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UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 23-2087

Milton Green

Plaintiff - Appellant

v.

City of St. Louis; Christopher Tanner, Officer, in his individual capacity

Defendants - Appellees

Cato Institute; Law Enforcement Action Partnership

Amici on Behalf of Appellant(s)

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis

(4:19-cv-01711-DDN)

JUDGMENT

Before COLLOTON, Chief Judge, LOKEN, and KOBES, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

April 08, 2025

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 23-2087

Milton Green

Plaintiff - Appellant

v.

City of St. Louis; Officer Christopher Tanner, in his individual capacity

Defendants - Appellees

Cato Institute; Law Enforcement Action Partnership

Amici on Behalf of Appellant

Appeal from United States District Court for the Eastern District of Missouri - St. Louis

Submitted: September 24, 2024

Filed: April 8, 2025

Before COLLOTON, Chief Judge, LOKEN and KOBES, Circuit Judges.

LOKEN, Circuit Judge.

St. Louis Police Officer Christopher Tanner, in pursuit of a fleeing suspect who had fired at police officers, mistakenly shot off-duty Officer Milton Green. Officer Green filed this action under 42 U.S.C. § 1983 against Officer Tanner and the City of St. Louis, asserting Fourth and Fourteenth Amendment violations and claims under Missouri state law. After extensive discovery, the district court[1] granted defendants' motion for summary judgment. Expressly viewing the evidence in the light most favorable to plaintiff Green, the court concluded that Officer Tanner did not violate Officer Green's constitutional right to be free from unreasonable seizure and the use of excessive force; that Officer Green's Monell claim against the City failed for lack of proof of a constitutional violation; and that official immunity barred Officer Green's state-law claims. The court subsequently denied Officer Green's motions to alter or amend the judgment and to submit newly discovered evidence. Officer Green appeals the grant of summary judgment dismissing all claims and the order denying his motion to reopen discovery. Reviewing the grant of summary judgment *de novo* and the denial of post-judgment relief for abuse of discretion, we affirm.

I. Background

The parties disputed many facts concerning the events in question throughout this litigation. Many core facts are uncontested. The district court based its decision on the

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[1] The Honorable David D. Noce, United States Magistrate Judge for the Eastern District of Missouri (now retired), conducting proceedings with the consent of the parties under 28 U.S.C. § 636(c)(1).

evidence viewed in the light most favorable to Officer Green, as established by his "statement of material facts and defendants's statement of material facts not controverted by plaintiff." We draw the following summary from the parties' statements of material facts, using plaintiff's statement when the two conflict.

At approximately 10 PM on the evening of June 21, 2017, officers of the St. Louis Metropolitan Police Department (SLMPD), including Officer Tanner, were surveilling and covertly following a suspected stolen vehicle. The vehicle occupants detected the police and fled, with the officers in pursuit. The police deployed spike strips to puncture the vehicle's tires; the occupants began shooting at the pursuing officers. The vehicle soon crashed near the home of Officer Green, an off-duty fifteen-year SLMPD officer who was with his neighbor in the driveway.

Officer Green saw the stolen vehicle crash. Two individuals exited the vehicle and ran to his neighbor's gangway. A police vehicle arrived and two officers began chasing the suspects. Officer Green saw a third individual exit the crashed vehicle. Hearing gunfire, Officer Green and his neighbor hid behind a car in the driveway. The third individual dropped to the ground, then got up, picked up his firearm, and continued through Officer Green's yard. He pointed the firearm at the car where Officer Green and his neighbor were hiding. Officer Green raised his department-issued firearm and commanded, "Police, put the gun down." The individual instead ran toward an alley with his gun still pointed at Officer Green.

Some of what happened next is disputed; we state the facts in the light most favorable to Officer Green. From behind, Officer Green heard the command, "Put the gun down." Assuming this was a direction from another

officer, Officer Green dropped his firearm and lay on the ground. Gunfire from the direction of the fleeing suspects had ceased. Officers at the scene did not hear any shots fired in the two to three minute period between the time Officer Green dropped to the ground and when Officer Tanner shot Officer Green.

Detective Carlson, at the scene, identified Officer Green and yelled, "There's a[n] off-duty police officer here, don't shoot. His name [is] Milton Green. He lives here. Don't shoot." Detective Carlson instructed Officer Green to come to him. Officer Green stood up, picked up his firearm with his right hand, pointed the muzzle toward the ground, and extended his left hand with his metal police badge visible for surrounding officers to see. It is undisputed that Officer Green then took a few steps toward Detective Carlson. He saw another officer approaching but continued to move toward Detective Carlson. There is no evidence Officer Tanner heard Detective Carlson's alert or knew the person approaching Carlson was Officer Green until after the shooting.

Officer Tanner and his partner, Officer Burle, arrived at the scene after the officers who pursued the first two suspects and joined the pursuit. Officers Tanner and Burle were approximately 30-50 feet away from Officer Green as he approached Detective Carlson. Officer Tanner testified that, as they approached, he saw a black male, whom he presumed to be a suspect from the crashed vehicle, on the ground with a gun next to him. The individual was wearing clothing that appeared similar to the clothing worn by the armed suspects that Tanner and Burle were pursuing. Officer Tanner testified that he did not see Detective Carlson as Tanner approached.

Both Officer Tanner and Detective Carlson had their flashlights directed toward Officer Green. Officer Green

testified that, as he turned and approached Detective Carlson, he took off his badge and put it out in front of him with his left hand extended so people could see it, with the badge facing in the direction of Officer Tanner or any other officer. Officer Tanner testified that he saw Officer Green stand up, pick up the firearm with his right hand while facing away from Officer Tanner, turn toward Tanner, and begin to move toward officers. "[I]t looked like a nickel-plated gun" in Officer Green's raised hand. Officer Tanner commanded Officer Green to drop the firearm. Green testified he heard one command to drop the gun but Officer Tanner fired without allowing sufficient time to comply. The shot hit Officer Green in the elbow, causing permanent injuries. As Officer Green fell, Detective Carlson yelled at Officer Tanner, "You shot Milton. I told you not to shoot him. I told you not to shoot him."

Officer Green's complaint asserted claims under § 1983 and Missouri state law: (1) an unreasonable seizure claim against Officer Tanner; (2) a use of excessive force claim against Officer Tanner; (3) a Monell municipal liability claim against the City of St. Louis for engaging in customs and practices of unreasonable seizures, excessive force, and failure to train and supervise; and (4) a battery claim under Missouri state law against Officer Tanner. The defendants moved for summary judgment on all claims in December 2022. The district court granted the motion on March 6, 2023. In granting summary judgment, the district court considered disputed facts in the light most favorable to Officer Green. In particular, the court assumed Officer Green had his firearm pointed at the ground in his right hand and not in the direction of Officer Tanner; Officer Green was prominently displaying his badge in his raised left hand; and Officer Tanner gave only

one command to drop the firearm without giving sufficient time for compliance before shooting.

After recounting the facts underlying our decisions in Liggins v. Cohen, 971 F.3d 798 (8th Cir. 2020), and Loch v. City of Litchfield, 689 F.3d 961 (8th Cir. 2012), the court explained:

> Defendant Tanner encountered similarly volatile facts and circumstances in this case. He arrived at the scene as the result of a car chase with a stolen vehicle, during which the vehicle's occupants shot repeatedly at the pursuing officers' vehicles. He knew that three suspects bailed out of the chased vehicle and fled. While plaintiff asserts that Detective Carlson yelled that plaintiff was an off-duty officer and that no one should shoot, no evidence in the record suggests that defendant Tanner heard Carlson's instruction. As he approached plaintiff's area, [Tanner] saw plaintiff stand up while picking up a gun, and he perceived that plaintiff was raising the gun in his direction. Under these circumstances, defendant Tanner had probable cause to believe that plaintiff posed an immediate threat of death or serious bodily injury, and his use of force was therefore reasonable. . . . Tanner instructed plaintiff to drop his gun . . . . When defendant Tanner perceived that plaintiff was pointing a gun at him, Tanner could have reasonably concluded that it was not feasible to wait for plaintiff's compliance.
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> * * * * *
>
> While the evidence here does not show that plaintiff was actually pointing a gun at defendant Tanner, it consistently shows that defendant Tanner perceived that plaintiff was pointing a gun

> at him. Defendant Tanner's mistake and his resulting use of force were reasonable.

Officer Green then filed a motion to alter or amend the summary judgment order Federal Rule of Civil Procedure 59(e) and sought to submit newly discovered evidence. The district court denied the Rule 59 motion:

> Though Tanner did not see what was in plaintiff's left hand, it is undisputed that plaintiff had a gun in his right hand when Tanner shot him. . . . Under the circumstances, Tanner's mistake of fact -- that plaintiff was raising the gun that he saw plaintiff pick up and hold in his right hand -- was reasonable.

The court further denied Officer Green's request to submit new evidence because the new evidence related to his Monell claim against the City, which failed for lack of proof of an underlying constitutional violation. This appeal followed.

II. Discussion

We review the grant of summary judgment *de novo*. "Summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Torgerson v. City of Rochester, 643 F.3d 1031, 1042 (8th Cir.) (en banc) (quotation omitted), cert. denied, 565 U.S. 978 (2011). "At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." Scott v. Harris, 550 U.S. 372, 380 (2007), quoting Fed. R. Civ. P. 56(c). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the

requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Where the parties and witnesses have different recollections of the events at issue, the question is whether there are material issues of disputed facts that would permit "a reasonable jury [to] return a verdict for the nonmoving party based on the evidence." Quick v. Donaldson Co., 90 F.3d 1372, 1377 (8th Cir. 1996), citing Anderson, 477 U.S. at 248. "A fact is 'material' if it may 'affect the outcome of the suit.'" Erickson v. Nationstar Mortg., LLC, 31 F.4th 1044, 1048 (8th Cir. 2022), quoting Anderson, 477 U.S. at 248.

A. The § 1983 Claims Against Officer Tanner

Officer Green claims that Officer Tanner's shooting was an unreasonable seizure and the use of unreasonable deadly force in violation of the Fourth and Fourteenth Amendments. The governing Fourth Amendment standard is important in "deadly force" cases. In the lead case, the Supreme Court held that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." Tennessee v. Garner, 471 U.S. 1, 7 (1985). Following Garner, the Supreme Court held in Graham v. Connor, 490 U.S. 386, 395 (1989), that "*all* claims that law enforcement officers used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard."

Use of force that results in death is of course a seizure. Even if some uses of excess force that do not result in death may not amount to a Fourth Amendment "seizure,"

as that term has been defined,[2] the Supreme Court has clarified that "Garner was simply an application of the Fourth Amendment's 'reasonableness' test . . . to the use of a particular type of force in a particular situation. . . . Whether or not [Officer Tanner's] actions constituted application of 'deadly force,' all that matters is whether [his] actions were reasonable." Scott, 550 U.S. at 382-83.

The Fourth Amendment reasonableness test asks "whether the amount of force used was objectively reasonable under the particular circumstances." Z.J. ex rel. Jones v. Kan. City Bd. of Police Comm'rs, 931 F.3d 672, 681 (8th Cir. 2019) (quotation omitted). "The issue is whether the totality of the circumstances -- including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether the suspect is actively fleeing or resisting arrest -- justifies a particular sort of seizure." Liggins, 971 F.3d at 800 (citations omitted). As the district court recognized, reasonableness must be viewed "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham, 490 U.S. at 396. "[W]e examine the information that the officer possessed at the time of his decision to use such force." Schulz, 44 F.3d at 648 (cleaned up). At the summary judgment stage, "[o]nce the predicate facts are established, the reasonableness of [an officer's] conduct under the circumstances is a question of law." Tlamka v. Serrell, 244 F.3d 628, 632 (8th Cir. 2001).

"The calculus of reasonableness must embody allowance for the fact that police officers are often forced

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[2] See United States v. Mendenhall, 446 U.S. 544, 554-55 (1980); Schulz v. Long, 44 F.3d 643, 647 (8th Cir. 1995).

to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation." Graham, 490 U.S. at 396-97. "In dangerous situations where an officer has reasonable grounds to believe that there is an imminent threat of serious harm, the officer may be justified in using a firearm before a subject actually points a weapon at the officer or others." Liggins, 971 F.3d at 801. "[I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used . . . if, where feasible, some warning has been given." Garner, 471 U.S. at 11-12; see Arnold v. McClinton, 112 F.4th 595, 603-04 (8th Cir. 2024); Smith v. Kilgore, 926 F.3d 479, 485 (8th Cir. 2019).

Officer Green argues the district court erred in assuming the fact that Officer Tanner perceived Green was pointing a gun at Tanner because Officer Tanner's own testimony forecloses the possibility that Tanner saw the metal badge in Green's left hand and mistook it for a gun -- there is "no evidence in the record" that Tanner saw what was in the Green's left hand, and "Tanner's own testimony . . . admits he did not and could not see" the object in the left hand.

Officer Green testified that, in response to Detective Carlson's directive, he got up off the ground, picked up his gun, and started walking toward Carlson with his left hand holding his badge "so people can see it" and his right hand holding the gun at his side with the muzzle pointing down. Officer Tanner testified that he saw Green on the ground with the gun nearby and was surprised to see Green rise and pick up the gun in a threatening manner. However, Tanner admitted that Green's left hand was blocked from

view and he did not see a badge. Green's statement of uncontrovered material facts recited that he stood up, started walking toward Carlson, extended his left hand toward officers holding his metal badge that he wanted them to see, and holding a gun in his right hand with the muzzle pointing to the ground. There is no evidence Officer Tanner saw Officer Green approach officers, only that he saw Green stand up and pick up the gun on the ground. Green and other officers testified that he held the gun in his right hand with the muzzle pointed down. Officer Green argues the position he held the gun is a material, outcome determinative fact, citing the majority opinion in Partridge v. City of Benton, 70 F.4th 489, 491-92 (8th Cir. 2023). These differences do not create a genuine issue of *material* disputed fact if the "crucial common facts" in all accounts is consistent. Malone v. Hinman, 847 F.3d 949, 953 (8th Cir.), cert. denied, 583 U.S. 870 (2017).

As the district court recognized, reasonableness turns on "the perspective of a reasonable officer on the scene." Graham, 490 U.S. at 396. The victim in Partridge was holding a gun and threatening suicide. Unless he pointed the gun at the officers dispatched to find and assist the victim, there was no "menacing action" that justified the officers use of deadly force. See Partridge, 70 F.4th at 492 n.2. Here, the totality of the circumstances was far different. Officer Tanner was pursuing suspects who fired at the pursuing officers, crashed their vehicle, and fled. Tanner had heard additional gunfire moments before and had reason to suspect that Officer Green, who was holding a gun, was the third occupant of the crashed vehicle. It was not a dark night and two flashlights were trained on Officer Green. In these circumstances, would a reasonable officer perceive that Green posed a threat of serious physical harm to Tanner and other officers?

If Officer Green was the third suspect and was approaching officers with a gun *pointed to the ground*, there was still a serious risk he could raise the gun and fire at the officers in a split second. "In dangerous situations where an officer has reasonable grounds to believe that there is an imminent threat of serious harm, the officer may be justified in using a firearm before a subject actually points a weapon at the officer or others." Liggins, 971 F.3d at 801 (citations omitted). The reasonableness determination must allow for the need to make split-second judgments about the amount of force that is necessary in tense, uncertain, and rapidly evolving situations. See Garner, 490 U.S. at 396-97. "There is no constitutional or statutory right that prevents an officer from using deadly force when faced with an apparently loaded weapon." Rogers v. King, 885 F.3d 1118, 1122 (8th Cir. 2018) (quotation omitted).

Officer Green argues that determining whether Officer Tanner was reasonably mistaken in thinking Green was armed is a question of fact for the jury. We disagree. "Even if a suspect is ultimately found to be unarmed, a police officer can still employ deadly force if objectively reasonable." Loch, 689 F.3d at 966 (quotation omitted). "Once the court has assumed a particular set of [predicate] facts[,] . . . whether [Green's] actions rose to a level warranting [Tanner's] use of force is a question of law for the court, not a question of fact." Liggins, 971 F.3d at 801, citing Scott, 550 U.S. at 381 n.8. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene." Kisela v. Hughes, 584 U.S. 100, 103 (2018), quoting Graham, 490 U.S. at 396.

Officer Green argues our decisions in Loch and Liggins are distinguishable because they involved "split-

second" decisions to shoot. We disagree. The circumstances leading up to Officer Tanner seeing a perceived suspect confronting officers with a gun in his hand made this a split-second decision. In Loch, an officer with prior information that a suspect was armed saw the suspect engage in a heated argument with another individual, ignore commands to get on the ground, advance toward the officer with his arms raised, and reach for a black object on his hip that turned out not to be a gun. 689 F.3d at 965-67. We affirmed summary judgment in favor of the officer. "An act taken based on a mistaken perception or belief, if objectively reasonable, does not violate the Fourth Amendment." Id. at 966. This was "the type of 'tense, uncertain, and rapidly evolving' situation requiring 'split-second judgments' that we are hesitant to second-guess with the benefit of hindsight." Id. at 967, quoting Graham, 490 U.S. at 396-97.

In Liggins, an officer shot a fleeing suspect holding a firearm in one hand with the barrel pointed downward. 971 F.3d at 800. We reversed the district court's denial of summary judgment because the suspect could "raise the gun and shoot . . . [in] an instant." Id. at 801. We concluded the officer's split-second decision to fire without "discern[ing] whether [the suspect] was carrying the gun in an unusual manner or to shout a warning and wait for him to react" was reasonable. Id. "Both common sense and our cases suggest that a warning is less likely to be 'feasible' in a high-pressure situation that requires a split-second judgment." Morgan-Tyra v. City of St. Louis, 89 F.4th 1082, 1086 (8th Cir. 2024) (citation omitted).

Viewing this "tense, uncertain, and rapidly evolving situation" from Officer Tanner's perspective, we agree with the district court that a reasonable officer could make the split-second decision that "the suspect pose[d] a

significant threat of death or serious physical injury to [Officer Tanner or other officers]." Garner, 471 U.S. at 3. Without doubt, in hindsight the decision to shoot was unnecessary and highly unfortunate. "It may appear, in the calm aftermath, that an officer could have taken a different course, but we do not hold the police to such a demanding standard." Estate of Morgan v. Cook, 686 F.3d 494, 497 (8th Cir. 2012) (quotation omitted); see Schulz, 44 F.3d at 649.

Accepting the facts cited by Officer Green, we agree with the district court that Officer Tanner's use of force was objectively reasonable. Officer Tanner confronted the same imminent threat of serious injury that the officers in Loch and Liggins faced. This is the type of dangerous situation where an officer has reasonable grounds to believe that an imminent threat of serious harm "justifies using a firearm before a subject actually points a weapon at the officer or others." Liggins, 971 F.3d at 801; see Garner, 490 U.S. at 396-97. Accordingly, we affirm the grant of summary judgment dismissing the individual § 1983 claims against Officer Tanner.

B. Monell Claims

Officer Green asserted § 1983 claims against the City of St. Louis based on an alleged continuing, widespread, persistent pattern of unconstitutional misconduct by the City's employees, namely, indifference to officer-involved uses of force and a failure to adequately investigate these matters. See Monell v. N.Y.C. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978); Mitchell v. Kirchmeier, 28 F.4th 888, 899-900 (8th Cir. 2022). "Absent a constitutional violation by a city employee, there can be no § 1983 or Monell liability for the City." Edwards v. City of Florissant, 58 F.4th 372, 376 (8th Cir. 2023) (cleaned up). The district court granted the City summary judgment on these claims

because Officer Tanner did not violate Officer Green's constitutional rights. On appeal, Officer Green argues the court erred in dismissing his claims against Officer Tanner and therefore we should also reverse the dismissal of his Monell claims. As we are upholding the dismissal of Officer Green's individual claims against Officer Tanner, there was no constitutional violation and no error in granting summary judgment to the City.

C. Denial of Post Judgment Motions

Officer Green argues the district court erred in denying his post judgment motions. He first argues the court erred in denying his Rule 59(e) motion to alter or amend the judgment because the court changed its theory of the governing facts and erred by again crediting facts viewed from Officer Tanner's perspective that are contradicted by other witnesses. After careful review, we agree with the district court that this argument and the new evidence presented did not meet the demanding standard for obtaining Rule 59(e) relief. See Yeransian v. B. Riley FBR, Inc., 984 F.3d 633, 636 (8th Cir. 2021); United States v. Metro. St. Louis Sewer Dist., 440 F.3d 930, 933-35 (8th Cir. 2006). Accordingly, we affirm the denial of Rule 59(e) relief for the reasons stated by the district court.

Officer Green's second post-judgment motions sought to reopen discovery in light of newly-discovered evidence. However, this evidence related entirely to the Monell claims and would not establish a constitutional violation by a City employee that is required to establish Monell liability. Thus, the district court did not abuse its discretion in denying this motion.

D. Missouri Battery Claims

Officer Green argues the district court erred in dismissing his state law battery claims as barred by Missouri's doctrine of official immunity. We disagree. Under Missouri law, "public officers acting within the scope of their authority are not liable for injuries arising from their discretionary acts or omissions." State ex rel. Twiehaus v. Adolf, 706 S.W.2d 443, 444 (Mo. banc 1986) (quotation omitted). The use of force when officers "draw and fire a weapon, even if they are negligent," is a discretionary duty. N.S. ex rel. Lee v. Kan. City Bd. of Police Comm'rs, 35 F.4th 1111, 1115 (8th Cir. 2022) (cleaned up), cert. denied sub nom. N.S. ex rel. Stokes v. Kan. City Bd. of Police Comm'rs, 143 S. Ct. 2422 (2023). "It is hard to imagine a setting more demanding of judgment than one in which line officers of the police department confront a person who has recently flourished a gun." Green v. Denison, 738 S.W.2d 861, 865 (Mo. 1987), abrogated on other grounds by Davis v. Lambert-St. Louis Int'l Airport, 193 S.W.3d 760 (Mo. 2006).

"[O]fficial immunity does not apply to discretionary acts done in bad faith or with malice." Davis v. White, 794 F.3d 1008, 1013 (8th Cir. 2015) (quotation omitted). Officer Green argued that Officer Tanner's malice or bad faith can be inferred from evidence that Green "did not present a threat to Tanner and that Tanner shot him without providing time to comply with his warning." The district court concluded the evidence viewed in the light most favorable to Officer Green did not contain facts from which bad faith or malice could reasonably be inferred because Tanner used force based on his mistaken belief that the badge Officer Green pointed at officers was a gun.

On appeal, Green argues we should vacate this decision because the district court used the same

erroneous reasoning it used in dismissing his § 1983 federal claims, "where it construed all the facts in a light most favorable to the moving, rather than non-moving party." As we have explained, this is an erroneous characterization of the district court's proper evaluation of the summary judgment evidence in this excessive force case. A finding of bad faith "embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, [or] breach of a known duty through some ulterior motive." Adolf, 706 S.W.2d at 447 (quotation omitted). Here, there is no evidence that Officer Tanner acted with malice or bad faith. When officers make split-second use-of-force decisions, absent evidence of ulterior motive or malice they are entitled to official immunity. See N.S., 35 F.4th at 1115, and cases cited.

For the foregoing reasons, the judgment of the district court is affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MILTON GREEN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CITY OF ST. LOUIS	)	No.
and	)	4:19 CV 1711 DDN
CHRISTOPHER TANNER,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on the motions of plaintiff Milton Green to alter or amend the judgment and submit newly discovered evidence (Doc. 133) and to reopen discovery (Doc. 135). Defendants Christopher Tanner and the City of St. Louis oppose both motions. (Doc. 148.)

This case arises out of the shooting of an off-duty St. Louis Metropolitan Police officer by an on-duty officer. Plaintiff brought claims of unreasonable seizure and excessive force in violation of the Fourth and Fourteenth Amendments under 42 U.S.C. § 1983 against Tanner; a *Monell* claim against the City; and a Missouri state law

battery claim against Tanner. (Doc. 1.) On March 6, 2023, this Court granted defendants' motion for summary judgment. (Doc. 131.) The Court concluded that defendant Tanner was entitled to qualified immunity because he mistakenly perceived that plaintiff was pointing a gun at him. (*Id.* at 11.) The Court further concluded that because Tanner did not violate plaintiff's constitutional rights, there could be no *Monell* or § 1983 liability for the City. (*Id.* at 12.)

Plaintiff now moves under Federal Rule of Civil Procedure 59(e) to alter or amend the Court's entry of summary judgment. (Doc. 133.) He argues that defendant Tanner could not have mistaken plaintiff's badge for a gun because he did not see plaintiff's left hand or what was in it. (Doc. 134 at 4.) He asserts that there is no factual support in the record for the argument that Tanner mistook plaintiff's badge for a gun because Tanner failed to dispute, pursuant to Fed. R. Civ. P. 56(c), that he did not see what was in plaintiff's left hand. (*Id.* at 6.) He also contends that he put forth evidence to dispute Tanner's claim that the gun was moving above his waist and pointed at Tanner, and the Court should have relied on this evidence in ruling on the motion for summary judgment. (*Id.* at 6-7.) Defendants assert in response that plaintiff's Rule 59(e) motion repeats arguments made during summary judgment briefing and that the arguments are otherwise futile. (Doc. 148 at 3-4.) In reply, plaintiff reasserts the argument that Tanner could not have mistaken the badge for a gun because he did not see what was in plaintiff's left hand. (Doc. 154 at 3.)

"Rule 59(e) motions serve the limited function of correcting manifest errors of law or fact or to present newly discovered evidence." *United States v. Metropolitan St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th

Cir. 2006) (internal quotations and citations omitted). To determine whether defendant Tanner is entitled to qualified immunity, the Court must judge the reasonableness of his use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Kisela v. Hughes*, 138 S.Ct. 1148, 1152 (2018) (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)). "The calculus of reasonableness must embody allowance for the fact that police are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. at 396-97. "The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law or fact." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation and citation omitted).

Though Tanner did not see what was in plaintiff's left hand, it is undisputed that plaintiff had a gun in his right hand when Tanner shot him. (Doc. 100 at ¶ 37.) Tanner testified that he saw plaintiff pick up a gun; pointed his flashlight at plaintiff; and perceived a "nickel-plated gun," which he believed at the time of his deposition "was actually [plaintiff's department-issued] Beretta." (Doc. 99-16 at 87:1-2, 93:25, 94:1-2.) Under the circumstances, Tanner's mistake of fact—that plaintiff was raising the gun that he saw plaintiff pick up and hold in his right hand—was reasonable.

Moreover, the Court did not find, as plaintiff argues, that his gun "was raised above his waist, and pointed at Tanner." (Doc. 134 at 7.) Rather, citing Tanner's deposition testimony, the Court noted that Tanner perceived plaintiff's gun moving above his waist and that

he viewed the movement as a threat. (Doc. 131 at 6.) Judging the events from Tanner's perspective, as it must when determining whether qualified immunity applies, the Court concluded that Tanner's use of force was reasonable. (*Id.* at 8.) The Court concludes that its memorandum and order granting summary judgment was not based on errors of fact or law, and it denies plaintiff's motion to alter or amend.

Plaintiff also moves to submit newly discovered evidence produced by St. Louis City Deputy Director of Public Safety Heather Taylor. (Doc. 133.) Plaintiff adduces a recording of a discussion between the Ethical Society of Police (ESOP) and then-Chief of Police Lawrence O'Toole, in which Chief O'Toole acknowledges weaknesses in training and policy, stating that huge tactical errors led to the shooting. (Doc. 134-2 at 28:40.) In the recording, Chief O'Toole also discusses the internal investigation process and the need for additional training regarding off-duty and undercover officer safety. An ESOP member questioned whether the shooting was correctly described as "friendly fire," and another member requested that an unbiased investigator handle the investigation of the shooting. He also offers an audio statement made by Deputy Director Taylor and a call between Major Mary Warnecke and Taylor. (Docs. 134-3 and 134-4.)

To prevail on his Rule 59(e) motion, plaintiff must show "that (1) the evidence was discovered after trial; (2) the movant exercised due diligence to discover the evidence before the end of trial; (3) the evidence is material and not merely cumulative or impeaching; and (4) a new trial considering the evidence would probably produce a different result." *United States v. Metropolitan St. Louis Sewer Dist.*, 440 F.3d at 933 (citing *U.S. Xpress Enter. Inc.*

v. J.B. Hunt Transp., Inc., 320 F.3d 809, 815 (8th Cir. 2003)). Having reviewed the new evidence adduced by plaintiff, the Court concludes that it does not meet this standard. The recordings pertain to alleged weaknesses in training and policy, which relate to plaintiff's *Monell* claim against the City. While the evidence is material to the *Monell* claim, if it were admitted, it would not produce a different result. The Court concluded that there could be no *Monell* liability because there was no underlying constitutional violation. Plaintiff has not produced new evidence that is material to the underlying § 1983 claims of unreasonable seizure and excessive force. Because the evidence is not relevant to the underlying § 1983 claims, the Court denies plaintiff's motion to submit newly discovered evidence.

Finally, plaintiff moves to reopen discovery, citing Federal Rule of Civil Procedure 16(b)(4), which states that "[a] schedule may be modified only for good cause and with the judge's consent." "The 'good cause' standard requires a demonstration that the existing schedule cannot reasonably be met despite the diligence of the party seeking the extension." *Burris v. Versa Products, Inc.*, Civil No. 07-3938 (JRT/JJK), 2009 WL 3164783, at *4 (D. Minn. Sept. 29, 2009). The motion to reopen discovery springs from the evidence produced by Heather Taylor. The Court concludes that plaintiff has not shown good cause to modify the scheduling order and reopen discovery. Plaintiff has not argued that defendants failed to produce any evidence related to the underlying § 1983 claims. As discussed above, additional evidence related to the *Monell* claim is not relevant. Because the Court concludes that good cause does not exist, it denies plaintiff's motion to reopen discovery.

CONCLUSION

For the reasons set forth above,

IT IS HEREBY ORDERED that the motion of plaintiff Milton Green to alter or amend and to submit newly discovered evidence **[Doc. 133] is denied.**

IT IS FURTHER ORDERED that the motion of plaintiff to reopen discovery **[Doc. 135] is denied.**

IT IS FURTHER ORDERED that the motion of St. Louis Post-Dispatch, LLC to intervene **[Doc. 141] is granted.** The Court directs the Clerk to docket as separate entries the motion to unseal and memorandum in support, Docs. 141-1 and 141-2.

IT IS FURTHER ORDERED that the motion of defendants City of St. Louis and Christopher Tanner for an extension of time to respond to intervenor St. Louis Post-Dispatch, LLC's motion to unseal **[Doc. 151] is granted.** Plaintiff and defendants shall file their responses, if any, to the motion to unseal within 14 days of the date of this order.

IT IS FURTHER ORDERED that the motion of plaintiff for a status hearing **[Doc. 153] is denied.**

/s/ David D. Noce

UNITED STATES MAGISTRATE JUDGE

Signed on April 28, 2023.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MILTON GREEN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CITY OF ST. LOUIS	)	No.
and	)	4:19 CV 1711 DDN
CHRISTOPHER TANNER,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on the motions of defendants City of St. Louis and Christopher Tanner for summary judgment (Doc. 89) and to exclude the report and testimony of plaintiff's expert Jeffrey Noble (Doc. 92), as well as the motion of plaintiff Milton Green to compel discovery (Doc. 101). The parties have consented to the exercise of plenary authority by the undersigned United States Magistrate Judge under 28 U.S.C. § 636(c).

For the reasons set out below, the Court sustains defendants' motion for summary judgment and denies defendants' motion to exclude and plaintiff's motion to compel as moot.

BACKGROUND

Viewing the evidence in the light most favorable to plaintiff, the record establishes the following facts, taken from plaintiff's statement of material facts and defendants' statement of material facts not controverted by plaintiff. (Docs. 99-1, 100.) Shortly before 10:00 p.m. on June 21, 2017, defendant Tanner and other St. Louis Metropolitan Police Department (SLMPD) officers were conducting surveillance of a suspected stolen vehicle in downtown St. Louis. (Doc. 100 at ¶¶ 1, 3.) The stolen vehicle fled the police vehicles once the occupants detected that they were being followed, and one of the officers deployed spike strips to puncture the stolen vehicle's tires. (*Id.* at ¶¶ 4-5.) Almost immediately after the vehicle's tires were spiked, the occupants of the stolen vehicle began shooting at the pursuing officers. (*Id.* at ¶ 6.) The stolen vehicle eventually crashed at the corner of Page and Astra, near plaintiff Milton Green's home. (*Id.* at ¶ 11; Doc. 99-1 at ¶ 4.)

Late in the evening of June 21, 2017, plaintiff, a 15-year SLMPD Officer, was off-duty and working on a car with his friend in the driveway that plaintiff shared with his neighbor. (*Id.* at ¶¶ 1-3.) While outside, he saw the stolen vehicle turn and crash at the intersection of Park and Astra. (*Id.* at ¶ 4-5.) He saw two individuals get out of the car and run to the gangway of his neighbor's house; shortly thereafter, another vehicle arrived, and two police officers began chasing the two individuals running through the gangway. (*Id.* at ¶¶ 6-7.) Plaintiff and his friend attempted to conceal themselves behind one of the cars in the driveway. (*Id.* at ¶ 12.) A third individual exited the crashed car and headed to the west side of plaintiff's house, dropping face down to the ground after hearing gunfire. (*Id.* at ¶¶ 11, 13.) When the third individual

pointed a gun at plaintiff's friend's car, behind which plaintiff and his friend were hiding, plaintiff pointed his gun up and said, "Police, put the gun down;" the third individual ran towards the alley with his gun still pointed at plaintiff. (*Id.* at ¶¶ 15-16.) Plaintiff then heard from behind him, "Put the gun down." (*Id.* at ¶ 17.) Surmising that the command came from a police officer and that it was directed toward him, he dropped the gun and lay prone on the ground. (*Id.* at ¶¶ 18-19.) Between the time that he went prone and defendant Tanner shot him, he did not hear any more gunshots. (*Id.* at ¶ 21.)

One of the on-duty officers at the scene, Detective Carlson, then yelled out, "There's a[n] off-duty police officer here, don't shoot. His name [sic] Milton Green. He lives here. Don't shoot." (*Id.* at ¶ 24.) Detective Carlson told Green to come to him. (*Id.* at ¶ 25.) Plaintiff stood up; picked up his gun with his right hand, with the muzzle pointing towards the ground and his right arm at his side; and extended his left hand, which held his badge. (*Id.* at ¶¶ 27, 29-30, 36.) Plaintiff was looking at and walking towards Detective Carlson when he saw, in his peripheral vision, another officer approaching. (*Id.* at ¶¶ 28, 47.)

Defendant Tanner yelled at plaintiff to drop his gun but did not give him adequate time to put his weapon down. (*Id.* at ¶ 40.) Defendant Tanner was "aiming at center mass" when he shot at plaintiff, but he missed and hit plaintiff in the elbow. (*Id.* at ¶ 49.) Detective Carlson then yelled, "You shot Milton. I told you not to shoot him. I told you not to shoot him." (*Id.*) Plaintiff fell to the ground. (*Id.* at ¶ 50.) Several officers then transported him to the hospital. (*Id.* at ¶ 51.)

Green brought this action for relief under 42 U.S.C. § 1983, with subject matter jurisdiction granted by 28 U.S.C. §§ 1331 (federal question) and 1343(a)(3) (to

redress a federal constitutional violation), and under Missouri law with subject matter jurisdiction granted by 28 U.S.C. § 1367. Plaintiff Green maintains the following claims:

(1) Unreasonable seizure in violation of the Fourth and Fourteenth Amendments against defendant Tanner under 42 U.S.C. § 1983 (Count 1);

(2) Use of excessive force in violation of the Fourth and Fourteenth Amendments against defendant Tanner under 42 U.S.C. § 1983 (Count 2);

(3) Engaging in customs of unreasonable seizures, excessive force, and failure to train and supervise, a *Monell* claim under 42 U.S.C. § 1983 against defendant City (Count 3); and

(4) Battery under Missouri law against defendant Tanner (Count 4).[1]

(Doc. 1.)

GENERAL LEGAL PRINCIPLES

Summary judgment is appropriate "if there is no dispute of material fact and reasonable fact finders could not find in favor of the nonmoving party." *Shrable v. Eaton Corp.*, 695 F.3d 768, 770-71 (8th Cir. 2012); *see also* Fed. R. Civ. P. 56(a). The party moving for summary judgment must demonstrate the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A dispute is genuine if the evidence may prompt a

[1] In his response to defendants' motion for summary judgment, plaintiff states that he intends to dismiss his claim for negligent infliction of emotional distress (Count 5 in the complaint) and his state law battery claim against defendant City (Count 4). (Doc. 99-24 at 26 n.10)

reasonable jury to return a verdict for either the plaintiff or the defendant, and it is material if it would affect the resolution of a case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 252 (1986); *Rademacher v. HBE Corp.*, 645 F.3d 1005, 1010 (8th Cir. 2011).

The burden shifts to the non-moving party to demonstrate that disputes of fact do exist only after the movant has made its showing. *Anderson*, 477 U.S. at 252. It is the nonmoving party's burden to set forth affirmative evidence and specific factual support by affidavit and other evidence to avoid summary judgment. *Id.* at 256; *Iverson v. Johnson Gas Appliance Co.*, 172 F.3d 524, 530 (8th Cir. 1999). If reasonable minds could differ as to the import of the evidence, summary judgment is not appropriate. *Anderson*, 477 U.S. at 250. The court must view the facts in the light most favorable to the non-moving party, but it is not required to accept unreasonable inferences or sheer speculation as fact. *Reed v. City of St. Charles, Mo.*, 561 F.3d 788, 791 (8th Cir. 2009).

DISCUSSION

Plaintiff's § 1983 unreasonable seizure and excessive force claims

In defense against plaintiff's § 1983 unreasonable seizure and excessive force claims, defendant Tanner asserts that he is protected by qualified immunity from suit. In resolving questions of qualified immunity at summary judgment, courts must engage in a two-pronged inquiry: (1) whether the facts, considered in the light most favorable to the plaintiff, show that the officer's conduct violated a federal right; and (2) whether the right was "clearly established" at the time of the alleged violation. *Tolan v. Cotton*, 572 U.S. 650, 655-56 (2014). If either prong is not satisfied, then qualified immunity will apply.

Thurairajah v. City of Fort Smith, Arkansas, 925 F.3d 979, 982-83 (8th Cir. 2019). "The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law or fact." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation and citation omitted).

"A police officer's use of deadly force against a subject is a 'seizure' under the Fourth Amendment." *Cole Estate of Richards v. Hutchins*, 959 F.3d 1127, 1132 (8th Cir. 2020) (citation omitted). Therefore, all claims that an officer has used excessive force "in the course of an arrest, investigatory stop, or other seizure are analyzed under the Fourth Amendment's objective reasonableness standard." *Nance v. Sammis*, 586 F.3d 604, 609-10 (8th Cir. 2009) (citing *Graham v. Connor*, 490 U.S. 386, 394 (1989)). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Kisela v. Hughes*, 138 S.Ct. 1148, 1152 (2018) (citing *Graham v. Connor*, 490 U.S. at 396). "The calculus of reasonableness must embody allowance for the fact that police are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. at 396-97. The inquiry requires careful attention to the facts and circumstances of each case, including

> the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat

> reasonably perceived by the officer; and whether the plaintiff was actively resisting.

McDaniel v. Neal, 44 F.4th 1085, 1090 (8th Cir. 2022) (citing *Lombardo v. City of St. Louis*, 141 S. Ct. 2239, 2241 (2021)). The Court must consider the totality of the circumstances in the light most favorable to plaintiff. *Capps v. Olson*, 780 F.3d 879, 884 (8th Cir. 2015).

Where an officer has probable cause to believe that a subject poses a threat of serious physical harm, either to the officer or to others, it is reasonable under the Fourth Amendment to use deadly force. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). "Generally, an individual's mere possession of a firearm is not enough for an officer to have probable cause to believe that individual poses an immediate threat of death or serious bodily injury; the suspect must also point the firearm at another individual or take similar 'menacing action.'" *Cole Estate*, 959 F.3d at 1132. "Before employing deadly force, an officer should give 'some warning' when it is 'feasible' to do so." *Loch v. City of Litchfield*, 689 F.3d 961, 967 (8th Cir. 2012) (quoting *Tennessee v. Garner*, 471 U.S. at 11-12).

The Court must analyze the events preceding the shooting from defendant Tanner's perspective to determine whether he had probable cause to believe that plaintiff posed an immediate threat of death or serious bodily injury. Defendant Tanner arrived at the scene of the shooting as the result of a car chase, during which gunshots were fired by the suspects at his and other police vehicles and after which he saw three suspects bail out of and run away from the vehicle. (Doc. 99-16 at 50:10-11, 53:1.) As he approached plaintiff, he saw him lying on the ground with his gun two feet in front of him. (*Id.* at 83:4-12.) He saw plaintiff pick up the gun while standing up, and he perceived that plaintiff was raising it above his

waist. (*Id.* at 87:1-2, 93:24-25.) When Tanner pointed the flashlight at plaintiff, he perceived a "nickel-plated gun," though he now understands that "it was actually [plaintiff's department-issued] Beretta." (*Id.* at 93:25, 94:1-2.) He did not see what plaintiff's left hand was doing, but he noted that plaintiff raised both of his hands. (*Id.* at 99:9, 19.) Plaintiff was not facing defendant Tanner directly, but plaintiff's gun was. (*Id.* at 89:8-9.) Defendant Tanner identified himself as a police officer and yelled "Drop the gun" multiple times before shooting plaintiff. (*Id.* at 95:16-18.) He also stated that, at the time he shot plaintiff, he did not see on plaintiff any police identification, including a badge. (*Id.* at 242:24-25.) It is undisputed that at the time defendant Tanner shot plaintiff, plaintiff was holding his silver metal police badge in his left hand and extending his left arm so that his badge was visible. (Doc. 91 at ¶ 40; Doc. 99-1 at ¶ 27.)

Viewing the evidence in the light most favorable to plaintiff, the Court assumes for the purposes of summary judgment that defendant Tanner instructed plaintiff to drop his gun at least once but did not give him time to comply.[2] The court also assumes that the gunfight between the other officers and suspects had ceased, as the evidence regarding the time between the last gunfire and defendant Tanner shooting plaintiff is inconsistent. (Doc. 99-16 at 105:8-9, 113:12-13; Doc. 91-2 at 66:17-20, 151:4-7.)

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[2] Plaintiff states that defendant Tanner yelled at him to drop his gun but did not give him adequate time to put his weapon down. Defendant Tanner asserts that he told plaintiff two or three times to put his gun down. Detectives Carlson and Bell do not remember hearing a warning, and Detective Burle, defendant Tanner's partner, does not know whether defendant Tanner gave plaintiff enough time to comply.

Defendant Tanner first cites *Liggins v. Cohen*, 971 F.3d 798 (8th Cir. 2020), to support his contention that his use of force was objectively reasonable. *Liggins* concerned an officer who shot a juvenile suspect while the juvenile was running and holding a gun in his hand. Id. at 800. The court assumed that the barrel of the gun was pointed down and that the officer did not give a warning before shooting the juvenile. *Id.* The Eighth Circuit held that the officer was entitled to qualified immunity because he had reasonable grounds to believe that the fleeing juvenile could raise the gun and shoot in a split second. *Id.* at 801. It concluded that "[i]n dangerous situations where an officer has reasonable grounds to believe that there is an imminent threat of serious harm, the officer may be justified in using a firearm before a subject actually points a weapon at the officer or others." *Id. Liggins* is distinguishable from this case in that defendant Tanner acted based on a different "confluence of circumstances." *Id.* at 802. Here, plaintiff was not fleeing or moving at a high rate of speed. Plaintiff did not take any steps towards defendant Tanner, but Tanner perceived that plaintiff was holding a pistol and raising it above his waist. (Doc. 99-16 at 92:10-22.)

The second case cited by defendant Tanner, *Loch v. City of Litchfield*, 689 F.3d 961 (8th Cir. 2012), is more analogous. The officer in that case responded to a call reporting that the plaintiff was intoxicated and trying to leave his residence in his vehicle. *Id.* at 964. When the officer arrived on the scene, the plaintiff's brother-in-law yelled that the plaintiff had a gun; the officer did not see or hear the plaintiff throw his gun out of the window. *Id.* The plaintiff engaged in a nose-to-nose confrontation with his brother-in-law, and the officer pointed his gun at the plaintiff and ordered everyone to get on the ground. *Id.* The plaintiff then turned and began walking towards the

officer with his hands raised above his head or out to his side, and the officer repeatedly ordered him to the ground; the officer also heard plaintiff say something that included the word "kill." *Id.* As the plaintiff reached the edge of the street, he slipped on a snowbank, and one of his hands moved toward his side. *Id.* The officer fired, hitting the plaintiff multiple times. *Id.* The officer told an investigator that he saw a black object on the plaintiff's hip, which he believed to be a holster or firearm but which was later determined to be a cell phone holder. *Id.* The Eighth Circuit held that the officer was entitled to qualified immunity because he knew that the plaintiff was intoxicated, he had been told that the plaintiff had a gun, the plaintiff continued walking toward him after he ordered him to the ground, he heard the plaintiff say "kill," and he saw one of the plaintiff's hands move to his side as he fell on the snowbank. *Id.* at 967.

Defendant Tanner encountered similarly volatile facts and circumstances in this case. He arrived at the scene as the result of a car chase with a stolen vehicle, during which the vehicle's occupants shot repeatedly at the pursuing officers' vehicles. He knew that three suspects bailed out of the chased vehicle and fled. While plaintiff asserts that Detective Carlson yelled that plaintiff was an off-duty officer and that no one should shoot, no evidence in the record suggests that defendant Tanner heard Carlson's instruction. As he approached plaintiff's area, he saw plaintiff stand up while picking up a gun, and he perceived that plaintiff was raising the gun in his direction. Under these circumstances, defendant Tanner had probable cause to believe that plaintiff posed an immediate threat of death or serious bodily injury, and his use of force was therefore reasonable. Additionally, even if defendant Tanner instructed plaintiff to drop his gun but did not give plaintiff time to comply, his use of force was reasonable.

When defendant Tanner perceived that plaintiff was pointing a gun at him, Tanner could have reasonably concluded that it was not feasible to wait for plaintiff's compliance.

The cases cited by plaintiff are distinguishable. In *Nance v. Sammis*, two officers were conducting surveillance in the area of a convenience store after receiving a report that two or three black males were going to rob the store. 586 F.3d 604, 606-07 (8th Cir. 2009). The officers noticed two black males, who were later determined to be 12 and 14 years old, approaching the area of the store, one of whom had a toy gun tucked into his waistband. *Id.* at 607. After instructing the boys to get on the ground and drop the gun, one of the officers shot and killed the boy with the toy gun in his waistband. *Id.* Affirming the denial of qualified immunity, the Eighth Circuit presumed that the officers approached the boys without identifying themselves as officers, that the decedent's toy gun was tucked in his pants throughout the confrontation, that the shooting officer only said to drop the gun and get on the ground, and that the decedent may have raised his hand or hands while trying to get on the ground before the shooting officer shot him twice without warning. *Id.* at 610-11. The court noted that the officers' knowledge that they might encounter a dangerous situation, by itself, would not permit the use of deadly force. *Id.* at 611. Conversely, in this case, defendant Tanner perceived that plaintiff was pointing a gun at him. He did not shoot plaintiff solely because he believed the situation was dangerous but because he had probable cause to believe that plaintiff posed a threat of serious harm to him.

In *Wealot v. Brooks*, the Eighth Circuit reversed the district court's grant of qualified immunity because there

were genuine disputes of material fact as to whether the officer saw the decedent throw his gun, rendering him unarmed, and whether at the time the officer shot him, he was turning to the officers and raising his hands in surrender. 865 F.3d 1119, 1125 (8th Cir. 2017). The court noted that the officers' key testimony about the gun was controverted by other witnesses, some of their own inconsistent statements, and some physical evidence. *Id.* at 1128. The court also stated, however, that it has affirmed that grant of qualified immunity in many cases "to officers who applied deadly force to an unarmed suspect because [the court] concluded the officers held a reasonable belief the suspect was dangerous." *Id. Wealot* is inapposite. No evidence in this case controverts defendant Tanner's reasonable belief that plaintiff was holding a gun at or near his waistline. (Doc. 99-16 at 93:25, 94:1-2; Doc. 91-9 at 19-21.)

In *Cole Estate of Richards v. Hutchins*, the officer shot the decedent as the decedent was pointing his gun either at the sky or at the ground. 959 F.3d 1127, 1133 (8th Cir. 2020). The Eighth Circuit concluded that the officer's use of force was not objectively reasonable because, at the time the officer fired the shots, the decedent was not wielding the gun in a menacing fashion and therefore did not pose an immediate threat of serious physical harm. *Id.* The court also noted that the officer's failure to provide a warning further confirmed that the use of deadly force was objectively unreasonable. *Id.* at 1133-34. Unlike in *Wealot*, in this case, defendant Tanner mistakenly perceived that plaintiff was wielding his gun in a menacing fashion by pointing it at Tanner. Conversely, in *Smith v. Kilgore*, the Eighth Circuit affirmed the district court's grant of summary judgment where the evidence consistently showed that the decedent pointed his gun at the shooting officer. 926 F.3d 479, 484 (8th Cir. 2019).

While the evidence here does not show that plaintiff was actually pointing a gun at defendant Tanner, it consistently shows that defendant Tanner perceived that plaintiff was pointing a gun at him. Defendant Tanner's mistake and his resulting use of force were reasonable.

In *Banks v. Hawkins*, the Eighth Circuit affirmed the denial of summary judgment where the officer shot the plaintiff immediately upon the plaintiff opening the door to his home. 999 F.3d 521, 526 (8th Cir. 2021). The court concluded that the officer's belief that the plaintiff was an immediate threat was unreasonable, as he waited more than ten minutes after hearing screams to attempt entry and had no reason to believe that the situation was still dangerous when the plaintiff opened the door. *Id* at 525-26. Here, while the record is inconsistent regarding the time between the end of the gunfight on the scene and defendant Tanner's gunshot, Tanner believed that plaintiff was an immediate threat because he perceived that plaintiff was pointing a gun in his direction.

Plaintiff cites *Capps v. Olson*, 780 F.3d at 885, and *Williams v. City of Burlington, Iowa*, 27 F.4th 1346, 1351 (8th Cir. 2022), in his surreply for the proposition that the jury must decide whether defendant Tanner's mistake was reasonable. *Capps* is inapposite because the district court held that the officer's use of the phrase "weapons unknown," as well as other evidence regarding the presence of a weapon, could have been interpreted by a jury to mean that the decedent did not have a weapon and that the officer did not believe that the decedent had a weapon. 780 F.3d at 885. Further, in *Williams*, while the officer argued that he did not see the decedent drop the gun, the decedent's estate marshalled competing evidence to support the claim that the officer saw the decedent drop the gun and that the decedent was not in a shooting

posture. 27 F.4th at 1351. Both cases contained evidence that called into question the reasonableness of the officer's mistake as to the presence of a weapon. Here, it is undisputed that plaintiff was holding his gun in one hand and his badge in the other. The question is whether it was reasonable as a matter of law for defendant Tanner to mistake plaintiff's nickel-plated badge for a gun. The Court concludes that it was.

Plaintiff contends that defendant Tanner cannot claim that he shot plaintiff based on a "mistaken perception or belief" because he intended to shoot plaintiff. (Doc. 99-24 at 18.) But it is the perception underlying the act, not the intentionality of the act itself, that is at issue. Plaintiff points out in his surreply that defendant Tanner testified that he vividly and distinctly recalled seeing a gun in plaintiff's hand, and he faulted plaintiff for failing to have his badge. Such testimony strengthens defendant Tanner's contention that his perception of the badge as a gun was a mistake of fact. The relevant inquiry, then, is not whether defendant Tanner intentionally shot plaintiff, but whether his mistaking plaintiff's badge for a gun was reasonable. The Court concludes that it was.

Because it has concluded that defendant Tanner did not violate plaintiff's rights to be free from unreasonable seizure and excessive force, the Court does not analyze whether plaintiff's rights were clearly established at the time of the shooting. "Courts should think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (quoting *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)).

The Court grants defendant Tanner's motion for summary judgment as to plaintiff's § 1983 unreasonable seizure and excessive force claims.

Plaintiff's *Monell* claim

Plaintiff alleges that defendant City had a custom of failing to adequately investigate officer-involved uses of force. Plaintiffs establish § 1983 municipal liability if they prove that their constitutional rights were violated by "'an action pursuant to official municipal policy' or misconduct so pervasive among non-policymaking employees of the municipality 'as to constitute a custom or usage with the force of law.'" *Ware v. Jackson County*, 150 F.3d 873, 880 (8th Cir. 1998) (citing *Monell v. Dept. of Soc. Serv.*, 436 U.S. 658, 691 (1978)). To show a "custom or usage," plaintiffs must prove "(1) the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees; (2) deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and (3) an injury by acts pursuant to the governmental entity's custom." *Mitchell v. Kirchmeier*, 28 F.4th 888, 899-900 (8th Cir. 2022) (cleaned up).

However, "absent a constitutional violation by a city employee, there can be no § 1983 or *Monell* liability for the City." *Whitney v. City of St. Louis, Missouri*, 887 F.3d 857, 861 (8th Cir. 2018); *see also Malone v. Hinman*, 847 F.3d 949, 955 (8th Cir. 2017). As discussed above, the Court concludes that defendant Tanner's use of force was objectively reasonable, so there was no constitutional violation. The Court therefore grants defendants' motion for summary judgment as to plaintiff's *Monell* claim.

Plaintiff's battery claim

Missouri applies the doctrine of official immunity to protect public employees from liability for certain torts committed during the performance of discretionary, but not ministerial, acts as part of their official duties. *Hendrix v. City of St. Louis*, 636 S.W.3d 889, 902 (Mo. Ct. App. 2021) (citing *Southers v. City of Farmington*, 263 S.W.3d 603, 610 (Mo. 2008)). "A discretionary act requires the exercise of reason in the adaptation of means to an end and discretion in determining how or whether an act should be done or course pursued," while a ministerial function "is one of a clerical nature which a public officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed." *Southers*, 263 S.W.3d at 610. The category into which an act falls is determined "on a case-by-case basis" considering three factors: "(1) the nature of the public employee's duties; (2) the extent to which the act involves policymaking or exercise of professional judgment; and (3) the consequences of not applying official immunity." *Id.* An act is discretionary where there is any room whatsoever for variation in when and how a particular task can be done. *Davis v. Buchanan Cnty. (Davis II)*, 11 F.4th 604, 629 (8th Cir. 2021).

"An 'officer's decision to use force in the performance of his duties is discretionary.'" *Boude v. City of Raymore*, 855 F.3d 930, 935 (8th Cir. 2017) (applying Missouri law); *Davis v. White (Davis I)*, 794 F.3d 1008, 1013 (8th Cir. 2015); *Seiner v. Drenon*, 304 F.3d 810, 813 (8th Cir. 2002) (applying official immunity to a case involving state law claims of battery, assault, and excessive force); *Richardson v. Sherwood*, 337 S.W.3d 58, 63 (Mo. Ct. App.

2011) (citing cases applying official immunity to intentional tort claims of false imprisonment, assault, and malicious prosecution); *DaVee v. Mathis*, 812 S.W.2d 816, 827 (Mo. Ct. App. 1991) (officers were entitled to official immunity on the plaintiff's assault claim).

In order to overcome official immunity, a plaintiff must present evidence to show that the defendant officer's conduct was "done in bad faith or with malice." *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443, 446 (Mo. 1986); *State ex rel. Alsup v. Kanatzar*, 588 S.W.3d 187, 190 (Mo. 2019) (official immunity protects officials who act within the course of their official duties and without malice). Bad faith "requires a dishonest purpose, moral obliquity, conscious wrongdoing, [or] breach of a known duty through some ulterior motive," while malice "involves actions that are so reckless or wantonly and willfully in disregard of one's rights that a trier of fact could infer from such conduct bad faith or [an] improper or wrongful motive." *N.S. ex rel. Lee*, 2022 WL 1739233, at *3. "In Missouri, a bad-faith allegation survives summary judgment if a plaintiff states facts from which it could reasonably be inferred that [defendant] acted in bad faith or from an improper or wrongful motive." *Boude*, 855 F.3d at 935.

Plaintiff contends that the Court can infer defendant Tanner's bad faith or malice from evidence showing that plaintiff did not present a threat to Tanner and that Tanner shot him without providing time to comply with his warning and with the intent to kill him. (Doc. 99-24 at 27.) As discussed above, the Court concludes that defendant Tanner mistakenly believed that plaintiff's badge was a gun and that, based on this misperception, his use of force was reasonable. Viewing the evidence in the light most favorable to plaintiff, there are not facts from

which the Court could reasonably infer bad faith or malice. The Court grants defendant Tanner's motion for summary judgment on plaintiff's battery claim.

CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that the motion of defendants for summary judgment **[Doc. 89] is granted.**

IT IS FURTHER ORDERED that the motion of defendants to exclude the report and testimony of Jeffrey Noble **[Doc. 92] is denied as moot.**

IT IS FURTHER ORDERED that the motion of plaintiff to compel [**Doc. 101] is denied as moot.**

An appropriate Judgment Order is issued herewith.

/s/ David D. Noce

UNITED STATES MAGISTRATE JUDGE

Signed on March 6, 2023.