy. The undisputed facts are that Brian Garber, a mentally disturbed man, went out of control. After assaulting his wife, he retreated to an upstairs bedroom in his parents' home. Members of his family believed he was armed, communicated such to the 911 dispatcher who in turn communicated it to the law enforcement officers in the field, and when three sheriff's deputies arrived in response to the domestic violence complaint, Brian Garber told them he had a gun. He menacingly pointed what appeared to be a gun from under his shirt. The deputies tried to calm Brian Garber down and get him to surrender, but he refused to raise his hands and said they would have to shoot him. While all three deputies justifiably feared for their safety, all testified they did not see the need to use force so long as Garber was conversing with them.

All three deputies ultimately shot Brian Garber at close range, killing him. All three deputies testified that they shot in response to a shot they believed came from Garber. They were adamant that the shot they heard did not come from one of their fellow officers. They were all wrong; Garber did not have a gun, and the only shots were fired by the three sheriff's deputies.

The question for the Court is whether the deputies and other officers are entitled to qualified immunity. Since the question of whether the deputies made a tragic mistake or intentionally used excessive force is ultimately one of credibility that the jury must decide, the Court denies the three deputies' motion for summary judgment. The jury must ultimately decide why three sheriff's deputies insist upon a version of the facts which they know is not correct. As there is no evidence that the deputies' actions stemmed from an official policy, custom, or practice, the Court grants the County's motion.

A. Richland County Sheriff's Office

Defendants argue that the Richland County Sheriff's Office is not an entity subject to being sued under § 1983. Knowlton does not argue to the contrary, and Defendants' position is supported by case law. *Barrett v. Wallace*, 107 F. Supp. 2d 949, 954 (S.D. Ohio 2000) ("Plaintiff's case against Defendant Sheriff's Office must be dismissed because the Sheriff's Office is not a proper legal entity, and, therefore, is not subject to suit or liability under 42 U.S.C. § 1983."). Accordingly, Richland County Sheriff's Office is dismissed.

B. Federal Claims

Knowlton asserts claims for excessive force on the bases of individual liability and several theories of municipal liability.

1. Individual Defendants

a. Legal Standard

"Government officials, including police officers, are immune from civil liability unless, in the course of performing their discretionary functions, they violate the plaintiff's clearly established constitutional rights. Stated differently, a 'defendant enjoys qualified immunity on

summary judgment unless the facts alleged and evidence produced, when viewed in the light most favorable to the plaintiff, would permit a reasonable juror to find that: (1) the defendant violated a constitutional right; and (2) the right was clearly established.'" *Jefferson v. Lewis*, 594 F.3d 454, 459 (6th Cir. 2010) (citations omitted). In *Saucier v. Katz*, the Supreme Court held that, in addressing the issue of qualified immunity, a court must first determine whether there is a violation of a constitutional right before addressing the issue of whether the right was clearly established. 533 U.S. 194, 201 (2001). The Supreme Court modified this approach in *Pearson v. Callahan*, allowing district and circuit courts the freedom to determine which prong of the immunity analysis to address first. 555 U.S. 223, 236 (2009).

"All claims that law enforcement officers have used excessive force—deadly or not . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard. We apply 'the objective reasonableness standard, which depends on the facts and circumstances of each case viewed from the perspective of a reasonable officer on the scene and not with 20/20 hindsight.'" *Jefferson*, 594 F.3d at 460–61 (citation omitted). The reasonableness of an officer's use of deadly force depends in large part on the severity of the crime at issue and whether the victim was armed or posed a danger to the officer or others. It is unreasonable for an officer to seize an unarmed, non-dangerous suspect by using deadly force. *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). "[O]nly in rare instances may an officer seize a suspect by use of deadly force." *Sample v. Bailey*, 409 F.3d 689, 697 (6th Cir.2005) (quoting *Whitlow v. City of Louisville*, 39 Fed.Appx. 297 (6th Cir.2002)).

b. Frazier, Nicholson, and Knee in their Individual Capacities

For the purposes of this motion, it is undisputed that Frazier, Nicholson, and Knee

believed Brian Garber to be armed when they arrived at the house and for the duration of incident. Brian Garber was not committing a crime and was not attempting to flee. Brian Garber did, however, claim to have a weapon and appeared to be wielding something under his shirt when the deputies confronted him in his bed.

The essential undisputed facts and reasonable inferences are few. First, Knee, Nicholson, and Frazier each claim to have fired in response to a gunshot "pop" sound. The three deputies' testimonies are highly consistent in this regard: Knee testified that he shot in response to hearing a gunshot from Brian Garber, Nicholson testified that he shot in response to hearing a gunshot from Brian Garber, and Frazier testified that he shot in response to hearing a gunshot from Brian Garber. Frazier, in particular, was adamant that the shot he heard, which prompted him to fire at Brian Garber, did not come from either Nicholson or Knee; Frazier also stated that it was "not possible" that any of them could have fired in response to Brian Garber's movement.[2] Frazier Test. 27. However, Brian Garber was unarmed and was not the source of any gunshot sound. No other source for such a sound has been identified, and it is reasonable to infer that trained and experienced law enforcement officers would know a gunshot sound at close range when they hear one. Frazier's grand jury testimony sums up this apparent paradox succinctly:

> [Prosecutor] Mr. Meyer: There was never a gun found. Correct?
> Deputy Frazier: Correct.
> Mr. Meyer: So can you explain to us what that pop was?
> Deputy Frazier: That's what we'd all like to know.

Frazier Test. 26.

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[2] While Frazier's testimony about what he may have seen is somewhat inconsistent between his deposition and earlier statements, any inconsistency is essentially irrelevant because Frazier, like Knee and Nicholson, claims to have fired in response to the sound of Brian Garber's gunshot, not his hand motions.

These facts put the Court in the unusual situation where the testimony of all three deputies involved in the deadly shooting contradicts the objective facts of that event. *See Jefferson*, 594 F.3d at 462 ("Though we are hesitant to doubt Officer Lewis's testimony that he saw a flash, the court may not simply accept what may be a self-serving account by the police officer. It must look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story.").

Because Brian Garber was unarmed and produced no "pop," the Court can only conclude that one of the deputies fired the first shot and that none of the deputies fired in response to any gunshot sound from Brian Garber. Thus, each of the deputies is either mistaken or lying about shooting in response to a gunshot sound from Brian Garber or otherwise. This is not a question of law for the Court, but a question of fact and credibility for a jury to decide.

While it is of course possible that two of the deputies made an objectively reasonable mistake in believing that the first shot came from Garber, none of them offered this explanation.[3] Neither did any of them state that they fired in response to what they perceived to be a threatening gesture or movement by Brian Garber with the object they believed to be a gun. Each of the deputies testified that he felt threatened during the confrontation, but went on to ***explicitly*** say that he did not feel the need to use deadly force until he heard Brian Garber shoot first and that the sound of Brian Garber's gunshot was the cause of his returning fire. In fact, Frazier maintained this position throughout his grand jury testimony with the knowledge that Brian Garber was unarmed and despite the prosecutor's attempts to get Frazier to offer alternative

[3] Though BCI agent Momchilov's opinion does not influence the Court's conclusions, the Court observes that Momchilov believed it possible that a gunshot from one of the deputies precipitating the shooting. Momchilov Dep. 88:14–25.

explanations for his use of his weapon.[4]

In *Cerbelli v. City of N.Y.*, a district court faced a similar dilemma,

> As mentioned above, Valdes insists that he shot Cerbelli when Cerbelli lunged toward and threatened Consalvo, while Ehmer maintains that Ehmer fired at Cerbelli only after Cerbelli charged toward him and Valdes. Because prior to the outbreak of gunfire Cerbelli stood in the middle of the precinct lobby, with Consalvo on one side of him and Ehmer and Valdes on the other, Cerbelli could not reasonably have posed a threat to Consalvo, Ehmer, and Valdes at the same time. Thus, if Valdes and Ehmer started shooting at the same time, as Ehmer insists, Valdes could not have fired to protect Consalvo just as Ehmer fired to protect Valdes and himself; one of their accounts necessarily would be false.

No. 99-CV-6846 ARR RML, 2008 WL 4449634, at at *8 (E.D.N.Y. Oct. 1, 2008). Noting that "given the difficult problem posed by a suit for the use of deadly force, in which the witness most likely to contradict [the police officer's] story—the person shot dead—is unable to testify[,] . . . . the court may not simply accept what may be a self-serving account by the police officer. The court '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.* at *5 (alterations in original) (internal citations omitted), the court concluded it "cannot resolve this factual dispute without a jury and consequently cannot determine satisfactorily the reasonableness of Ehmer's decision to open fire at this time."

If a jury concludes that one (or more) of the deputies made an honest mistake about

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[4] The issue of the deputies discussing the shooting prior to giving their statements may be considered by a jury as part of its credibility evaluation. It is possible a jury will find that the three deputies intentionally corroborated their stories as Knowlton hypothesizes, it is possible that the jury will find that the deputies may have merely accidentally confused some of their memories through discussion, and it is also entirely possible that a jury will believe that the deputies' recollections are honest and reliable, as the Defendants hypothesize. This is not a determination for the Court to make.

hearing a pop from Brian Garber's gun, it is likely the jury will find the deputy or deputies to have acted reasonably under the circumstances. *But see Jefferson,* 594 F.3d at 462 (affirming denial of summary judgment for a police officer because of disputed facts, noting, "[t]he fact that most strongly cuts against the reasonableness of Officer Lewis's decision to 'return' fire is that, even accepting Officer Lewis's testimony [that he saw a flash] on its face, Officer Lewis only saw a flash; he heard no corresponding gunshot before he 'returned' fire."). On the other hand, if the jury concludes that one (or more) of the deputies was dishonest about his reason for shooting, the jury may well conclude that the deputy (or deputies) used unconstitutional excessive force. Since the ultimate decision on qualified immunity and the constitutionality of the use of deadly force hinges on the credibility of the officers, the jury must decide this case. *See generally Sova v. City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998) (reversing summary judgment granted in favor of a pair of officers where it was not possible to identify which officer(s) has shot the victim). Accordingly, qualified immunity cannot be granted at this stage, and Count 1 for Excessive Force may proceed against Knee, Nicholson, and Frazier.

c. Zehner and Sheldon in their Individual Capacities

The undisputed facts indicated that neither Zehner nor Sheldon shot Brian Garber, was in the room when Brian Garber was shot, or otherwise had any direct, personal responsibility for the shooting of Brian Garber.

i. Failure to Prevent

Plaintiffs suggest that Zehner and Sheldon may be found liable on the basis of failing to prevent the use of force. "Generally speaking, a police officer who fails to act to prevent the use of excessive force may be held liable when (1) the officer observed or had reason to know that

excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring." *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997).

Clearly, Sheldon was not at the scene and thus had neither the requisite knowledge or opportunity. With regard to Zehner, the evidence shows that he took a position on the stairs, roughly twenty feet from the door into Brian Garber's bedroom, while the other deputies, under the supervision of Sergeant Nicholson, were the ones who encountered Brian Garber. Zehner testified that his attention was divided between looking down the hall toward Brian Garber's room and down the stairs to watch for anyone approaching from behind. Zehner also testified that he did not see Frazier enter the bedroom. Up until the moment of the shooting, the three deputies were engaged in audible conversation with Brian Garber, which included the officers trying to de-escalate the situation.

Thus, while Zehner plausibly may have anticipated that his officers would potentially employ ***some*** force in dealing with an armed domestic violence suspect, there is simply no evidence from which to infer that Zehner would have had reason to know that ***excessive*** force would be used or that he could have done anything to prevent the shooting.

Thus, there is no basis to impute liability to Zehner or Sheldon.

ii. Supervisory Liability

Finally, Knowlton also asserts supervisory liability.

> "[S]imple negligence is insufficient to support liability of [supervisory officials] for inadequate training, supervision, and control of individual officers." A supervisory official may not be held liable under § 1983 for the misconduct of those the official supervises unless the plaintiff demonstrates that "the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it." At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly

> acquiesced in the unconstitutional conduct of the offending officers." Supervisory liability under § 1983 cannot be based upon a mere failure to act but must be based upon active unconstitutional behavior.

Combs v. Wilkinson, 315 F.3d 548, 558 (6th Cir. 2002) (alterations in original) (citations omitted).

Here, Sheldon's chief deputy, Masi, completed an internal investigation which ultimately concluded with the board finding that the shooting was lawful. Furthermore, Sheldon and Masi referred the matter to BCI for an independent criminal investigation. Prosecutors presented the matter to a grand jury which ultimately did not return an indictment.[5] These investigations—particularly the immediate referral to an outside agency for criminal investigation—are not consistent with authorization or approval of potentially unconstitutional conduct.

Accordingly, there is no basis for a jury to find individual liability for excessive force on the part of either Zehner or Sheldon. These claims must be dismissed.

2. Municipal Entity Liability

In relevant part, Knowlton has named Richland County and Richland County Board of Commissioners as well as Steve Sheldon, Raymond Frazier, Andrew Knee, James Nicholson, and Donald Zehner, in their official capacities, as defendants. "Official-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."

[5] Any concerns about the effectiveness of the BCI investigation or the prosecutor's investigation is immaterial, as neither BCI nor the prosecutor is a party.

Kentucky v. Graham, 473 U.S. 159, 165 (1985) (citations omitted). Thus, here, each of the defendants named in his official capacity is simply another way of naming Richland County as a defendant.

"On the merits, to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the entity itself is a 'moving force' behind the deprivation; thus, in an official-capacity suit the entity's 'policy or custom' must have played a part in the violation of federal law." *Id.* at 166 (citations omitted). "A plaintiff can make a showing of an illegal policy or custom by demonstrating one of the following: (1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations. A municipality 'may not be sued under § 1983 for an injury inflicted solely by its employees or agents.'" *Burgess*, 735 F.3d at 478 (citations omitted). Here, Knowlton argues for municipal liability on the basis of custom and ratification.

There is an absence of evidence establishing an inappropriate custom. First, Richland County Sheriff's Office does have official written policies related to the use of force and use of deadly force. Masi Dep. Exs. at 11–22, Doc #: 32-8. There is no serious argument that these written policies are inappropriate. Second, (as discussed more in the next paragraph addressing ratification) the evidence does not demonstrate toleration of excessive force in this case. However, even if there were evidence of toleration of excessive force in this case, Knowlton, in

attempting to argue ***a custom*** of tolerating unconstitutional conduct, provides no other examples of Richland County's toleration of unconstitutional actions. This incident alone is insufficient to demonstrate such a custom. *See, e.g., Jackson v. Wilkins*, 517 F. App'x 311, 322 (6th Cir. 2013) ("One example of the City's failure to discipline, however, does not prove that the City had a policy of failing to discipline."). There is no evidence of an unconstitutional custom that may have caused the current incident.

Nor is there evidence of ratification. "The Sixth Circuit has held that 'official toleration, . . . concealment . . . [and] a complete failure to initiate and conduct any meaningful investigation,' into complaints of constitutional violations may establish municipal liability." *Ragsdale v. Sidoti*, No. 5:12 CV 2484, 2015 WL 10986350, at *5 (N.D. Ohio June 5, 2015), *quoting Marchese v. Lucas*, 758 F.2d 181, 187–88 (6th Cir. 1985). The evidence demonstrates that Richland County conducted an internal investigation of the shooting and that BCI conducted a separate, criminal investigation of the shooting. While not perfect, the underlying BCI investigation particularly appears reasonably thorough and meaningful. The Sheriff's Office's "Use of Force Investigative Team/Firearms Review Board" reviewed the internal investigation and BCI's independent investigation BCI's investigation and concluded the use of force was reasonable and no laws had been violated. Masi Dep. Exs. at 10. Separately, the grand jury decided not to indict. First, the Court again notes that the quality of the BCI investigation is outside the scope of the instant lawsuit, as BCI is not named as a defendant here, and any errors or suboptimal practices in that investigation are not the responsibility of the Sheriff's Office or County. Second, there is no evidence that the BCI investigation was made "impotent" by Sheriff's Office mismanagement, as Knowlton argues. Opp. 28, Doc #: 34-1. That Frazier's grand jury and deposition testimonies are

somewhat different on the matter of whether he saw motion or not is immaterial, as he made clear in both testimonies that the impetus for taking his first shot was the pop sound, not the movement. Frazier also testified to the grand jury that he had not seen "that remote control laying out there in plain sight," and that he'd thought that Brian Garber's gun would have fallen to the right. Frazier Test. 42:7–43:23. The investigators and grand jury would thus have been capable of meaningfully evaluating Frazier's credibility and his claims about the facts of the case and about how he acted. Finally, to the extent the BCI's investigation was negatively impacted by the deputies' handling of the scene prior to the BCI investigation, there is no evidence that the Sheriff's Office was aware of any effect on BCI's investigation such that they choose to discipline or counsel (or not) those individuals involved—an official cannot ratify if the official is not aware.

Finally, Knowlton does mention prior disciplinary issues in Frazier's employment record. However, in her Amended Complaint, Knowlton does not allege inadequate training or supervision as a basis for municipal liability. Moreover, because there is no evidence that any prior disciplinary matter rose to the level of a constitutional violation, Frazier's employment record also fails to demonstrate custom or ratification of unconstitutional, excessive force.

In closing this discussion, it is worth returning briefly to the high standard applicable with regard to *Monell* liability: that the entity itself is a "moving force" behind the deprivation of a person's constitutional right. "In addition to showing that the [the government entity] as an entity 'caused' the constitutional violation, plaintiff must also show a direct causal link between the custom and the constitutional deprivation; that is, she must show that the particular injury was incurred ***because*** of the execution of that policy. This requirement is necessary to avoid *de facto*

respondeat superior liability explicitly prohibited by *Monell*." *Doe v. Claiborne Cty., Tenn. By & Through Claiborne Cty. Bd. of Educ.*, 103 F.3d 495, 508 (6th Cir. 1996) (internal quotation marks and citations omitted). Here, there is no evidence of an unconstitutional policy or that such a policy might have been the moving force behind a deprivation of Brian Garber's rights. Accordingly, all municipal liability claims—including those against the County, Board, and the various official capacity Defendants—are dismissed.

C. State Law Claims

1. Individual Torts

Knowlton's state law claims for assault and battery, wrongful death, survivorship, and willful, wanton, and reckless conduct against Knee, Nicholson, and Frazier in their individual capacities survive summary judgement.

Employees of an Ohio political subdivision are immune from suit for negligent torts. *Burgess v. Fischer*, 735 F.3d 462, 479 (6th Cir. 2013). However, they are not immune from suit for actions "committed with malicious purpose, in bad faith, or in a wanton or reckless manner." *Id*. (quoting Ohio Rev. Code Ann. § 2744.03(A)(6)(b)) (internal quotation marks omitted). "Malice is the willful and intentional design to do injury or the intention or desire to harm another, usually seriously, through conduct which is unlawful or unjustified." *Id.* (quoting *Cook v. City of Cincinnati*, 658 N.E.2d 814, 821 (Ohio Ct. App. 1995) (internal quotations omitted). Bad faith is present when a Defendant "acted with a 'dishonest purpose,' or 'conscious wrongdoing,' or he breached a 'known duty through some ulterior motive or ill will.'" *Id.* at 479–80 (quoting *Cook*, 658 N.E.2d at 821). "Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great

probability that harm will result." *Id*. at 480 (quoting *Anderson v. City of Massilon*, 983 N.E.2d 266, 273 (Ohio 2012)) (internal quotations omitted). Finally, reckless conduct involves the "conscious disregard of or indifference to a known or obvious risk of harm . . . that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Id*. (quoting *Anderson*, 983 N.E.2d at 273) (internal quotations omitted). When there is a material factual dispute about whether police conduct was reasonable under the Fourth Amendment, there is also a dispute as to whether the conduct was reckless for purposes of Ohio tort immunity. *Burgess*, 735 F.3d at 480 ("[B]ecause we find that there is a question as to whether [the officers'] conduct was reasonable under the Fourth Amendment, we also find that upon viewing the facts in a light most favorable to Plaintiffs there is a question as to whether the conduct was reckless under § 2744.03(A)(6)(b).").

As stated above, there is a dispute of material fact as to whether the actions of Defendants Knee, Nicholson, and Frazier were reasonable under the Fourth Amendment. Therefore, there is also a dispute of material fact as to whether the actions of those same Defendants were reckless for the purposes of Ohio tort immunity, and the state law claims must also survive summary judgement. However, there is no reasonable dispute about whether any other Defendants acted with "malicious purpose, in bad faith, or in a wanton or reckless manner." To the extent these state law claims are asserted against other Defendants, they are dismissed on the basis of immunity.

2. Negligent Supervision and Negligent Hiring and Retention

The Complaint asserts claims for negligent supervision against Sheldon and negligent hiring and retention against Sheldon and the municipal Defendants.

"The elements of an action for negligent hiring and retention are (1) the existence of an employment relationship, (2) the employee's incompetence, (3) the employer's actual or constructive knowledge of such incompetence, (4) the employee's act or omission causing plaintiff's injuries, and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injury." *Linder v. Am. Natl. Ins. Co.*, 798 N.E.2d 1190, 1197 (Ohio Ct. App. 2003). "The elements of a negligent supervision claim are the same as those for negligent hiring or retention." *Browning v. Ohio State Hwy. Patrol*, 786 N.E.2d 94, 104 (Ohio Ct. App. 2003). For proximate cause, the conduct must be foreseeable. *Id.*; *Staten v. Ohio Exterminating Co.*, 704 N.E.2d 621, 623 (Ohio Ct. App 1997). "Foreseeability is based upon whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of the act." *Staten*, 704 N.E.2d at 624. Conduct is foreseeable to an employer only if it knew, or should have known, of the employee's propensity "to engage in similar criminal, tortuous, or dangerous conduct." *Browning*, 786 N.E.2d at 103.

Here, Knowlton describes in some detail Frazier's disciplinary history, but does not provide evidence related to Knee's or Nicholson's disciplinary histories, nor does Knowlton allege in her Opposition negligence as to any officer but Frazier. Opp. 29. Also, the evidence only relates to Frazier's ongoing employment, not his hiring. Accordingly, the Court will only discuss Frazier and his supervision and retention.

The available evidence from Frazier's employment history includes a handful of disciplinary issues including several use of force complaints. The two complaints from August and September of 2013, however, neither resulted in a conviction nor internal discipline related to the use of force (the one resulting disciplinary action was apparently related to failing to file

proper paperwork). On the other hand, in May 2013, Frazier was suspended and referred for psychological evaluation. As Knowlton observed, the psychologist noted Frazier " has low frustration tolerance and sometimes responds to stressors in a maladaptive manner." Fitness for Duty Evaluation 6. After the evaluation, Frazier received discipline for "Unsatisfactory Work Performance and Failing to Maintain a Required Standard of Performance" and returned to duty.

This psychological evaluation reveals three important things. First, when faced with troubling behavior on the part of its deputy, Frazier, the department responded by suspending him and requiring a psychological evaluation. When Frazier was returned to duty, he received an "instruction in caution." This evidence demonstrates the Sheriff's Office was actively managing rather than neglecting potential personnel performance issues. Second, the psychologist identified issues such as "frustration tolerance" and "coping skills" and noted Frazier was "somewhat intolerant of difference or change." *Id.* at 5. These issues, while likely requiring awareness and management, are of a different nature than what transpired in Brian Garber's bedroom. There is no evidence that suggests Frazier became frustrated with or intolerant of Brian Garber or otherwise fired in anger. Thus, Frazier's history does not make the type of excessive force at issue a foreseeable, "likely result" of continuing to employ Frazier as a deputy. Third, the psychological examiner concluded, "[Frazier] could be returned to full duty immediately." *Id.* at 6. Thus, while Knowlton suggests Frazier was known to be incompetent, there is no evidence to support this. Assuming, *arguendo*, that Frazier was actually incompetent, the evidence does not indicate that the Sheriff's Office had actual or constructive knowledge of such incompetence.

In sum, the available evidence demonstrates that when the Sheriff's Office believed there might be an issue with Frazier's ability to perform his duties, it acted to manage the situation. In

doing so, the Sheriff's Office received a professional psychological evaluation clearing Frazier for duty. There is no evidence upon which a jury could find that the Sheriff's Office acted unreasonably in employing Frazier or that it knew, or should have known, of a likelihood to engage in "similar criminal, tortuous, or dangerous conduct." *Browning*, 786 N.E.2d at 103. The evidence does not support a finding of negligence.

These counts must be dismissed.

V. Conclusion

For the reasons discussed above, Motion for Summary Judgement, Doc #: 31, is GRANTED IN PART and DENIED IN PART. Count 1 for excessive force, Count 2 for assault and battery, Count 3 for wrongful death, Count 9 for survivorship, and Count 10 for willful, wanton, and reckless conduct may proceed against Defendants Knee, Nicholson, and Frazier in their individual capacities only. All other claims and defendants are dismissed.

Motion to Strike, Doc #: 37, is DENIED as moot.

IT IS SO ORDERED.

Dan A. Polster Apr. 5, 2017
DAN AARON POLSTER
UNITED STATES DISTRICT JUDGE