

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

James Gray, IV,	:	Case No. 2:09-cv-868
	:	
Plaintiff,	:	Judge Algenon L. Marbley
	:	
v.	:	Magistrate Judge Norah McCann
	:	King
Village of Middleport, et. al.,	:	
	:	
Defendants.	:	
	:	
	:	
	:	
	:	
	:	

**PLAINTIFF'S MEMORANDUM IN RESPONSE TO MOTIONS FOR SUMMARY
JUDGMENT BY DEFENDANTS KOEBEL (DOC 39) AND
VILLAGE OF MIDDLEPORT (DOC 43.)**

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I. INTRODUCTION

James Gray was shot in the face by Steve Koebel. Mr. Gray was unarmed on April 15, 2009, when he was shot by Middleport Police Officer Koebel. Mr. Gray brings this civil rights action challenging as excessive Koebel's use of deadly force. On the night in question, Defendant Koebel confronted Mr. Gray in an open field and actually ordered Mr. Gray to turn around. Gray complied with the command. Koebel then cited the turn as a reason to shoot Gray. Mr. Gray survived but has extensive injuries to his mouth and face. Mr. Gray also sues the Village of Middleport for arming Koebel as a police officer but then failing to train or supervise him regarding his use of his firearm on the job. This error by the City is so basic it has been cited by the U.S. Supreme Court has a classic reason to hold a city liable in shooting cases. See *City of Canton v. Harris*, 489 U.S. 378, 390, fn 10 (1989). A DVD summarizing the evidence has been filed with this memorandum. As set out on the DVD and in detail below, this Court should deny summary judgment to the defendants.

II. FACTS

Defendant Koebel first encountered Mr. Gray on Middleport Hill at about 12:30 a.m. in the early morning of April 15, 2009.¹ Mr. Gray was walking from Middleport to the home of his ex-wife, Lisa Eakins.² Koebel stopped Gray, frisked him, satisfied himself that Gray was not armed, and both warned him to go home and stay there.³ Both Koebel and Gray agree that Mr. Gray was drunk at that time.⁴ Thirty minutes after this encounter, a white Buick left the area

¹ Steven M. Koebel Dep. p. 62:12-17 (Doc.28).

² Koebel Dep. p. 63:9-12.

³ Koebel Dep. Ex 18, BCI Interview of Steven Koebel 000190-000191 (Doc.29-1).

⁴ Koebel Dep. p. 63:5-7; James Gray Dep. p. 29:20-23 (Doc.41).

traveling toward Pomeroy on Rt. 7 at a high rate of speed.⁵ Koebel notified dispatch and gave chase.⁶ At that time Lt. Ben Davidson was on duty in Middleport and Officers Brent Rose and John Kulcher were on duty in nearby Pomeroy.⁷ Gallia County Sheriff deputies were also on patrol. Defendant Koebel could therefore expect that he would have back up within two to three minutes.⁸

Mr. Gray did not get very far. A short distance down Route 7, he attempted to turn right on Union Avenue and lost control of his car. Gray went down an embankment and hit a fence.⁹ The area was not populated and Koebel knew that the only building near the crash site was abandoned.¹⁰ Mr. Gray's air bags deployed into his face.¹¹ He stumbled in his drunken state out of the driver side of the car and walked a few feet to the left when he was stopped by a fence.¹² Gray was still unarmed. Koebel stopped his cruiser on the embankment and immediately ran down toward Mr. Gray as Gray stood at the fence.¹³ Koebel recognized Gray as the unarmed drunk man he had stopped and frisked on the hill.¹⁴ Lighting was very poor.¹⁵ The ground was soggy.¹⁶ Koebel's siren was on and his oscillating lights were engaged.¹⁷ Mr. Gray's radio was playing very loudly and his horn was stuck in the on position.¹⁸

⁵ Koebel Dep. p. 76:5-10, 76:19-22.

⁶ Koebel Dep. p. 79:17-20.

⁷ Koebel Dep. p. 110:3-11.

⁸ Koebel Dep. p. 88:2-6.

⁹ James Gray Dep. pp. 45:12-25; 46:1-2, 21-22; Koebel Dep. pp. 76:23-25, 77:1.

¹⁰ Koebel Dep. p. 78:14-21.

¹¹ Gray Dep. p. 37:3-13.

¹² Gray Dep. p. 55:1-3.

¹³ Koebel Dep. pp. 84:6-8; p. 85:7-9; p. 86:12-14.

¹⁴ Koebel Dep. p. 91:13-16.

¹⁵ Koebel Dep. pp. 84:25; 85:1-19.

¹⁶ Gray Dep. p. 54:2-8.

¹⁷ Koebel Dep. p. 84:11-14.

¹⁸ Koebel Dep. p. 84:20-24.

Defendant Koebel stopped about 30 – 40 feet behind Gray as Gray stood facing the wire fence with his back to Koebel.¹⁹ He yelled to Gray to stop climbing on the fence and Gray complied.²⁰ Koebel knew that Gray was drunk and may also have been injured in the crash.²¹ Rather than wait for back up, which arrived within one minute, Koebel claims that he yelled to Gray to put up his hands, turn around and get on his knees.²² Gray started to comply by turning around to the right and Koebel shot Gray twice in the face.²³

The pain was searing and Gray fell to the soggy ground, writhing in agony and shock.²⁴ He was bleeding profusely from his face.²⁵ Koebel's supervisor, Lt. Davidson, was on the scene seconds after Koebel shot Gray. Davidson admitted that there was no need for Koebel to confront Gray alone saying, "I probably would have waited."²⁶ Had Koebel waited one minute he would have been backed up by the two Pomeroy officers, his supervisor Ben Davidson of Middleport, and Sgt. Holman of the Meigs County Sheriff's Office. These four officers arrived immediately after the shooting.²⁷ Meigs County EMS transported Mr. Gray and provided emergency medical care.²⁸

Koebel claims that he feared for his life because he did not see Gray's hands and thought that Gray was reaching into his pants and would turn around and shoot Koebel with a gun.²⁹

¹⁹ Koebel Dep. p. 77:7-13.

²⁰ Koebel Dep. p. 91:3-7.

²¹ Koebel Dep. pp. 96:7-11; 89:9-11.

²² Koebel Dep. p. 78:2-4.

²³ Koebel Dep. p. 78:6-10.

²⁴ Gray Dep. p. 59:2-7 (Doc.40), 79:1-10 (Doc.41-1); Koebel Dep. p. 111:9-14; EMS Records (Bates 000061)(describing scene, with Mr. Gray "lying prone in water gathered in low lying area").

²⁵ Davidson Dep. p. 44:1-6, 12-14 (Doc.45).

²⁶ Davidson Dep. p. 68:6-18.

²⁷ Koebel Dep. p. 104:9-10; 110:2-13.

²⁸ Koebel Dep. p. 102:23-25.

²⁹ Koebel Dep. p. 95:10-15.

Koebel's story itself creates a material issue of fact because it is inconsistent. Koebel claims both that he told Gray to turn around³⁰ and that he did not tell Gray to turn around.³¹ This is important since he shot Gray when Gray turned around. In his incident report drafted on the morning of the shooting, Koebel failed to state that he had instructed the suspect to turn around.³² In his deposition he testified both that he told Gray to turn around and that he did not tell Gray to turn around:

7 Q. So how -- so say it like you said it to
8 him.

9 A. Put your hands up where I can see them
10 and get down our knees. I don't recall telling
11 him to turn around...

15 Q. So now you're saying that you aren't
16 sure that you told him to turn around?

17 A. Right.

18 Q. And as you sit here today, do you have a
19 present recollection of giving him the commands?

20 A. I gave him commands to show me his
21 hands, to get down on his knees....

3 Q. And let's assume that the camera is
4 located where you were, all right?

5 A. Okay.

6 Q. And what did you see Mr. Gray do?

7 A. He had his hands at the front of his
8 waistband.

9 Q. All right.

10 A. I told him to show me his hands and to
11 turn around, and he just made the move to go over
12 his right shoulder without showing me his hands,
13 like he had a weapon in his waistband, and that he
14 was pulling it on me. That's when I feared for my
15 life and shot him twice...

21 Q. So you did tell him to turn around?

³⁰ Koebel Dep. p. 95:21-22; Koebel Dep. Ex. 18, BCI Interview 000198 (Doc.29-1).

³¹ Koebel Dep. p. 94:7-17.

³² Koebel Dep. Ex.19, Koebel Statement (Doc. 29-2).

22 A. Yes.

23 Q. Okay. And you saw him turn to the
24 right?

25 A. He turned toward his right shoulder.

1 Q. Okay. And that's when you shot him?

2 A. Right.

3 Q. And you're sure of that?

4 A. Right.³³

The pain endured by Mr. Gray was severe and terrifying. His face was shot. He was bleeding profusely. His brain may have been hit. He could well have died. He was screaming and writhing in pain all the way to the hospital.³⁴ While being treated, hospital staff noted that Mr. Gray was experiencing “very extreme pain.”³⁵ In the months following, Mr. Gray experienced nightmares and flashbacks regarding the incident, causing increased anxiety and anguish.³⁶

Prior to the shooting Mr. Gray had an engaging smile with beautiful teeth and a handsome face.³⁷ But in prison he was referred to as “bullet head” by the other inmates.³⁸ His face is mangled, his jaw clicks, and his teeth are shattered.³⁹ His girlfriend struggled to kiss his distorted face when she visited him in prison.⁴⁰ Dental expert Jack Hahn, DDS, was unable to examine Mr. Gray in prison but, based on the medical records and X rays, he provided a preliminary estimate that \$65,000 will be needed to repair his teeth and secure plastic surgery to

³³ Koebel Dep. pp. 94-96.

³⁴ EMS record Bates 000061 – 000065.

³⁵ Medical Records, St. Mary’s Hospital, 4/15/09 Bates 000990 and 000994.

³⁶ Fairmont Hospital History and Physical Examination, 5/27/09, Bates 001474.

³⁷ Photo of Mr. Gray Before Incident, Bates 000524.

³⁸ Gray Dep. p. 74:6-7 (Doc.41-1).

³⁹ Gray Dep. pp. 57:17-58:2 (Doc.41); Bates photo 000528, still photo from depo 3/8/10.

⁴⁰ Gray Dep. p. 74:10-24 (Doc.41-1).

repair his face.⁴¹ Mr. Gray was severely traumatized by the shooting and was hospitalized for psychological treatment for six days in late May, 2009.⁴²

Mr. Gray pled guilty to fleeing and eluding, a felony of the fourth degree, and served an 18 month sentence in prison for his conduct on April 15, 2009. Mr. Koebel was not disciplined for the shooting. He was suspended and then resigned shortly after the shooting for using excessive force on a suspect at the jail and then submitting a written report “that include[d]s false statements about the incident.”⁴³ At the time of his deposition Koebel was driving a school bus for children.⁴⁴

Contested facts show that the Village of Middleport fails to train its officers on use of deadly force and ratified the shooting in this case. The Village ensures that officers know how to hit a target.⁴⁵ But they do not train the officers on threat assessment or *when* it is permissible to shoot at the target.⁴⁶ This is particularly important in Middleport where gun ownership is so prevalent that the Village lets officers such as Koebel provide their own weapons.⁴⁷ Therefore officers who regularly use weapons as civilians are in particular need of training on the constitutional limits for using force as members of law enforcement. The Village has failed to teach officers how to determine – objectively – if a suspect poses a threat to the officer or the public and when deadly force may be used in response to that threat.⁴⁸ Defendant Koebel even stated that he never received any policies or procedures from the Village of Middleport Police

⁴¹ Expert report of Jack A. Hahn, DDS.

⁴² Fairmont General Hospital Discharge Summary (Bates 001470 – 00142).

⁴³ Koebel Dep. Ex.11, Notice of Suspension (Doc. 28-11).

⁴⁴ Koebel Dep. p. 5:23-25.

⁴⁵ Koebel Dep. p. 20:9-20; Swift Dep. p. 84:13-17 (Doc.47).

⁴⁶ Koebel Dep. pp. 20:21-24; 21:11-14; Swift Dep. pp. 84:18-25, p. 86:1-4.

⁴⁷ Koebel owned the Glock that he used to shoot Mr. Gray. Koebel Dep. pp. 67:24-68:3.

⁴⁸ Koebel Dep. p. 29:19-24; Swift Dep. p. 83:11-14.

Department.⁴⁹ Fellow Middleport Officer Holter testified that he did not get any policies and procedures until after Koebel shot Mr. Gray and didn't even know they existed before then.⁵⁰ He received no training specific to his duties at Middleport and stated simply, "So I do things based on how I was raised, I guess."⁵¹ But of course civilian notions of police work do not match law enforcement standards.

All of the facts relevant to the two pending motions are summarized and relevant portions of the video depositions, photographs and exhibits organized on a short DVD that will be manually filed contemporaneously with the filing of this memorandum.

III. ARGUMENT

A. Standard for Determination of Summary Judgment in Civil Rights Case

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "If ... the defendant disputes the plaintiff's version of the story, the defendant must nonetheless be willing to concede the most favorable view of the facts to the plaintiff for purposes of [summary judgment]." *Phelps v. Coy*, 286 F.3d 295, 298 (6th Cir. 2002). "[W]hen the non-moving party presents direct evidence refuting the moving party's motion for summary judgment, the court must accept the evidence as true." *Adams v. Metiva*, 31 F.3d 375, 382 (6th Cir. 1994).

The evidence presented is construed in the light most favorable to the non-moving party, which is given the benefit of all favorable inferences that can be drawn there from. *United States*

⁴⁹ Koebel Dep. p. 39:19-22.

⁵⁰ Holter Dep. p. 6:17-25 (Doc.46).

⁵¹ Holter Dep. p. 8:4-5.

v. Diebold, Inc., 369 U.S. 654, 82 S. Ct. 993 (1962); *Cox v. Kentucky Dept. of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995)(in resolving a motion for summary judgment, the court “must afford all reasonable inferences, and construe the evidence in the light most favorable to the non-moving party”). Nor may the Court weigh the evidence or determine the truth of the matter; the Court “determines whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2510 (1986). “The central issue is ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” *Spadafore v. Gardner*, 330 F.3d 849, 852 (6th Cir. 2003). Defendants cannot meet this burden. Any discussion of summary judgment should also take note of its abuse. Summary judgment has been overused, particularly in civil rights cases. As one federal court has recently noted, “commentators are in near unanimous agreement that federal courts overuse summary judgment as a case management tool.” *In re One Star Class Sloop Sailboat Built in 1930*, 517 F.Supp.2d 546, 555 (D. Mass. 2007)(collecting sources). Federal courts seem all too willing to pass judgment on issues that are traditionally reserved for the jury. Thus in many fact bound cases the Court blocks the jury’s evaluation of witnesses, eliminates the opportunity for live testimony, and eliminates the test that comes through cross-examination of the witnesses. See Arthur R. Miller, *The Pre-trial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?* 78 N.Y.U. L.REV. 982, 1090 (2003).

The core issue in this case is whether Defendant Koebel acted reasonably in shooting Mr. Gray. This is a question that simply should not be decided on summary judgment. As Arthur Miller, one of these leading commentators in this realm, suggests, summary judgment is inappropriate in instances where one of the main questions is the reasonableness of an

individual's actions since "human behavior, reasonableness, and state of mind [are] matters historically considered at the core province of jurors." Miller, *The Pre-trial Rush to Judgment*, at 1132.

A number of federal courts have urged restraint in the use of summary judgment. *See Doe v. Abington Friends School*, 480 F.3d 252, 258 (3rd Cir. 2007) ("Since the Supreme Court removed the [summary] judgment procedure from disfavored status in the 1980s, some have opined that the pendulum has swung too far in the opposite direction."); *Terranova v. Torres*, 603 F.Supp.2d 630, 632 n. 3 (S.D.N.Y. 2009) ("The problem, of course, is that the drawing of reasonable inferences and the evaluation of the reasonableness of the Officers' conduct are matters constitutionally for the jury. Evaluating such matters at the summary judgment stage has led at least one prominent critic to question the constitutionality of summary judgment.") (citing Suja Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007)); *In re One Star*, 517 F.Supp.2d at 556 (addressing the great value in pressing for trial rather than issuing a decision on summary judgment); *Green v. Sears, Roebuck & Co.*, 434 F.Supp.2d 1025, 1035 (D. Colo. 2006) (urging a narrow role for summary judgment and citing to the academic criticisms); *Lyons v. Bilco Co.*, No. 3:01CV1106(RNC), 2003 WL 22682333, *1 n. 1 (D. Conn. 2003) ("Judicial discretion to deny summary judgment in favor of a full trial has been approved by most courts of appeals" and citing academic criticisms); *Anderson v. Potter*, 723 F.Supp.2d 368, 372 n.4 (D. Mass. 2010) (noting the existence of the academic criticisms and their validity). Even this Court has recently denied summary judgment in an excessive force case, stating "'Because 'the reasonableness of the use of force is the linchpin of the case' and 'the legal question of qualified immunity turns upon which version of the fact one accepts, the jury, not the judge, must determine liability.'" *Zar v. Payne*, 2011 WL 93857 *11 (S.D. Ohio 2011, Marbley,

J.) citing *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 903 (6th Cir. 1998). Thus this Court should be similarly vigilant in its use of summary judgment, as the main issues *sub judice* are traditionally constitutionally reserved for the jury.

B. Contested Material Facts Preclude Summary Judgment for Defendant Steven Koebel

The Fourth Amendment to the United States Constitution prohibits the government from committing “unreasonable searches and seizures.” A seizure that is effected through the use of excessive force is necessarily “unreasonable.” *Graham v. Connor*, 490 U.S. 386, 388, 109 S.Ct. 1865 (1989). In that case the Supreme Court identified several factors to assist the trier of fact in determining whether the force used was reasonable:

“the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting or attempting to evade arrest by flight.”

Graham, 490 U.S. at 396. The Court noted that the “totality of the circumstances” should be reviewed “to ascertain whether police used excessive force.” See *Zar v. Payne*, 2011 WL 93857 *11 (S.D. Ohio 2011). See also, *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694 (1985). The Supreme Court has now further clarified, however, that the core inquiry is whether the force used was “objectively reasonable.” *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 1776 (2007). In that case the Supreme Court explained that individual and government interests must be balanced to determine if a seizure is reasonable:

In determining the reasonableness of the manner in which a seizure is effected, “[w]e must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.” [citations omitted]

Scott v. Harris, 127 S.Ct. 1769, 1778 (2007). The Court warned that there is no “magical on/off switch” for discovering when an officer’s conduct is excessive. *Id.* at 1777. The Sixth Circuit

has added that when determining reasonableness, “judges are to look to the ‘factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’” *Davenport v. Causey*, 521 F.3d 544, 552 (6th Cir. 2008) (citing *Maryland v. Pringle*, 540 U.S. 366, 370, 124 S.Ct. 795 (2003)).

The Sixth Circuit has applied these principles in one especially informative decision for the purposes of the present case – *Bing v. City of Whitehall*, 456 F.3d 555 (6th Cir. 2006). In *Bing*, the police were called to Bing’s home in a populated residential area after there were reports that he fired shots in the presence of his neighbors. After arriving on the scene, the police learned that Bing was intoxicated and that they had been called out before to Bing’s residence for reports of shots fired, so they knew he had weapons in his house. These facts then led the officers on scene to wait for backup before attempting to apprehend Bing. While the exact facts that led to Bing’s death were disputed, he was ultimately shot and fatally wounded by the police in his home after a SWAT team arrived to backup the first officers on scene. Even though the officers were dealing with an individual that had ready access to a firearm, had already fired shots before their arrival, was intoxicated, and was in a well-populated area, Sixth Circuit upheld the denial of summary judgment to defendant officers where the material facts in the light most favorable to Plaintiffs showed that: “(1) when the officers entered the house, Bing did not fire a gun at them; (2) Bing posed no safety threat to anyone at that point; and (3) the officers shot Bing in the back without provocation.” *Id.* at 571. The court stressed that given those assumptions, “the officers had no legitimate interest in using deadly force that could counterbalance Bing's fundamental interest in his life.” *Id.* at 572.

Applying these principles to the present case and comparing it to the facts presented in *Bing*, it is clear that the shooting was unreasonable.⁵² The crime at issue was driving under the influence at excessive speed. That crime had concluded when Gray crashed into the fence. At the time of the shooting there was no flight underway. Koebel agrees that Gray had stopped trying to scale the fence.⁵³ Thus the key in this case is the threat assessment by Defendant Koebel. Did Mr. Gray pose an immediate threat to the safety of the officer or others? A jury could reasonably find that Mr. Gray posed no threat at that point.

Mr. Gray was unarmed when Defendant Koebel met him on the hill and he was still unarmed after the crash, which is a stark contrast to the decedent in *Bing* where the police knew the man was armed right before they arrived and the facts suggested he still had access to firearms at the time of the shooting. Defendant Koebel initially gave a clear direction to Mr. Gray – stop climbing the fence. Mr. Gray complied. Then Koebel gave three directions at once – raise hands, turn around, get on knees – and Mr. Gray again complied. That is, Mr. Gray started to turn around. Rather than recognize the turn as compliance with one of his commands, Defendant Koebel shot him. That was not objectively reasonable. That is particularly true in this case where the two were isolated and no members of the public were at risk, unlike the situation in *Bing* that unfolded in a well-populated residential neighborhood. Moreover, in this

⁵² Defendant Koebel incorrectly suggests that plaintiff is suing under the due process clause and that the shooting is justified if there is probable cause to believe that Mr. Gray posed a threat. The Fourteenth Amendment is only mentioned in the complaint as it is the vehicle to incorporate the Fourth Amendment and apply it to the fifty states. This is a fourth amendment case and the shooting must be addressed under the principles set out in this memo.

⁵³ Koebel Dep. p. 91:3-7.

case Defendant Koebel knew that back up was readily available.⁵⁴ Even Koebel's supervisor, Ben Davidson, stated that, "I probably would have waited."⁵⁵

The government interest in shooting Mr. Gray was not strong. With the lighting low, the sirens, radio and horn blaring, and the oscillating lights flashing the scene must have seemed surreal to the drunk and traumatized Gray who was still reeling from the impact of the crash and air bag deployment.⁵⁶ Koebel claims he reasonably feared for his life but, as quoted above, he also tried to change his testimony when it looked like Gray's turn complied with his instruction. In short, Koebel's recitation of what happened between the two of them is not consistent and the issue must be decided by the trier of fact⁵⁷.

Defendants rely on Police Practices Expert Jack Ryan. His report states that "Officer Koebel reported that he gave several verbal commands that included a command to Gray to stop, put up his hands and get down on his knees."⁵⁸ Mr. Ryan fails to note, as detailed in the DVD and the facts above, that Defendant Koebel excluded the command to turn around from his report, then included it in his BCI interview and then denied it at deposition and then finally agreed at deposition that indeed he did tell Mr. Gray to turn around shortly before he shot Gray. Thus the very conduct that Defendant Koebel and expert Ryan cite as threatening – Mr. Gray's turn toward Koebel – reflects compliance with an order by defendant Koebel. A jury could easily find that it was unreasonable to shoot Mr Gray under those circumstances.

⁵⁴ Ben Davidson explained that back-up is available for any call within 2 – 3 minutes. Davidson Dep. p. 48:24.

⁵⁵ Davidson Dep. p. 68:15.

⁵⁶ Gray Dep. p. 37:3-13; Koebel Dep. p. 84:11-24; Photo of car (Bates 000355).

⁵⁷ Defendant Koebel states that there is no issue of fact since Gray's recollection of the shooting is not clear. Koebel motion for summary judgment (Doc. 39, p. 10). But as set out above the contested facts are amply provided by Koebel himself.

⁵⁸ Ryan Expert Report, p.11 (Doc. 39-1).

Police Practices expert Michael Lyman, Phd, carefully reviewed all of the evidence in this case and correctly concluded, “...that the use of deadly force by Middleport Police Officer Steve Koebel against James Gray, IV, was excessive, unnecessary and served no objectively reasonable purpose. Koebel’s actions in this matter were inconsistent with nationally recognized standards of care and served no legitimate law enforcement purpose.” (emphasis in original.) A reasonable jury could easily agree.

Mr. Koebel shot because he “assumed” Mr. Gray had a gun.⁵⁹ But an officer cannot shoot at what he *thinks* he sees. A reasonable officer must have an objectively reasonable basis for determining that he or a member of the public is at risk. See, e.g., *Chappell v. City of Cleveland*, 585 F.3d 901, 915 (6th Cir. 2009), “[the officers] were entitled to defend themselves unless their perception is shown by some evidence not to have been reasonable.”(officers had qualified immunity when they shot suspect approaching them with knife who was 5 – 7 feet away). As shown above, the facts in this case clearly show substantial evidence demonstrating that the risk allegedly perceived by Koebel was simply not present. This should be a jury question.

Reviewing the decision to shoot as an issue of qualified immunity provides no more protection for Defendant Koebel. Officers are entitled to assert the defense of qualified immunity if the right they have violated was not clearly established and not something a reasonable officer would have known at the time of the violation. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). There is generally a two-step analysis to determine if the defendant is entitled to the defense. See *Saucier v. Katz*, 533 U.S. 194, 200-201 (2001), *overruled in part by Pearson v. Callahan*, 129 S.Ct. 808 (2009). The first question to ask is, “[t]aken in the light

⁵⁹ Koebel Dep. Ex. 19, Koebel Statement (Doc. 29-2).

most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* at 201. Then once it is established that the officer's conduct violated some federally protected right, a court should proceed to ask "whether the right was clearly established." *Id.* Although this sequential analysis is not mandatory in all cases, it remains beneficial because "it often may be difficult to decide whether a right is clearly established without deciding precisely what the constitutional right happens to be." *Pearson*, 129 S.Ct. at 818, *citing Lyons v. Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring).

The law was clearly established in April 2009 that threat assessments that an officer is at risk must be objectively reasonable. See *Green v. Taylor*, 239 Fed. Appx. 952 (6th Cir. 2007)(No qualified immunity where question of fact exists regarding compliance with officer command to raise hands and whether car moved toward officer); *Floyd v. City of Detroit*, 518 F.3d 398 (6th Cir. 2008)(No qualified immunity to two officers who fired on plaintiff but unreasonably and inaccurately perceived plaintiff as having a gun); *Carpenter v. City of Cincinnati*, 2003 WL 23415143 (S.D. Ohio 2003)(No qualified immunity to two officers where questions of fact present regarding whether car moved and where one officer unreasonably perceived shots by brother officer as shots from the suspect). Even Defense expert Ryan has conceded this point in his publications. For example, in "Deadly Force Based on Perceived Threat," Mr. Ryan reviewed the case of *Sample v. Bailey*, 337 F.Supp.2d 1012 (N.D. Ohio 2004) where the officer shot a suspect claiming that the suspect refused to show his hands and made a threatening gesture as he hid in a closet. Mr. Ryan correctly observed that the court denied summary judgment and denied qualified immunity because there was a question of fact as to whether the suspect was actually complying with the officer's command.

www.patc.com/articles/detail.php?id=LL63. The same result should apply here where there is an issue of fact as to whether the suspect (Mr. Gray) was complying with Defendant Koebel's commands.

Finally, summary judgment should also be denied because Defendant Koebel's credibility regarding his commands are directly put at issue on this record. *Bing*, 456 F.3d 555 (Officers' claim that decedent fired on them contradicted by other evidence and trier of fact would determine officer credibility); *Jefferson v. City of Flint*, 2008 WL 3200655 (E.D. Mich. 2008)(officer claim that plaintiff's arm was outstretched and she was holding shiny object contradicted by plaintiff requiring trial to jury); *Leisure v. City of Cincinnati*, 267 F. Supp. 2d 848 (S.D. Ohio 2003)(No summary judgment where officer has two explanations on how shooting occurred). Finally, this Court recently held that summary judgment is inappropriate on grounds of qualified immunity where there are "contentious factual disputes over the reasonableness of the use of force." *Zar v. Payne*, --- F.Supp.2d ----, 2011 WL 93857, *10 (S.D. Ohio 2011). This point is of particular importance in this case since, as noted above, Koebel was forced to resign shortly after this incident because he used excessive force on another suspect and lied about it in his report.

C. Contested Material Facts Preclude Summary Judgment for Defendant Village of Middleport

The Village of Middleport first states that it cannot be liable if Koebel is not liable. While plaintiff states that this is an overstatement of the law it is nonetheless clear on this record that a reasonable jury could find Defendant Koebel liable and therefore a separate analysis is required for the Village. The Village of Middleport was deliberately indifferent to the safety of its citizens by failing to train Koebel and its other officers in use of force and threat assessment.

The Village also failed to supervise Koebel and ratified his excessive force in this case. The Village can be liable under 42 U.S.C. § 1983 based on one of three theories: (1) the action violating the constitution was taken pursuant to a formal policy; (2) the action was taken pursuant to a longstanding practice or custom; and (3) the action was taken by a person serving as a “final policymaker.” *Monell v. Dept. of Soc. Serv. of the City of New York*, 436 U.S. 658 (1978). In this case Plaintiff has presented facts to support a Village custom or practice of failing to train and supervise Defendant Koebel and the other officers. This custom was a moving force behind the excessive force. Providing a weapon to a police officer and then failing to train and supervise the officer in its use was the very example cited by the Supreme Court when it developed this theory of liability in *City of Canton v. Harris*, 489 U.S. 378, 390 n. 10 (“The city has armed its officers ...[the] failure to [train]...could properly be characterized as ‘deliberate indifference’ to constitutional rights.”)

The Sixth Circuit described this theory in [*Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1247-48 \(6th Cir. 1989\)](#). In that case a county was held liable for failure to provide adequate medical care to disabled inmates in a jail. The court stated that,

Under the principles articulated in *Monell*, Leach must demonstrate that his maltreatment was the result of a policy or custom of the governmental entity. The policy involved here is one of deliberate indifference to the medical needs of paraplegic and physically incapacitated prisoners in the Shelby County Jail. The manifestation of this policy here has two aspects: first, *the Sheriff failed to supervise his employees adequately when he knew or should have known of the danger that inmates such as Leach were likely to receive inadequate care* and second, the Sheriff failed to investigate this incident and punish those responsible, in effect ratifying their actions.

Id. (emphasis added). See also *Abdi v. Karnes*, 556 F.Supp. 2d 804 (S.D. Ohio 2008)(Fact issue on adequacy of training for arrests of mentally ill citizens supported denial of summary judgment for County).

The difference between a straight policy or custom argument and one based on a failure to supervise is the need to prove “deliberate indifference.” *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). That is, in order for a failure to supervise to amount to a policy or custom that serves as the moving force of a constitutional violation, that failure to supervise must be so bad that it reflects deliberate indifference to the rights of persons who interact with the employees. See also [*DiSorbo v. Hoy*, 343 F.3d 172, 176-79 \(2d Cir. 2003\)](#) (describing facts that led to jury verdict, affirmed by appeals court, that city was liable for police misconduct due to its deliberate indifference to need to supervise officers); [*Frey v. Hicks*, 992 F.2d 1450, 1455-58 \(6th Cir. 1993\)](#) (affirming jury verdict finding defendant liable for failure to supervise); [*McKenna v. City of Memphis*, 785 F.2d 560 \(6th Cir. 1986\)](#) (recognizing theory of municipal liability based on failure to supervise and discipline officers); [*Bordanaro v. McLeod*, 871 F.2d 1151, 1157-59 \(1st Cir. 1989\)](#) (same).

Note that the term “deliberate indifference” in cases involving failure to train or supervise is based upon an interpretation of § 1983 and the notion that a “policy” is a course of action chosen among various alternatives. The policy of failing to train or supervise must be a “deliberate” or “conscious” choice by the municipality. See *City of Canton*, 489 U.S. at 389. Deliberate indifference here is an objective, not subjective, standard. This use of the term is not based upon its application in the Eighth Amendment context which involves a subjective standard. *Farmer v. Brennan*, 511 U.S. 825 (1994). In *Farmer*, the Court explained: “It would be hard to describe the *Canton* understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective.” *Id.* at 841. In this case the Village ratified the conduct of Koebel and found no error in his shooting. Ratification can be evidence of deliberate indifference and municipal liability. *Kohler v. City of Wapakoneta*,

381 F.Supp.2d 692 (N.D. Ohio 2005), citing *Leach v. Shelby Co Sheriff*, 891 F. 1241, 1247 (6th Cir. 1989) ; *Marchese v. Lucas*, 758 F.2d 181, 182 (6th Cir. 1985); *Otero v. Wood*, 2004 WL 1009788 at p. 13 (S.D. Ohio 2004)(when a city ratifies the unlawful conduct of it its employees, the city subjects itself to § 1983 liability by failing to meaningfully investigate those acts); *Wright v. City of Canton*, 138 F. Supp.2d 955, 966 (N.D. Ohio 2001)(municipal liability can be established when a final policymaker approved an inadequate investigation into police use of excessive force).

Defendant Koebel was the target of complaints by citizen Tammy Thomas in February, 2009. She complained to both the Chief of Police and to the Middleport Mayor that Koebel had used excessive force on her.⁶⁰ The Village failed to properly investigate her claims. Then when Mr. Koebel shot Mr. Gray, the Village also failed to determine if Defendant Koebel actually followed the Village use of force policy. For example, Lt. Davidson was Koebel's supervisor the night of the shooting.⁶¹ He was so close to the scene that he actually saw Koebel's cruiser lights as the shots were fired.⁶² He was never asked for his opinion on the propriety of the shooting.⁶³ Indeed, it was only when Koebel used excessive force against Dwayne Qualls in June 2009 and that force was caught on videotape that the Village acted and finally forced his resignation later that month.⁶⁴ Chief Swift stated that he did not know that Koebel suffered from and was taking medication for anxiety when he was hired.⁶⁵ He agrees now that he should have known these

⁶⁰ Swift Dep. pp. 32:17-25, 33:1-6 (Doc.47); James M. Gerlach Dep. pp. 29-30 (Doc.27).

⁶¹ Davidson Dep. p. 29:6-8 (Doc.45).

⁶² Davidson Dep. pp. 47:24- 48:4.

⁶³ Davidson Dep. p. 47:19-23.

⁶⁴ Swift Dep. pp. 56:2-7, 59:1-11.

⁶⁵ Swift Dep. pp. 14:2- 14; 17:4- 13.

facts.⁶⁶ Moreover, a psychologist rated Defendant Koebel's fitness for police work as "maybe" noting that "he tends to be pretty uptight in stress situations generally."⁶⁷ Chief Swift claimed that he did not know of this evaluation.⁶⁸ If in fact important medical information impacting supervision did not reach Chief because of the way he organized the flow of information at the Village, he has created a practice that further makes the supervision and training deliberately indifferent. Thus there were indicators when Defendant Koebel was first hired that he was in need of careful supervision but nothing was done to provide that.

Finally, as set out above, the Village never shared its use of force or other policies with Koebel before the shooting and conducted no "shoot –don't-shoot" training with him during his time on the force. In this case, defense expert Ryan suggests that it is acceptable for nine years to elapse with no such training or other scenario training to help an officer stay clear on threat assessment and when to shoot. In another case, however, expert Ryan testified that it was "inconsistent with generally accepted practices on law enforcement training" to require no post academy "shoot-don't shoot" for an officer as part of his in service. See *Hickey v. The City of New York*, 2004 WL2724079, *20 (S.D.N.Y. 2004). Thus contested facts exist that support the claim of failure to train and supervise against the Village.

D. Defendant Koebel is not Entitled to Summary Judgment on State Law Claims

Plaintiff agrees that the Village of Middleport is not liable on the state law claims due to governmental immunity under O.R.C. §2744.

⁶⁶ Swift Dep. pp. 14:12- 14. The Chief stated that all of the medical evaluations went to the Clerk and he had never had a discussion about what medical conditions, such as anxiety, that she should report to him in order to help him supervise his officers. *Id* at 17:17-24.

⁶⁷ Koebel Dep. Ex.3, Evaluation (Doc. 28-3).

⁶⁸ Swift Dep. pp. 19-21.

The same contested issues of fact reviewed above, however, prevent a ruling in favor of Defendant Koebel on the state law claims. A municipal employee is generally immune from liability unless one of the three categories of exceptions applies:

- (a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;
- (b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;
- (c) Civil liability is expressly imposed upon the employee by a section of the Revised Code.

Id. at § 2744.03(A)(6) . Plaintiffs claim that Koebel acted “in a wanton or reckless manner.” Recklessness under O.R.C. § 2744.03(A)(6)(b) “refers to an act done with knowledge or reason to know of facts that would lead a reasonable person to believe that the conduct creates an unnecessary risk of physical harm and that this risk is greater than that necessary to make the conduct negligent.” *E.g., Thompson v. Bagley*, 2005 Ohio 1921, *P49 (Ohio Ct. App. Apr. 25, 2005). Ordering a suspect to turn around and then shooting him when he does certainly could be classified as reckless. Whether a defendant’s actions were reckless is typically a question for the trier of fact. *E.g., Carpenter v. City of Cincinnati*, 2003 U.S. Dist. LEXIS 7105, *39 (S.D. Ohio Apr. 17, 2003); *Fabrey v. McDonald Village Police Dep’t*, 639 N.E.2d 31, 35 (Ohio 1994). If the trier of fact concludes that Mr. Gray was complying with Defendant Koebel’s commands, a jury could reasonably conclude that Defendant Koebel was reckless in shooting Mr. Gray. *Baker v. City of Hamilton*, 471 F.3d, 601 609 (6th Cir. 2006)(reversing district court’s summary judgment order on state assault and battery claims because evidence was sufficient to establish a genuine issue of material fact as to whether officer acted maliciously or in bad faith in striking and arresting plaintiffs).

The Sixth Circuit applied O.R.C. §2744.03(A)(6)(b) to affirm the denial of summary judgment to employees in the Hamilton County Morgue. *Chesher v. Neyer*, 477 F.3d 784 (6th Cir. 2007). In that case the county coroner permitted Thomas Condon, a commercial photographer, to have access to deceased persons in the morgue. Condon proceeded to access, manipulate, photograph and view these persons without the consent of the families. The coroner and his employees claimed immunity. The district court rejected the claim and the Sixth Circuit agreed. First the court defined reckless conduct:

Most relevant for the purposes of this appeal is the exception for acts or omissions that were committed “in a wanton or reckless manner.” Ohio Rev.Code Ann. § 2744.03(A)(6)(b) . Under Ohio law, wanton and reckless conduct is defined as perversely disregarding a known risk, or acting or intentionally failing to act in contravention of a duty, knowing or having reason to know of facts which would lead a reasonable person to realize such conduct creates an unreasonable risk of harm substantially greater than the risk necessary to make the conduct negligent.

Id. at 797, citing *Webb v. Edwards*, 165 Ohio App.3d 158, 845 N.E.2d 530, 536 (2005). The Court stated that the issue of recklessness is normally a question of fact to be determined by the jury:

“[w]hether such actions rises [sic] to the level of recklessness is normally a question to be determined by the trier of fact.” [citing *Thompson v. Bagley*, WL 940872 (Ohio Ct. App. Apr. 25, 2005, 11] see also *Fabrey*, 639 N.E.2d at 35 (noting that “the issue of wanton misconduct is normally a jury question”).

Id. at 800. Thus in this case it is similarly appropriate to submit the question of Koebel’s recklessness to a jury.

Note also that Ohio state courts often conclude that it is improper to grant 2744 immunity at the summary judgment stage when there are questions of material fact surrounding whether or not law enforcement conduct is reckless. *Alley v. Bettencourt*, 134 Ohio App. 3d 303, 315 (Ohio App. 4 Dist. 1999)(no 2744 immunity when questions regarding excessive force exist as to officer conduct at arrest and when plaintiff was taken to hospital); see also *Ruth v. Jennings*, 136

Ohio App.3d 370, 376, 736 N.E.2d 917 (Ohio App. 12 Dist. 1999)(police officers not entitled to Chapter 2744 immunity because substantial questions are present regarding the reasonableness of the officers actions when the plaintiff was arrested and when the plaintiff was taken to jail, and these questions must be considered by a jury); *Estate of Graves v. Circleville*, 2008 WL 4958368 (Ohio App. 4 Dist. 2008)(officers who permitted auto to be returned to the drunk driver who then drove drunk and killed a woman not entitled to 2744 immunity.) Defendant Koebel is not entitled to summary judgment on 2744 immunity.

E. Defendant Koebel is not Entitled to Summary judgment on the Issue of Punitive Damages

Finally, Defendant Koebel seeks summary judgment on the punitive damage claim. These damages are available under both the federal and state law claims. *Smith v. Wade*, 461 U.S. 30, 56 (1983)(holding that punitive damages are available in §1983 suits against an official in his personal capacity); O.R.C. § 2315.21(C) (setting out the availability of punitive damages in state tort actions). The federal claim has no heightened burden of proof. *Smith v. Oakland*, 538 F.Supp.2d 1217, 1246 (N.D. Cal. 2008)(“ Plaintiffs did not have to prove by clear and convincing evidence [. . .] that they were entitled to punitive damages for the federal [§ 1983] claims. All they needed to show under federal law was a preponderance of the evidence.”). The Ohio claims for punitive damages, on the other hand, are subject to the clear and convincing evidentiary standard pursuant to statute. O.R.C. § 2315.21(D)(4). The request should be denied since there is evidence that Koebel covered up his confusing instructions and misled investigators. His conduct supports submission of punitive damages to the jury.

IV. CONCLUSION

The motions for summary judgment by Defendant Koebel and the Village should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2011 a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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