

**Case No. 14-5963**

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IN THE  
United States Court of Appeals  
FOR THE SIXTH CIRCUIT

EDWARD AND TINA GODAWA, as Administrators of the  
Estate of MICHAEL GODAWA  
Appellees,

v.

OFFICER DAVID BYRD,  
Defendant-Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF KENTUCKY (BERTELSMAN, W.)

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**APPELLANTS EDWARD AND TINA GODAWAS' BRIEF**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, Appellants Edward and Tina Godawa make the following disclosures: (1) that they are not a subsidiary or affiliate of a publicly owned corporation and (2) that there is no publicly owned corporation, that is a party to this appeal that has a financial interest in the outcome.

Dated: November 18, 2014

/s/Christopher D. Roach

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**STATEMENT CONCERNING ORAL ARGUMENT**

Pursuant to Sixth Circuit Rule 28(b)(1)(B) and 34(a), the Appellants request that this matter be set for oral argument. This appeal involves a question of law with the potential to be a matter of first impression in this circuit.

## **JURISDICTIONAL STATEMENT**

This is an appeal from the Memorandum and Opinion Order and Judgment of the District Court entered on August 1, 2014 which granted the Defendant's motion for summary judgment and dismissing the Plaintiffs' federal claims with prejudice on grounds of qualified immunity. (RE 66, 67 Opinion and Order, Page ID# 893, Judgment, Page ID # 894). The notice of appeal was timely filed on August 1, 2014. (RE 68, Notice of Appeal, Page ID# 895).

This appeal is taken pursuant to 28 U.S.C. § 1291, for review of the above-cited orders of the District Court to the extent such orders denied Plaintiffs Edward and Tina Godawa's decedent's civil rights claims asserted under 42 U.S.C. § 1983 on the grounds of qualified immunity. The claims in the District Court arose under 42 U.S.C. § 1983, and the Constitution of the United States, and state law claims based upon the Constitution and laws of the Commonwealth of Kentucky. The District Court had jurisdiction of the 42 U.S.C. § 1983 and U.S. Constitutional claims under 28 U.S.C. § 1331 and 1343. The District Court had supplemental jurisdiction of the state law claims under 28 U.S.C. § 1367 and the doctrine of pendent jurisdiction. The District Court was the proper venue under 28 U.S.C. § 1391.

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Whether the district court erred when it found that qualified immunity protects Defendant David Byrd for his actions that resulted in the loss of Michael Godawa's life.

## **STATEMENT OF THE CASE**

This is an appeal that arises out of a confrontation between the Defendant Officer David Byrd and the decedent, Michael Godawa. During that confrontation, Michael Godawa, a twenty-one-year-old resident of Kentucky, was shot in the back as he attempted to leave. Throughout Michael's interaction with Defendant Officer Byrd, Michael was courteous, cogent, and well-spoken. However, Michael decided to leave the parking lot and leave Defendant Officer David Byrd, who was on bike patrol.

As Michael backed out of his parking spot, he clipped Officer Byrd's bike, causing it to fall. He backed into the parking lot, so that the nose of his car pointed toward the exit, and as he drove forward was blocked in by Byrd, who ran into Michael's car as he attempted to block Michael in. As Michael's rear passenger side tire passed by Officer Byrd, Officer Byrd fired one shot, through the rear passenger side window, striking Michael in the back behind his right armpit. It must be stressed that Officer Byrd shot Michael Godawa in the back as Michael Godawa entered a four lane road. Also, at the he shot Michael Godawa, Officer

Byrd was not in any danger, nor was anyone else, except drivers on the four lane highway who were put in danger by Byrd's shooting. The shooting was caught on the surveillance video tape from the Finish Line Bar and Grill.

Michael turned left out of the parking lot, turned around about two hundred feet down the road and returned to the scene. As he returned he was slumped over the steering wheel. His car came to rest after striking a telephone pole. When responding officers showed up, Officer Byrd got on his bike and rode it to the final resting spot of Michael's car, just in time to watch Michael's last moments alive.

### **STATEMENT OF FACTS**

Three separate pieces of evidence illustrates what happened that night: 1) Surveillance video from the Finish Line Bar and Grill,(RE 15-2) 2) Lapel video from Defendant Officer David Byrd, (RE 21-1) and 3) the deposition testimony of Defendant Officer David Byrd. (RE 26-1, Byrd Deposition).<sup>1</sup> Where another inference can be drawn from the video and audio of the event from Byrd's self-serving statements, it is the Godawas' position that the court should disregard those statements where the video and audio allow inferences in favor of the decedent's family. All reasonable inferences from those videos should be resolved in favor of the Plaintiffs, Edward and Tina Godawa, not in favor of Officer Byrd.

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<sup>1</sup> One original and three copies of the videos (15-2, Finish Line Surveillance Video; 21-1, Lapel Video) were provided to the clerk for the Court's use on November 12, 2014.

It is Byrd's actions that took the life of Edward and Tina Godawa's son, and as an interested party, the trial court should have disregarded the testimony of Byrd where a reasonable inference could be made from the videos in favor of the Godawas. Michael Godawa ("Michael") may have acted with disrespect when in the early morning hours of June 23, 2012, he decided to drive away from bicycle Elsmere Officer David Byrd ("Defendant Byrd" or "Byrd") during Byrd's attempt check out the twenty-one year Michael, as Michael sat in his car at the Finish Line Bar and Grill parking lot. What Michael would not have expected, was to be shot in the back, as he drove away, and killed by Defendant Byrd for attempting to flee.

During that stop, Michael was nervous but was otherwise courteous and cooperative with Defendant Byrd, up until the point he decided to flee. Byrd did not smell the odor of alcohol or marijuana, and was investigating Michael for underage drinking based on a tip from a witness at the Finish Line Bar and Grill. Defendant Byrd admits, under oath, that he shot Michael in the back because he was afraid for the public's safety if Michael drove onto the highway despite admitting that an officer is not allowed to shoot even a fleeing felon and that it's not policy to shoot anyone under suspicion of DUI. It is absurd that Defendant Byrd addressed his concerns for safety by shooting the driver of a vehicle as he entered onto a four lane road. Did he expect Michael Godawa to drive more safely

with a bullet in his back? Was the public safe with Michael Godawa driving onto the road with a bullet in his back?

### ***Training and Certifications***

Defendant Byrd was trained by the Department of Criminal Justice Training Center located in Richmond, Kentucky in 2010. (RE 26-1, Byrd Depo., Page ID# 182<sup>2</sup>). He also received training from the Covington Bike School, instructed by Lieutenant Donaldson in 2012. *Id.* at Page ID# 183. He is certified in CPR and is a Kentucky Certified Concealed Carry Deadly Weapon Instructor. *Id.* at Page ID# 213, 252.

David Byrd started his employment with the Elsmere, Kentucky Police Department in January 2010. *Id.* at Page ID# 177. In late 2011 or early 2012, Defendant Byrd became a “bike cop” and was issued a Cannondale brand police bike, worth over \$1,000. *Id.* at Page ID# 193. He also carried a Department issued Glock, Model 22, forty caliber handgun for use while on duty. *Id.* at Page ID# 207. This handgun had a four to six pound trigger pull, and was not considered by Defendant Byrd to be a “hair trigger.” *Id.* at Page ID# 207-08. Defendant Byrd was trained to pull his weapon when he is preparing to use it and to use his weapon

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<sup>2</sup> Page references to the record refers to the Page ID# as required by the Sixth Circuit rules.

to protect himself and to protect the lives of others. *Id.* at Page ID# 183. He was also trained that he is not to shoot someone that is fleeing. *Id.* Defendant Byrd agreed that Michael was fleeing. *Id.*

### ***The Death of Michael Godawa***

On the night of Michael Godawa's death, Defendant Byrd was working third shift, 8:00 p.m. to 6:00 a.m., as a bicycle officer. (RE 26-1, Byrd Depo., Page ID# 196). While patrolling his beat, Defendant Byrd received a tip that a minor was getting beer outside of the Finish Line Bar and Grill, and walking around outside. *Id.* at Page ID# 198. Defendant Byrd and a bar employee watched as Michael moved his car from the back of the parking lot, to an open spot closer to the bar. *Id.* After Michael turned off his car, Defendant Byrd approached on the driver's side and requested Michael's driver's license. *Id.*

Michael told Defendant Byrd that he did not have his license on him, and instead gave his social security number upon the Byrd's request. *Id.* at Page ID# 198-99. Defendant Byrd then went to his bicycle to get a notepad to write down information, returned to Michael's car, and continued the questioning. *Id.* at Page ID# 199. Defendant Byrd observed a beer can in the center console, and asked if Michael had been drinking. *Id.* at Page ID# 199-200. Michael denied drinking and told Byrd that the beer can belonged to his girlfriend. *Id.* Michael later told

Defendant Byrd that the beer was his and that he had consumed alcohol. *Id.* at Page ID# 200.

Defendant Byrd requested that Michael perform field sobriety tests, and Michael declined at first, but eventually accepted the request to take a breath test. *Id.* at Page ID# 201-02. Defendant Byrd then walked back to his bike to request a patrol car that could supply a Preliminary Breath Test (“PBT”). *Id.* at Page ID# 202. At no point did Defendant Byrd smell alcohol or marijuana on Michael’s breath. *Id.* Nor did Defendant Byrd ever ask Michael his age, even though this would be the most important question to ask when investigating a tip of underage drinking. *Id.* at Page ID# 201.

Michael was courteous during the entire encounter, he just refused the sobriety tests. *Id.* at Page ID# 254. While Defendant Byrd walked to his bicycle to request the PBT, Michael started his car and backed up, so that it was pointed in the direction of the parking lot exit. *Id.* at Page ID# 202. While Michael did hit Defendant Byrd’s patrol bicycle, he did not hit Defendant Byrd while backing out of the parking spot. *Id.* Defendant Byrd then ran along the driver’s side of Michael’s car, to block the exit, and ordered Michael to stop. *Id.* at Page ID# 203. However, Michael put the car in drive and started forward. *Id.*

Michael was not, in the opinion of Defendant Byrd, recklessly flying through the parking lot *Id.* at Page ID# 203. He estimated that Michael was

driving between five and ten miles per hour. *Id.* at Page ID# 204. Defendant Byrd had his gun drawn and pointed at Michael as Michael drove towards Defendant Byrd. *Id.* According to Byrd, Michael's car struck Defendant Byrd's leg at the knee as Byrd hemmed Michael in. *Id.* at Page ID# 205. When he saw a clear background, Byrd fired a single shot at Michael's back through the rear passenger window. *Id.*

Michael then turned left out of the parking lot onto South Dixie Highway and Byrd ran after, walking against traffic in the right hand northbound lane of Dixie Highway. *Id.* at 208-09. Michael then turned the car around in the parking lot of an auto repair shop and then turned onto Northbound Dixie Highway. *Id.* at Page ID# 208. Byrd continued to head northbound with his gun drawn while aiming at Michael's car, but did not shoot a second time because Michael was slumped against the steering wheel and appeared to be injured. *Id.* at Page ID# 209. Byrd ordered Michael to stop again and Michael accelerated and collided with a utility pole on the corner of Lytle and Dixie Highway. *Id.* at Page ID# 210. Byrd then ran back to recover his bicycle as other cruisers started arriving at this time. *Id.* at Page ID# 211. He admits at his deposition that he had two feet firmly on the ground and his elbows on the hood. He also admitted that he did not need to seek medical attention.

In addition, according to the officer who stayed with Michael Godawa and his car, they thought Michael was injured by the accident. Byrd never told the officers he shot Michael Godawa in the back. Byrd did not fire his gun accidentally, he intended to fire his gun with knowledge that it could seriously injure or kill Michael. *Id.* at Page ID# 208, 257. According to Byrd's deposition testimony, he fired his weapon because both himself and the general public were in danger of an intoxicated driver that had just attempted to murder an officer. *Id.* at Page ID# 256. Despite his current reason for shooting Michael in the back as he fled, the no reasonable officer could have believed that their life or the public was in danger under the circumstances.

After the incident, Byrd was examined by the Florence squad and refused to be transported to the hospital. *Id.* at Page ID# 217. He was however, transported to Saint Elizabeth in Florence by Sergeant Leming, where the hospital took x-rays and blood samples. *Id.* at Page ID# 218. The blood test was to test for narcotics or alcohol in Byrd's blood. *Id.* Byrd went to the hospital because he was ordered to, not because he was hurt so as to warrant a trip. *Id.* at Page ID# 220.

During his deposition, the only additional crime that Byrd considered that Michael attempted, was attempted murder of a police officer. *Id.* at Page ID# 256. When Byrd made contact with Michael's car, his elbows were on the hood, his feet were on the ground (although he claims not the entire time because the vehicle was

moving forward) and he was never knocked to the ground. *Id.* at Page ID# 271-73. When asked why he drew his weapon, Byrd states that he “drew his weapon because the vehicle “nearly struck me when I was backing up and they were attempting to flee.” *Id.* at Page ID# 275. He was trained to draw his weapon when he is preparing for its use, and that he should use his weapon to defend himself or the lives of others. *Id.* at Page ID# 182. This means that at Byrd was preparing to use his weapon prior to Michael’s alleged attempt to take Byrd’s life.

### **SUMMARY OF THE ARGUMENT**

The trial court decided what the evidence shows, not what inferences a reasonable juror could make from the evidence presented. The trial court failed to make inferences from the facts in favor of the non-moving party, the Plaintiffs Edward and Tina Godawa. Instead, the trial court took facts, some of which are undisputed, **and resolved every inference from the facts in favor of the Defendant, Officer Byrd.** In its cursory memorandum and opinion order, the trial court misstates the evidence in the record, relies upon evidence not of record, and resolves every inference in favor of Defendant Officer Byrd. In a one sentence conclusion the trial court found that probable cause existed for Officer Byrd to believe that Michael committed four separate felony offenses without any analysis, and contrary to Byrd’s deposition testimony that the only additional crime he

suspected Michael of was attempted murder. (RE 66, Opinion and Order, Page ID#885-86).

The trial court failed to follow the well-established law for the resolution of motions for summary judgment when it resolved all inferences in favor of the Defendant Officer. All of those inferences should have been resolved in favor of the non-moving party, the Godawas. The trial court should have drawn all inferences from the video footage in favor of the Godawas where possible and should disregard any statements by Defendant Byrd that interpret or contradict that evidence. As an interested witness, a jury should be able to disregard Defendant Byrd's testimony, especially where his actions caused the death of the only other party.

#### **STATEMENT OF STANDARD OF REVIEW**

The standard of review of the District Court's grant of qualified immunity is de novo, as that issue is a question of law. *Spurlock v. Thompson*, 330 F.3d 791,796 (6th.Cir 2004). In reviewing immunity defenses, this Court determines whether the facts alleged by the Godawas, if proved, would overcome the asserted defenses. *Id.* at 796. Summary judgment is appropriate if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). When reviewing a motion for summary judgment, the facts and any reasonable inferences drawn from the facts must be viewed in the

light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party opposing summary judgment, however, must present more than a “mere scintilla” of evidence; the evidence must be such that a reasonable jury could find in favor of the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

### **ARGUMENT**

Don and Tina Godawa filed suit on behalf of the estate of their son, Michael Godawa, alleging that the Defendant violated Michael’s constitutional right to be free from unreasonable seizure under the Fourth Amendment of the United States Constitution. (RE15- 1). The action was brought under 42 U.S.C. 1983, which provides a cause of action for violation of federal statutory or constitutional rights by state actors. 42 U.S.C. § 1983. The two elements required for a successful 1983 claim are 1) that the Defendant acted under color of state law, and 2) that the Defendant deprived the Plaintiff of a constitutional or statutory right. *Marvin v. City of Taylor*, 509 F.3d 234, 243 (6th Cir. 2007).

The district court ruled that the Defendant, Elsmere Officer David Byrd was entitled to qualified immunity on the Godawa’s federal claims finding that the force used was reasonable and that Byrd did not violate any clearly established law. The court relied on three items of evidence: 1) Surveillance video from the Finish Line Bar and Grill,(RE 15-2), 2) Lapel video from Defendant Officer David

Byrd, (RE 21-1), and 3) the deposition testimony of Defendant Officer David Byrd. (RE 26-1, Byrd Deposition).<sup>3</sup> In making its determination, the district court resolved all inferences from the evidence in favor of Officer Byrd, misstated evidence, and relied upon “evidence” not in the record. When the inferences are taken in favor of the Godawa’s it is clear that the district court erred in granting Officer Byrd’s motion for summary judgment.

Further, any testimony from Officer Byrd should be disregarded where an inference can be made in favor of the Godawas based upon the surveillance and lapel videos. When a party kills the only other witness, here Michael Godawa, the trial court should specifically disregard the testimony of the officer as an interested witness when other evidence exists from which inferences favorable to the decedent can be made. In this case, there is a lapel video and a surveillance video, from which a reasonable jury could find that Michael Godawa did not pose a threat to Officer Byrd or the Public.

**I. As an Interested Party, the Court should Resolve all Inferences from Evidence of Record in Favor of the Plaintiffs without Regard for Byrd’s Self-Serving Statements**

The Supreme Court has recognized the “general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as ‘affirmative evidence of guilt.’ ” *Reeves v. Sanderson Plumbing Products, Inc.*,

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<sup>3</sup> See Footnote 1, copies of video were provided to the clerk for the Court’s use.

530 U.S. 133, 146 (2000) (*quoting Wright v. West*, 505 U.S. 277, 296 (1992)). In fact, the Sixth Circuit has reviewed this principal of evidence previously as it relates to a business defendant, a defendant that must rely on the testimony of its employees. *See Almond v. ABB Indus. Sys., Inc.*, 56 Fed.Appx. 672, 2003 WL 173640 (6th Cir. Jan.22, 2003) (per curiam). In ruling that the district court was not required to disregard the interested witnesses' testimony it examined whether there was contrary evidence or cross examination calling the witnesses' veracity into doubt. *Id.* The Court held that courts can consider the testimony of a moving party's interested witnesses, specifically when those witnesses are employees of a business, because business defendants will often be able to respond only through the testimony of their employees. *Id.* at \*2.

The Sixth Circuit found that this holding was consistent with *Chesapeake & Ohio Ry. v. Martin*, 283 U.S. 209, 218, (1931), in which the Supreme Court stated that courts need not deny the conclusiveness of testimony of the moving party that “is not contradicted by direct evidence, nor by any legitimate inferences from the evidence[,]” because the rule requiring that testimony be considered by the jury is not “an absolute and inflexible one.”

Here the Court should hold that the district court should disregard the interested testimony of Officer Byrd where that testimony contradicts permissible

inferences from the video evidence. Particularly, the jury is allowed to believe or disbelieve testimony of witnesses, and particularly interested witnesses.

**II. The Trial Court Erred when it Resolved all Inferences from Evidence in Favor of the Officer Byrd, Misstated the Evidence Presented, and Based Conclusions off of Evidence Not Presented in the Record**

The Fourth Amendment prohibits the use of excessive force by an arresting officer. *Graham v. Connor*, 490 U.S. 386, 397 (1989). The district court applies an objective reasonableness test, considering the reasonableness of the use of force from the “perspective of a reasonable officer on the scene rather than with the 20/20 vision of hindsight.” *Id.* at 396. This determination should be made “in light of the facts and circumstances confronting [the officers], without regard to their underlying intent or motivation.” *Id.* at 397. It is not for the court to substitute its own personal notion of the appropriate procedure for those decisions made by police officers in the face of rapidly changing circumstances. *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir.1992).

The Fourth Amendment “reasonableness” test requires a careful balancing of the individual interest in being free from unreasonable seizures and the important governmental interest in protecting the safety of its peace officers and the public. *Graham*, 490 U.S. at 396 (citing *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985)). The reasonableness of a particular use of force “requires careful attention to the facts and circumstances of each particular case, including:” (1) “the severity of the

crime at issue,” (2) the immediacy of the threat posed by the suspect to the officers or others, and (3) whether the suspect is “actively resisting arrest or attempting to evade arrest by flight.” *Id.* Because the trial court resolved all inferences in favor of Officer Byrd, misstated evidence of record, relied on evidence not in the record, and provided no analysis on the elements of the Graham balancing test, this Court should reverse the district court’s grant of summary judgment to Defendant Officer Byrd.

**A. The trial court resolved a number of issues in favor of Defendant Officer Byrd in determining that Byrd feared for his safety and the safety of third parties**

The trial court erred in its findings of what the evidence established in this case. Essentially, the trial court relied upon one paragraph of findings from the facts presented to the court: 1) Byrd suspected that Michael was intoxicated, 2) that Michael backed his car over Byrd’s bicycle, 3) nearly struck Byrd while backing up, 4) Michael continued to drive despite commands to stop and a drawn weapon, 5) Michael drove into Byrd, causing him to go on the hood of the car, 6) still continued his flight, 7) that Byrd made a split second decision, and 8) that the entire incident from starting the vehicle to pulling out onto Dixie Highway was between fifteen and twenty seconds. (RE 66, Opinion and Order, Page ID# 885).

Of the eight facts relied upon in the order determining that no constitutional violation occurred, four of them are not supported by the record. 1 ) That Michael

backed over Byrd's bike, 2) that Byrd suspected Michael was intoxicated, nearly striking Byrd, 3) that Michael drove into Byrd, 4) that this caused Byrd to go onto the hood of the car and 5) that Michael was not shot in the back.

*1. No evidence of record that Michael backed over Byrd's bicycle*

The district court misstates the facts in the record, stating that Michael backed over Byrd's bicycle. The facts, listed in the fact section of the opinion and order are as follows:

The decedent struck the officer's bicycle and nearly struck the officer in the process of backing up. Doc. 26-1, Byrd Depo, 23, 30.

(RE 66, Opinion and Order, Page ID# 880). While the difference between running over a bicycle and striking a bicycle might just be a matter of semantics for the district court, the implications of both are important to the totality of the circumstances. First, this baseless assertion shows that the court dismissed all potential inferences for the non-moving party, the Godawas, and instead went out of its way to find for the Defendant Officer.

Second, liability of an officer, in an excessive force case, depends upon whether the officer acted reasonably under the totality of the circumstances. Nothing in evidence would allow a reasonable juror to find that the decedent backed **over** the bicycle. Byrd himself uses the term, "struck" and makes no mention of being backed over.

Other evidence of record shows that the bike was still functional, defeating the premise that the bike was run over. The only damage to the bike was that the rear derailleur was bent, the derailleur changes what gear the bike is in. (RE 26-1, Byrd Depo. Page ID# 195). Byrd was able to ride his bike down the road to the final resting spot of Michael's car. *Id.* Presumably, the bike was taken because it was a quicker means of conveyance than Byrd walking or running. If Michael had backed over the bike, Byrd would not have been able to ride the bike down the road.

In changing that one word, the district court changed the inferences that can be drawn from what happened. A person driving a car that runs over a bike allows a reasonable juror to find that the person was acting recklessly or in a purposely threatening manner. It is much less likely that a person would accidentally run over a bike. Simply striking a bike allows the reasonable juror to find that the Michael was in control of his vehicle, that he was not driving recklessly, and that he was not trying to hit Byrd. A juror could find that the act of striking Byrd's bicycle was just an accident; a finding that could allow the juror to find that under the totality of the circumstances that it was unreasonable for Byrd to use deadly force against the decedent. Therefore the Court should hold that the second factor of the Graham test should have been resolved in favor of the Godawas.

***2. Byrd was Investigating the possibility of underage drinking not a regular driving under the influence charge***

The district court also concluded that Officer Byrd was investigating an intoxicated driver. However, what the record shows is that Byrd was actually investigating a report of underage drinking. (RE 26-1, Byrd Depo., Page ID# 197). This is not the same as an investigation into someone that is visibly intoxicated. First, it is illegal in the Commonwealth of Kentucky for a person under twenty-one years old to possess alcohol at all. Ky. Rev. Stat. § 244.085 Under suspicion of a minor drinking, consuming any amount of alcohol is a crime even if the person is not intoxicated. Further, a minor who is suspected of drinking and driving may be charged for a DUI if the blood alcohol content is more than 0.02. Ky. Rev. Stat. §189A.010. The level for a person over twenty-one years old is 0.08, four times the amount of someone under twenty one years old. *Id.*

When Byrd approached Michael he learned that Michael did not have identification on him. Even at the time that Michael attempted to flee, Byrd had no verification if Michael was old enough to legally drink. This means that Byrd's request for a preliminary breath test could have been, not because he thought that Michael was over the 0.08 limit, but because he thought that Michael was a minor, who conveniently did not have his ID, that would blow over the 0.02 limit.

The other facts present verify Byrd did not suspect that Michael was actually intoxicated. Michael was polite and courteous during the entire encounter, a fact that is demonstrated by the lapel video.<sup>4</sup> The lapel video also shows that Michael was generally cooperative, cogent, and clear in his speech. Byrd's own deposition testimony bears out that Michael did not smell like either marijuana or of alcohol.<sup>5</sup> These facts demonstrate that at the time that these events were happening, Byrd at most believed that Michael was an underage drinker. Yet with these facts, contradicting Officer Byrd's own statements, the district resolved the inferences in favor of Byrd's singular self-serving statement that he feared for the safety of the motoring public because he believed that Michael was intoxicated. For this reason alone the Court should reverse the district court's grant of summary judgment for Officer Byrd.

***3. The Video Evidence allows an inference that it was Byrd that ran into Michael's car as Byrd tried to prevent Michael's flight***

The district court also found that the evidence established that Michael drove into Officer Byrd as he drove out of the parking lot.

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<sup>4</sup> See Footnote 1, copies of RE 21-1, Lapel Video were provided to the clerk for the Court's use.

<sup>5</sup> The autopsy in this matter shows that Michael tested positive for marijuana and had a BAC near the legal limit, but this information was unknown to the Defendant Officer at the time of the shooting. (RE 54-1)

The decedent continued to drive forward and struck the officer in the left leg around the knee, which knocked the officer onto the hood of the car. [Doc. 26-1] at 33, 39; Doc. 21-1, Lapel Video at 1:27:58-59.

However, with the exception of Byrd's self-serving statements, the video also shows Byrd advancing toward Michael's car at the same time that Michael is pulling forward. It is clear that Byrd was attempting to put himself between Michael's car and the exit. A reasonable juror could conclude from the evidence that it was Byrd that walked into Michael's car while attempting to prevent Michael's flight. Further it is important to note that the traffic stop instructor at Richmond stated that it was not a tactic to put an officer's body in front of a vehicle to prevent flight.

The district court includes that a loud crash can be heard on the lapel video, although this fact is included in the facts and not analysis section of the opinion and order, to bolster the argument that Byrd was violently struck by Michael's car and thrown onto the hood. However, the loud noise does nothing to delineate which party ran into whom, and fails to take into account the fact that a loud crash on a microphone can be caused by merely brushing or bumping the microphone. Anyone that has ever been to an auditorium and heard someone drop a microphone or tap a microphone to make sure it is on, knows enough to know that just because the crash is loud on the camera, it does not directly translate into the severity of the collision. Nor does it indicate what came into contact with the microphone,

whether it is Michael's car or the officer's arm, or a piece of equipment carried on the officer, the "crash" heard on the lapel cam does not establish the violence of the collision nor what caused the noise. It is the trial court once again reaching a result in favor of Defendant Officer Byrd without concern for the evidence in the record.

***4. No evidence that Dixie Highway was busy and that Byrd feared for the public's safety on the road***

The trial court also appears to pay lip service to the fact that Officer Byrd felt that Dixie highway was a busy highway. In doing so, the court ignores common sense and other facts present in the record. "The decedent was attempting to flee onto a busy U.S. Highway, where he continued to pose a serious risk of harm to the motoring public." (RE 66, Opinion and Order, Page ID# 887).

The district court took the time to list the time frame for each interaction between Byrd and Michael, but when it comes to the deciding that Byrd was concerned for the motoring public on a busy U.S. highway, it avoids the fact that the events took place just before 1:30 a.m. Further, the assertion is made without citation to a single piece of evidence in the record. Instead, the court cites to three cases; two about fearing the safety of the motoring public following lengthy, high speed pursuits, and one that is about an officer using force to protect another officer that had fallen to the ground from a driver that was attempting to flee. None

of these cases are factually similar to this case, and provide no guidance to the court's determination, which has no factual basis or analysis.

***5. The district court downplays the fact that Michael was shot in the back***

The district court also makes the factual finding that Michael was shot in the right shoulder upper back area and lodged in his chest, from the passenger side of the vehicle. What the evidence of record showed was that the shot was fired through the rear passenger side window, and entered Michael's back near his right arm, ultimately lodging in near his sternum. While the district court overlooks this fact, it is important because it shows that Michael was already driving away when the shot was fired. This limits the danger to Byrd because it would require Michael to stop and change gears before he could back up. Once the front of the vehicle has passed, it does not pose any danger to Byrd.

**B. The trial court Performed No Analysis on Graham's "Crimes at Issue" Element**

The trial court almost exclusively focused its evaluation of the Graham factors on threat of harm posed to the officer and others. The Godawas admit that Michael was attempting to flee the traffic stop. Yet, when confronted with the first element of the balancing test, it summarily found that the "crimes at issue" were severe with **no** analysis whatsoever. The total application of this Graham element in the opinion is as follows:

[A]t the time the fatal shot was fired, the officer had probable cause to believe the decedent committed a number of violent and serious offenses, including attempted murder, first-degree assault, wanton endangerment in the first degree, and fleeing and evading in the first degree.”

(RE 66, Opinion and Order, Page ID# 885-86). Without any analysis of the facts as they existed at the time of the altercation, the district court has accepted the Defendant Officer’s theory presented in his motion for summary judgment as the crimes that Byrd suspected Michael of committing at the time of the shooting. Yet these are not even the crimes put forward by Byrd during his deposition, but rather even later fabrications. (RE 26-1, Byrd Depo., Page ID# 178).

*Murder* requires that Michael 1) caused the death of another person, 2) with the intent to cause the death of another; or 1) wantonly engages in conduct which creates a grave risk of death, and 2) causes the death of another person. Ky. Rev. Stat. § 507.020. Attempted murder requires that with the same culpability, Michael took a substantial step towards committing murder. Ky. Rev. Stat. § 506.010. Statute defines an intentional act as one that is undertaken with the conscious objective to cause that result. Ky. Rev. Stat. § 501.020.

No rational trier of fact viewing the surveillance video from The Finish Line could conclude that at the time that Michael Godawa was shot in the back that he had attempted to murder Defendant Byrd. Here, Michael’s lack of intent can be seen in the surveillance video. After coming to a complete stop after backing his

car out of the parking spot, Michael pulls forward and directs his car toward the exit. As Michael is driving forward, it is Defendant Byrd that runs into Michael's path, putting himself in any danger that he might have experienced. When Michael drives forward he directs his car away from Byrd as far as he can. Byrd is directing Michael's car into parked vehicles, which if he hits could cause his car to deflect and actually run Byrd over.

Byrd was never directly in front of the car, but rather runs into the front, passenger-side quarter panel as Michael attempts to flee. Had Michael really attempted to murder Defendant Byrd, he would have directed his car at Byrd and not the exit. At this point in time, Byrd claims that Michael had just attempted to murder him. Yet, as these events unfolded, Byrd felt safe enough to put use his own body to prevent a suspect that showed every sign of fleeing, from fleeing in his car.

*Assault in the first degree* requires that Michael intentionally caused serious physical injury with a deadly weapon, or while engaging in conduct that creates a grave risk of danger to another thereby causes serious physical injury to another. Ky. Rev. Stat. § 508.010. Once again, the video shows that Michael's intent was to flee the scene, not to injure Defendant Byrd. Further, there is no serious injury as required under the established law. *See McDaniel v. Commonwealth*, 415 S.W.3d 643 (Ky. 2013) (finding that a through-and-through gunshot to victim's hand

where the victim had to take off work for couple months and where the pain at the time of the shooting was “worse than childbirth”); and *Anderson v.*

*Commonwealth*, 352 S.W.3d 577 (Ky. 2011)(finding that a cut on the face of the victim, along the jawbone and caused by a straight razor was not a serious physical injury sufficient for a charge of first degree assault); *see also Swan v.*

*Commonwealth*, 384 S.W.3d 77 (Ky. 2012)(noting that the requirement for serious physical injury requires a “fairly strict level of proof”).

Defendant Byrd suffered a “scrape” on his left knee, which a jury could find was actually created because of his own behavior in trying to use his body to trap Michael into the Finish Line parking lot. What is undeniable is that the “injury” suffered by Defendant Byrd cannot as a matter of law meet the standard for a serious physical injury. Further, Byrd did not claim to suspect Michael of assault in the first degree during his deposition, rather this is a new claim put forward by Byrd after the fact. Hindsight cannot work to benefit the Godawas and is also prohibited by to benefit Byrd. If Byrd did not actually suspect Michael of this at the time of the incident, then he is prohibited from claiming it now.

Wanton endangerment requires that he wantonly created a substantial danger of death or serious physical injury to another person under circumstances manifesting extreme indifference to human life. Ky. Rev. Stat. § 508.060  
Wantonly" -- A person acts wantonly with respect to a result or to a circumstance .

. . . when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. Ky. Rev. Stat. § 501.020

Fleeing or evading police in the first degree requires that Michael, while operating car with intent to elude or flee, knowingly or wantonly disobeys a direction to stop, given by a person recognized to be a police officer, and 1). The person is driving under the influence of alcohol or any other substance or combination of substances in violation of Ky. Rev. Stat. § 189A.010; or 2) creates substantial risk, of serious physical injury or death to any person or property; or

Taking the facts in a light most favorable to the Godawas, no reasonable officer would have used deadly force to apprehend Michael Godawa in this situation, and Defendant Byrd's use of deadly force that night is clearly unreasonable. Michael was being investigated for potentially being a minor drinking in the parking lot of the Finish Line Bar and Grill. (RE 26-1, Byrd Depo., Page ID#197). Underage drinking is not a crime involving the infliction or threatened infliction of serious physical harm. *Graham*, 490 U.S. at 396. Further, there is no indication that Michael was intoxicated. Defendant Byrd stated that he did not smell either alcohol or marijuana, did not even ask Michael how old he

was, and stated that Michael was courteous during the stop. Because no reasonable officer could have believed that Michael committed any serious crimes during the incident, as it was Byrd that ran into Michael's car putting his own safety at risk, the Court should find that this factor weighs in favor of the Godawas and reverse the trial court's grant of summary judgment.

### **III. Michael's Right to be Free from Excessive Force was Clearly Established at the Time of His Interaction with Officer Byrd**

Resolving all inferences from the evidence of record in favor of the Godawas, Michael's right to be free from the excessive force used against him was clearly established since *Cupp*. In its opinion and order, the district court relies upon the recent Supreme Court decision in *Plumhoff*, finding that the Godawas failed to meaningfully distinguish *Plumhoff*. However, factually similar cases in the Sixth Circuit have previously labelled the force used by Byrd in this case to excessive, and Byrd violated Michael's clearly established right to be free from deadly force in this situation. Therefore the Court should hold that the Godawas established that Byrd violated Michael's clearly established right and reverse the district court's opinion and order.

**A. *Plumhoff* is factually distinguishable from this case, as *Plumhoff* involved a lengthy, dangerous, high-speed pursuit, and suspected evidence of a pedestrian being struck**

In maintaining that the Godawas failed to distinguish, the district court concludes with limited to no analysis that *Plumhoff*, the “controlling” case stands means that an officer is immune when he fires his pistol at a driver attempting to escape from a parking lot onto a public highway. Yet in the next moment the court quotes *Plumhoff* finding that particular passage especially relevant.

Thus the record conclusively disproves respondent’s claim that the chase in the present case was already over when petitioner began shooting. Under the circumstances at the moment when the shots were fired, all that a reasonable officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to so, he would once again pose a deadly threat for others on the road. Rickard’s conduct even after the shots were fired – as noted, he managed to drive away despite the efforts of the police to block his path – underscores the point.

(RE 66, Opinion and Order, Page ID# 890-91). The district court reasoned that this while the shooting followed a one hundred mile-per-hour chase, the shooting happened in a parking lot when the vehicle was at a standstill. *Id.* at Page ID# 891. This interpretation is directly contrary to the Supreme Court’s ruling and the facts of the case.

In *Plumhoff*, the Plaintiff was driving around midnight with a headlight out. *Plumhoff v. Rickard*, No. 12-1117, 134 S.Ct. 2012, 2017 (May 27, 2014). When the officer pulled the Suspect over, he noticed an indentation about the size of a

head or basketball in the windshield, justifying a suspicion that the suspect collided with a pedestrian. *Id.* The Suspect was unable to produce identification, looked nervous, and drove away when he was commanded out of the vehicle. *Id.*

The officer pursued, and was eventually joined by five other cruisers on the pursuit. *Id.* The suspect swerved through vehicles driving on the highway and reached speeds of over one hundred miles per hour. *Id.* After exiting the highway the suspect made a sharp right hand turn, struck a cruiser, and spun out into a parking lot and struck another vehicle. *Id.*

In risk of being cornered, the suspect put his car in reverse and two officers got out of their cruiser, guns in hand and pounded on the passenger side window. *Id.* The suspect's car then ran into another cruiser and his tires started spinning while his car rocked back and forth, indicating that the suspect was accelerating into the cruiser. *Id.* The officer then fired three shots into the suspect's car and the suspect reversed in a one-hundred and eighty degree arc, maneuvered onto another street and forced one officer to step out of the way. *Id.* As the car continued to speed away, two officers fired twelve additional shots at the vehicle, killing both the suspect and the passenger in the car. *Id.* at 2018.. *Plumhoff v. Rickard*, No. 12-1117, 134 S.Ct. 2012, 2017 (May 27, 2014).

Rickard was not at a standstill when the officer shot as the district court stated in its opinion and order. Rather he was accelerating into another cruiser to

attempt to move the vehicle out of the way to continue his flight. The Supreme Court's ruling in *Plumhoff* was based off of the totality of the circumstances. The Supreme Court looked at the potential evidence of a pedestrian already having been struck, the nervous demeanor of Rickard, the swerving at speeds in excess of one hundred miles per hour in traffic, and the use of his vehicle as a battering ram against a police cruiser while two officers banged on his windows to attempt to get his compliance. By the time that the officers shot Rickard, he was acting like a caged animal desperate to get away and willing to do anything necessary to escape. The same cannot be said about Michael's actions.

Officer Byrd had none of the reasons that the officers had in *Plumhoff* to believe that Michael posed a risk of danger to himself or the public. Officer Byrd himself stated that he did not think that Michael was recklessly flying through a parking lot, and that he estimated his speed to be around seven miles per hour. Further, Michael's flight was not precipitated by a lengthy or indisputably dangerous chase, nor by any indication that Michael had previously struck a pedestrian or other object. Overall, Michael's flight was less than ten seconds, rather than five minutes, and it is the Godawas' contention that his attempt to flee was not made dangerous by his actions, rather by Officer Byrd's actions as he stepped in front of the vehicle as it pulled forward to prevent escape.

*Plumhoff* included speeds over 100 miles per hour, weaving through traffic at those speeds, included multiple collisions with both cruisers and other vehicles, continued use of an accelerator to attempt to move a cruiser out of the way, a vehicle that looked like it was already in a previous collision with a pedestrian, and a continued attempt to drive away after three shots were fired into the car.

*Plumhoff* is clearly not applicable to the case at bar, except to show that Michael's actions would not lead a reasonable officer to believe that the lives of other civilians were in danger.

**B. The Sixth Circuit has previously held the type of force used by Byrd to be excessive in Cupp**

In *Cupp*, the Sixth Circuit found that the a Defendant Officer was not entitled to Qualified Immunity when he shot the decedent in the head as he drove past in the Officer's police cruiser, because the right was clearly established in *Garner*. *Smith v. Cupp*, 430 F.3d 766, 776 (6th Cir. 2005); *see also Sample v. Bailey*, 409 F.3d 689, 697 (6th Cir.2005) (stating that "only in rare instances may an officer seize a suspect by use of deadly force."). The Sixth Circuit recognized that a suspect fleeing in a stolen police cruiser posed some danger to the public but held that the danger "was not so grave as to justify the use of deadly force." *Id.* at 773. The facts did not mention any bystanders "whose physical safety could have been endangered by [the suspect's] actions," and the court held that a jury would

“be entitled to determine that [the police officer's] use of force was unreasonable and accordingly unconstitutional,” *Id.* at 774-75.

In *Freland*, the Sixth Circuit held that a police officer was justified in using deadly force to stop a suspect from continuing his dangerous flight after the suspect had twice attempted to ram a police cruiser and, having been cornered, turned and sped back up a street endangering a number of officers attempting to stop him. *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir.1992). *Freland* is distinguishable in that the suspect ran a stop sign, exceeded speeds of 90 m.p.h. on public roadways, attempted to ram a police cruiser on two separate occasions, was chased more than two and one half miles, turned his car around on a residential lawn, and intentionally crashed into the front end of a police cruiser. *Id.* at 349.

In *Adams v. Speers*, 473 F.3d 989, 991 (9th Cir.2007), a suspect had led police on a chase, “largely within the speed limit,” for over an hour. An officer twice rammed the suspect's vehicle and later, without warning, shot and killed the suspect as the suspect's vehicle rolled away. *Id.* at 991–92. The Ninth Circuit found it “obvious” that “[n]o officer acting reasonably in these circumstances could have believed that he could use deadly force to apprehend” the suspect. *Id.* at 993–94.

The right to be free from the use of deadly force to prevent a suspected felon from fleeing has been clearly established and the facts and circumstances surrounding this case follow that the right was established in both *Garner* and in

*Cupp*. While the district court points to bystanders at the Finish Line Bar and Grill, the proximity of the bystanders alone does not distinguish this case from *Cupp*.

Byrd testified that he did not think that Michael was recklessly flying through the parking lot, rather Michael was driving between five and ten miles per hour. The “close” proximity of the bystanders means nothing considering that Michael was driving in the parking lot, the bystanders were standing on the patio, Michael was not moving quickly, he had control of his vehicle to the point that there was likely no chance that he was going to harm the bystanders and that he was driving away from the bystanders. *Cupp* involved a person that was fleeing in a police cruiser while accelerating rapidly. The district court’s interpretation of the danger a vehicle presents during flight means that it is reasonable for an officer to use deadly force **anytime** that anyone suspected of DUI attempts to flee on a road that is not absolutely deserted.

When Michael pulled forward to exit the parking lot, Byrd estimated his speed to be between five and ten miles per hour. *Id.* at Page ID# 32. In the surveillance video, Byrd runs to the front passenger side of Michael’s car at 1:19:11, out of the direct path of Michael’s car. (Doc. 15-1, Exhibit 1, Finish Line Surveillance Video)<sup>6</sup>. One second later Michael started to pull forward as

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<sup>6</sup>One original and three copies of the video and instructions were provided to the clerk for the Court’s use.

Defendant Byrd moved toward the driver's side of the car in an attempt to hem Michael in. At 1:19:16 Michael fully pulls his vehicle out of the parking lot and drives off. In making his decision to fire his weapon, he stood up and saw that the background was clear. (RE 26-1, Byrd Depo., Page ID# 205).

All of these statements and the video surveillance footage go directly against Byrd's reason for shooting Michael Godawa in the back: That he was protecting himself and the public from an intoxicated driver that just attempted to use deadly force on an officer. *Id.* at Page ID# 280.

Byrd fired his weapon through the rear, passenger-side window of Michael's car, striking Michael in the back. (RE 26-1, Byrd Depo., Page ID# 181; RE 18-4 & 5, Autopsy Photo; RE 18-3, EMS Report). Defendant Byrd was trained to pull his weapon when he was prepared to use it to defend himself or the lives of others. (RE 26-1, Byrd Depo., Page ID# 183). Defendant Byrd pulled his weapon when Michael backed up and nearly hit him. *Id.* at Page ID# 276. Therefore he was prepared to use it to defend himself or others at the time Michael backed out of his parking spot. If Byrd was truly fearful of Michael's actions, why not fire when he could still reasonably be found to be fearful?

## **CONCLUSION**

The district court impermissibly resolved every single factual issue in favor of Defendant Officer Byrd. When the facts are inferred in favor of the Godawas, it

is clear that the use of deadly force to prevent an underage drinker from fleeing is excessive. Michael was courteous and cogent during the stop, when he backed out of his spot he did strike Byrd's bicycle, but did not strike Byrd, did not drive onto a pedestrian path, and when he pulled forward to leave, it was Officer Byrd that put himself in danger in trying to put himself in front of Michael's car. Byrd ran into Michael's car and as Michael drove away fired a shot into his back, at 1:30 a.m. while the highway was clear of passing motorists. Byrd himself states that Michael was only moving between five and ten miles per hour, a reasonable speed in a parking lot, and was not driving recklessly fast.

Officer Byrd's use of force was excessive and the Sixth Circuit previously ruled factually similar force unreasonable in *Cupp*. Therefore the Parents of Michael Godawa, the Plaintiffs, respectfully request that the Court reverse the district court's opinion and order to allow a jury to determine if Byrd's use of deadly force was unreasonable.

Respectfully submitted,

/s/ Christopher D. Roach

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## CERTIFICATE OF COMPLIANCE

Pursuant to Sixth Circuit Rule 32(a)(7)(c) and Sixth Circuit Rule 32(a), the undersigned certifies that this brief complies with the type-volume limitations of Sixth Circuit Rule 32(a)(7)(b). The brief has been prepared in proportional typeface using Times New Roman 14 point.

Exclusive of the portions of the brief exempted by Sixth Circuit Rule 32(a)(7)(B)(iii), the brief contains 8,634 words. If the Court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.

The undersigned understands a material misrepresentation in completing this certificate or circumvention of the type volume limits in Sixth Circuit Rule 32(a)(7), may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

/s/ Christopher D. Roach  

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Christopher D. Roach

## ADDENDUM – DESIGNATION OF APPENDIX CONTENTS

Appellant, pursuant to Rules of Appellate Procedure, Rule 28(d) and 30(b), hereby designate the following portions of the record below for inclusion in the Joint Appendix:

Description of Entry	Date	Docket #	Page ID Range
Finish Line Bar and Grill Surveillance Video	11/28/2012	15-1	N/A
Byrd Lapel Video	07/17/2013	21-1	N/A
Byrd's Deposition	09/03/2013	26-1	173-285
Opinion and Order	08/01/2014	66	876-893
Judgment	08/01/2014	67	894
Autopsy	04/21/2014	54-1	801-805
Autopsy Photos	12/27/2012	18-4	102-103
Autopsy Photo	12/27/2012	18-5	104-105
EMS Report	12/27/2012	18-3	100-101

## CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2014, a true copy of the foregoing corrected appellate brief has been sent via the Court's CM/ECF system which will serve all counsel of record

/s/ Christopher D. Roach

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