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**United States Court of Appeals
For the Eighth Circuit**

No. 16-4141

John Morrison Raines, III, as Guardian of the
Estate of John Morrison Raines IV

Plaintiff-Appellee

v.

Counseling Associates, Inc.; Janet Stannard, MD;
Lauren Gates, MGR; Richard Moore, EdD;
Lou Strain, LPE; Mental Health Risk Retention
Group, Inc; Conway Regional Medical System, Inc.;
Continental Casualty Company;
Rodger D. Langster, MD

Defendants

Andrew Burningham, Conway Police Officer;
James Burroughs, Conway Police Officer;
Steven Culliford, Conway Police Officer

Defendants-Appellants

John & Jane Does, I-X; City of Conway, Arkansas;
Scottsdale Insurance Company

Defendants

Appeal from United States District Court
for the Eastern District of Arkansas – Little Rock

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Submitted: December 14, 2017
Filed: March 5, 2018 (Corrected March 6, 2018)

Before SMITH, Chief Judge, KELLY and ERICKSON,
Circuit Judges.

ERICKSON, Circuit Judge.

In response to an emergency call from a male reporting he had been stabbed inside his apartment and was hiding in the closet, police officers located John Raines IV (“Raines”) standing outside on the sidewalk of the apartment building holding a knife. During the encounter with Raines, which lasted less than two minutes, the officers shot at Raines twenty-one times. Raines is paralyzed from the waist down as a result of the encounter.

John “Jack” Morrison Raines III brought this action in his capacity as guardian of Raines’s estate. The claims are against three police officers claiming unreasonable seizure and against the City of Conway, Arkansas, under 28 U.S.C. § 1983 for failure to train the officers on how to interact with a mentally ill person; for negligence, gross negligence, and willful and wanton conduct; and for violations of due process and the right to be free from cruel and unusual punishment under the Arkansas Civil Rights Act. The defendants moved for summary judgment. The district court¹

¹ The Honorable James M. Moody, Jr., United States District Judge for the Eastern District of Arkansas.

denied the motion on all claims except for the negligence and cruel and unusual punishment claims. The officers appeal the denial of summary judgment based on qualified immunity. We dismiss the appeal for lack of jurisdiction.

I. BACKGROUND

On March 10, 2013, police responded to an apartment complex in Conway, Arkansas following a report of a stabbing victim hiding inside a closet and a robbery in progress inside the apartment. Officer Andrew Burningham was first to arrive on scene. He approached Raines, who was standing outside on the sidewalk by the apartment building with a knife in his hand. Officer Burningham ordered Raines to drop the knife and then he drew his handgun. Raines began saying “fine, fine, fine” and raised the knife to just above his shoulder level, waving it back and forth. Approximately 20 seconds later, Officers Steven Culliford and James Burroughs arrived at the scene. They drew their handguns and repeatedly directed Raines to “Drop the knife!” Additional officers arrived on scene and formed a semi-circle around Raines with their guns drawn. Raines continued waving the knife and shifting his weight from foot to foot on the sidewalk. Officers Culliford and Burroughs told Raines that he would be shot if he came towards them.

When Officer Rachel Hanson arrived on the scene, she pointed her handgun at Raines and instructed him to “Drop the knife!” She then re-holstered her weapon,

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drew her taser, and moved towards Raines. Detective Jason Cameron, with his gun drawn, positioned himself directly behind Officer Hanson in order to provide protection and “cover” to Officer Hanson. The taser video camera confirmed that at some point during Officer Hanson’s approach towards Raines, Officers Burningham, Culliford, and Burroughs began firing their weapons at Raines. Detective Cameron did not fire his weapon. In total, officers fired twenty-one shots. Raines was struck four times – in the left arm, left face, left chest, and mid-back. As a result of the encounter, Raines is paralyzed from the waist down.

Officers Burningham, Burroughs, and Culliford moved for summary judgment on the Fourth Amendment unreasonable seizure claim, arguing that their use of deadly force against Raines was legally justified. In support of their argument that Raines made an aggressive movement towards Officer Hanson while holding the knife, the officers relied on deposition testimony from those at the scene as well as two videos, one taken from a police vehicle dashboard camera and one taken from the taser video camera. Raines contended that the videos contradict the officers’ version of events and that there remained a question as to whether Raines posed a threat when he was shot by the officers.

After studying the videos and considering the other evidence presented by the parties, the district court held that Raines raised a genuine dispute as to whether the officers had probable cause to suspect that Raines posed a significant threat of death or serious

physical injury to others. Accordingly, the district court denied summary judgment on the issue of qualified immunity. This interlocutory appeal followed.

II. DISCUSSION

This Court reviews *de novo* the denial of qualified immunity. *Rush v. Perryman*, 579 F.3d 908, 912 (8th Cir. 2009) (citing *Duckworth v. St. Louis Metro. Police Dep't*, 491 F.3d 401, 405 (8th Cir. 2007)). “[W]e will affirm if ‘there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” *Estate of Morgan v. Cook*, 686 F.3d 494, 496 (8th Cir. 2012) (quoting Fed. R. Civ. P. 56(a)). “In determining whether an officer is entitled to qualified immunity, we ask (1) ‘whether, taking the facts in the light most favorable to the injured party, the alleged facts demonstrate that the official’s conduct violated a constitutional right’; and (2) whether the asserted constitutional right is clearly established.” *Lee v. Driscoll*, 871 F.3d 581, 584 (8th Cir. 2017) (quoting *Wallingford v. Olson*, 592 F.3d 888, 892 (8th Cir. 2010)).

Although an order denying qualified immunity is immediately appealable, “our interlocutory jurisdiction is limited.” *Mallak v. City of Baxter*, 823 F.3d 441, 445-46 (8th Cir. 2016) (citing *Cooper v. Martin*, 634 F.3d 477, 479-80 (8th Cir. 2011) and *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995)). “[W]e have authority to decide the purely legal issue of whether the facts alleged by the plaintiff are a violation of clearly established law.” *Franklin ex rel. Franklin v. Peterson*, 878 F.3d 631, 635

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(8th Cir. 2017) (citations omitted). We do not have jurisdiction over an interlocutory appeal from a district court's denial of summary judgment based on qualified immunity when the denial is premised on a determination that "the pretrial record sets forth a 'genuine' issue of fact for trial." *Mallak*, 823 F.3d at 446 (quoting *Johnson*, 515 U.S. at 319-20). An exception lies "where the record plainly forecloses the district court's finding of a material factual dispute." *Mallak*, 823 F.3d at 446.

The initial inquiry is whether the officers' shooting of Raines amounted to a Fourth Amendment violation. *Estate of Morgan*, 686 F.3d at 496. In making this determination, we have said:

The reasonableness of an officer's use of force is evaluated by looking at 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 officers or others, and whether he is actively resisting arrest or attempting to evade by flight. The use of deadly force is not constitutionally unreasonable if an officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others.

Id. (quotations and citations omitted). "But where a person 'poses no immediate threat to the officer and no threat to others,' deadly force is not justified." *Ellison v. Leshner*, 796 F.3d 910, 916 (8th Cir. 2015) (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)).

The officers testified that they all believed Raines aggressively advanced on Officer Hanson just prior to the shots being fired. The defendants contend that their testimony is supported by the taser video when played in slow motion. Raines counters that the video evidence demonstrates that he was continuing to exhibit the same movements as he had done during the minute before he was shot. Unlike in *Scott v. Harris*, 550 U.S. 372, 379-80 (2007), where irrefutable video evidence resolved any factual disputes regarding the parties' conduct, the video evidence in this case is inconclusive as to whether or not Raines advanced on the officers in a manner that posed a threat of serious physical harm to an officer.

Whether the officers reasonably believed Raines posed a sufficient threat depends on what occurred. The district court was unable to make this determination based on the evidence presented. Having reviewed the evidence in the record, we conclude that there is a key factual question in this case about whether Raines advanced on Officer Hanson just before being shot, which is both material and disputed, that precludes us from resolving the legal issue of whether the officers' conduct constitutes a violation of clearly established law.

While we have jurisdiction to determine whether conduct constitutes a violation of clearly established law, "we lack jurisdiction to determine whether the evidence could support a finding that particular conduct occurred at all." *Franklin*, 878 F.3d at 638 (citing *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) and *Johnson*,

515 U.S. at 313-18). Accordingly, the court's determination on the issue of qualified immunity was not a final decision. *Franklin*, 878 F.3d at 638 (citing *Johnson*, 515 U.S. at 313).

III. CONCLUSION

The appeal is dismissed for lack of jurisdiction.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

**JOHN “JACK” MORRISON RAINES
III as Guardian of the Estate of
John Morrison Raines IV PLAINTIFF**

v. CASE NO. 4:15cv102-JM

**SCOTTSDALE INSURANCE
COMPANY; MENTAL HEALTH
RISK RETENTION GROUP, INC.;
ANDREW BURNINGHAM, CONWAY
POLICE OFFICER; JAMES
BURROUGHS, CONWAY POLICE
OFFICER; STEVEN CULLIFORD,
CONWAY POLICE OFFICER;
CITY OF CONWAY, ARKANSAS; DEFENDANT
and JOHN & JANE DOES I-X [sic]**

ORDER

(Filed Oct. 7, 2016)

Pending is the motion for summary judgment filed by Officer Andrew Burningham, Officer James Burroughs, Officer Steven Culliford, and the City of Conway (the “City Defendants”). Plaintiff has filed a response, and the City Defendants have filed a reply. For the reasons stated below, the motion (Docket No. 77) is granted in part and denied in part.

Background Facts

Plaintiff is the guardian of the estate of his adult son, John Raines IV (Raines), who has been diagnosed with schizophrenia. The lawsuit against the City Defendants arises out of events that occurred on March 3, 2013.¹ While the specific details are hotly disputed, the following facts are not. On March 1, 2013, Raines was riding to his job at Subway with his roommate, Nathan Dodson, when Raines began suffering seizure-like symptoms and became combative. Dodson called 911, and Officer Culliford was one of the officers who responded. Dodson informed Officer Culliford that Raines had recently been taken off of his schizophrenia medicine, Clozaril and Abilify, and was having mental health issues. Officer Culliford followed the ambulance that took Raines to Conway Regional Hospital.

Two days later, on the night of March 3, 2013, the police were called to an apartment complex in Conway and told that a robbery had just occurred and that a male subject was stabbed. Officer Burningham was the first to arrive on the scene. He approached Raines, who was standing outside on the sidewalk around the apartment building, and said “What’s going on?” Raines did not respond. Officer Burningham then noticed blood on Raines’ left wrist and arm, assumed he was bleeding and assumed that Raines was the stabbing victim. Next Officer Burningham noticed the

¹ Plaintiff has also sued Scottsdale Insurance Company and Mental Health Risk Retention Group, Inc. for medical negligence in the treatment of his son’s mental illness prior to the March 3rd incident; those defendants are not part of this motion.

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knife in Raines' hand, which was down by his side; he ordered Raines to drop the knife and drew his gun. Raines began saying "fine, fine, fine" and raised the knife to just above shoulder level and started waving it back and forth. Within 20 seconds after Officer Burningham arrived at the scene, Officers Culliford and then Officer Burroughs arrived. The three officers were arrayed around Raines, weapons drawn, and all yelling "Drop the knife!" repeatedly at Raines. Raines did not drop the knife but continued to wave it and repeat "fine, fine, fine." Raines was shifting his weight from foot to foot, generally staying in place on the sidewalk outside of the building. Officers Culliford and Raines [sic] told Raines that they would shoot if he advanced towards them.

Officer Hanson was the next to arrive on the scene and approach Raines. She was also yelling at Raines to "Drop the knife!" Within a minute of arriving on the scene, she re-holstered her pistol, drew her taser, and advanced towards Raines. Detective Cameron was directly behind Officer Hanson with his gun trained on Raines to provide protective cover to Officer Hanson. At some point during her approach towards Raines with her taser, Officers Burningham, Culliford, and Burroughs began firing at Raines. Although Officer Hanson had approached within optimum target distance for the taser, she did not discharge it at Raines until after shots were fired. The parties dispute whether Raines made any steps towards Officer Hanson before he was shot. Defendants rely on testimony to the effect that Raines was aggressively advancing on Officer

Hanson. Plaintiff relies on video from Officer Hanson's taser camera which he says shows that Raines did not make any advance towards Officer Hanson until after he was shot and tased, the force of which caused Raines' movement in Officer Hanson's direction.

There were twenty-one shots fired, some of them after Raines was on the ground. Raines was struck four times, in the left arm, left face, left chest, and mid-back. Detective Cameron, who was positioned directly behind Officer Hanson with his weapon out to provide cover for her, did not fire his weapon. The shooting occurred less than a minute after the first officer arrived on the scene. Raines was twenty-one years old at the time of the shooting and was having mental health issues as a result of being taken off his schizophrenia medication a short time before the shooting.² He survived the incident but is paralyzed from the waist down.

Plaintiff sued Officers Burningham, Burroughs, and Culliford for unreasonable seizure in violation of the Fourth and Fourteenth Amendments. He also sued the City under § 1983 for failure to instruct, supervise, control and discipline and for state law claims for negligence and for violations of the Arkansas Civil Rights Act. These defendants have moved for summary judgment on all claims against them.

² The Court assumes this last fact for the purpose of this motion only. It is not disputed by the City Defendants but may well be disputed by the medical defendants.

Summary Judgment Standard

The Eighth Circuit Court of Appeals has cautioned that summary judgment should be invoked carefully so that no person will be improperly deprived of a trial of disputed factual issues. *Inland Oil & Transport Co. v. United States*, 600 F.2d 725 (8th Cir. 1979), *cert. denied*, 444 U.S. 991 (1979). The Eighth Circuit set out the burden of the parties in connection with a summary judgment motion in *Counts v. M.K. Ferguson Co.*, 862 F.2d 1338 (8th Cir. 1988):

[T]he burden on the moving party for summary judgment is only to demonstrate, *i.e.*, [to] point out to the District Court,' that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and, if the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted.

Id. at 1339 (quoting *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273-274 (8th Cir. 1988)) (citations omitted). Only disputes over facts that may affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Unreasonable Seizure

“The intrusiveness of a seizure by means of deadly force is unmatched.” *Tennessee v. Garner*, 471 U.S. 1, 9 (1985). The Fourth Amendment is intended, in part, to protect against “physically abusive government conduct.” *Gardner v. Buerger*, 82 F.3d 248, 251 (8th Cir. 1996) (quoting *Graham v. Connor*, 490 U.S. 386, 394 (1989)).

Officers Burningham, Burroughs, and Culliford seek summary judgment on the Fourth Amendment unreasonable seizure claim against them on the basis that their use of deadly force against Raines was legally justified. Defendants rely on *Gardner*, which held that “[a] seizure-by-shooting is objectively reasonable when “the officer [using the force] has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.” *Id.* at 252 (quoting *Tennessee v. Garner*, 471 U.S. 1, 9 (1985)). However, like the Court in *Gardner*, the Court finds that this is a question for the jury on the facts of this case.

Defendants assert as fact that Raines made an aggressive advance towards Officer Hanson while holding a knife, putting her in danger of being killed or seriously harmed. However, after studying the videos from the police cruiser dashboard video camera and the taser video camera as well as the other evidence presented by the parties, the Court finds that there is a genuine issue of material fact as to whether the officers had probable cause to suspect that Raines posed

a significant threat of death or serious physical injury to others. There is also evidence that Officer Culliford knew or should have known that Raines was having mental health issues after his interaction with him two days before the shooting incident which resulted in Officer Culliford following the ambulance that took Raines to the hospital.

Finally, while the Court agrees with Defendants that the focus of the inquiry into whether the seizure was unreasonable is the actual time of the shooting and not the events that happened before the shots were fired, “this does not mean we should refuse to let juries draw reasonable inferences from evidence about events surrounding and leading up to the seizure.” *Gardner* at 253. Viewing the evidence most favorably to Plaintiff, the Court finds that there is sufficient evidence to permit a reasonable jury to conclude that the officer’s use of deadly force was not objectively reasonable. The officers’ motion for summary judgment is denied.

Qualified Immunity

The Court must answer the following questions to determine whether Officers Burningham, Culliford, and Burroughs are entitled to qualified immunity: (1) whether the facts alleged or shown, construed in the light most favorable to Plaintiff, establish a violation of a constitutional or statutory right, and (2) whether that constitutional right was clearly established as of March 3, 2013 such that a reasonable official [sic]

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would have known that his actions were unlawful. *See Pearson v. Callahan*, 555 U.S. 223. “Unless the answer to both of these questions is yes, the defendants are entitled to qualified immunity.” *Krout v. Goemmer*, 583 F.3d 557, 564 (8th Cir. 2009).

Assuming the facts listed in the background section to be true, there is sufficient evidence in the record to establish Plaintiff’s claim of a constitutional violation in the seizure of Raines through the use of deadly force. The constitutional right to be free from the use of deadly force during a seizure by police was a clearly established right under the Fourth Amendment’s prohibition against unreasonable seizures at the time of the shooting. *Ngo v. Storlie*, 495 F. 3d 597 (8th Cir. 2007). The officer’s [sic] motion for summary judgment on the issue of qualified immunity is denied.

Failure to Train

Under certain limited circumstances, a municipality may be liable under § 1983 for constitutional violations that result from its failure to train its employees. *Connick v. Thompson*, 563 U.S. 51, 61 (2011). This failure to train must rise to the stringent standard of “deliberate indifference” to the rights of a citizen’s [sic] with whom the municipal employees came into contact. *Id.* While a pattern of similar constitutional violations by untrained employees is ordinarily required to prove deliberation [sic] indifference, in narrow range of some circumstances, the Supreme Court has left open the possibility that “the unconstitutional

consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a preexisting pattern of violations. *Id.* at 64 (discussing the Court’s decision in *City of Canton, Ohio v. Harris*, 489 U.S. 378, at 390 and n.10 (1989)). The Eighth Circuit has also recognized the possibility that “evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability.” *Folkerts v. City of Waverly, Iowa*, 707 F.3d 975, 982 (8th Cir. 2013) (quoting *Bd. of Cnty. Comm’rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 409 (1997)). *See also Abney v. City of St. Charles, Mo.*, No. 414CV01330AGF, 2015 WL 164040, at *5-6 (E.D. Mo. Jan. 13, 2015) (“The unconstitutional consequences of failing to train subordinate law enforcement officers to properly interact with suspects with disabilities, and to refrain from excessive force, may well be patently obvious.”); *Sampson v. Schenck*, 973 F. Supp. 2d 1058, 1066 (D. Neb. 2013) (“A need to train subordinate law enforcement officers to properly conduct interrogations and to properly interact with cognitively disabled or mentally ill suspects may well be patently obvious and the failure to train these skills can be causally linked to the violation of Livers’s rights.”)

In controverting the City Defendant’s statement of facts, Plaintiff submitted the following deposition evidence in support of their argument that the defendant officers had little or no training in dealing with a person who has mental health issues: Officer Hanson may

have had an hour or two at the police academy or the police department. Her training did not aid her understanding that Raines was experiencing a mental health crisis. Officer Burningham had been through some mental health training when the department periodically reviews policy. He doesn't recall with what frequency it is done, whether it is every two to three years. Officer Burroughs does not recall getting any training on dealing with someone who is mentally unhealthy. Officer Culliford stated that an incident such as this was not used in any training scenario, and that it was his understanding that persons having a mental health crisis should be approached the same as anyone else. Finally, Plaintiff offers the testimony of the City Defendants' witness Thomas Martin, a teacher for a company called Public Agency Training Council, that it would be objectively unreasonable for a police chief not to train his officers on how to interact with mentally ill persons. The City did not reply to Plaintiff's argument regarding the lack of training offered to the officers on dealing with mental health individuals. In light of the deposition evidence submitted by Plaintiff combined with the evidence of Raines's odd movements and the police officer's actions in the video from the taser camera, the Court finds that the City has not established the absence of a genuine issue of material fact as to the adequacy of the City's training. As the Sixth Circuit held in *Russo v. City of Cincinnati*, 953 F.2d 1036, 1047 (6th Cir. 1992), "we hold that plaintiffs have offered sufficient evidence to suggest that the training program for police officers offered by the City with respect to the use of force on mentally disturbed

persons is constitutionally inadequate, that this inadequacy results from the City's deliberate indifference to the rights of such persons, and that this inadequacy may have directly resulted in [Raines' injuries].”

State Law Claims against the City

In addition to the federal claims, Plaintiff has made state law claims against the City for (1) negligence, gross negligence, and willful and wanton conduct as well as (2) violations of due process and the right to be free from cruel and unusual punishment pursuant to Article 2, Sections 7 and 8 of the Arkansas Constitution. The City moves for summary judgment on each of these state law claims.

The City first raises the defense of sovereign immunity pursuant to Ark. Code Ann. §21-9-301 for any claim of negligence. Plaintiff's [sic] does not dispute that the City is entitled to sovereign immunity for the claim of negligence, and the City's motion for summary judgment is granted on the negligence claim. However, the sovereign immunity statute does not shield the City from actions constituting gross negligence or willful conduct, the City's motion for summary judgment on these claims is denied.

Regarding the claims under the Arkansas Constitution, the ACRA enables persons to seek relief for “the deprivation of any rights, privileges, or immunities secured by the Arkansas Constitution.” Ark. Code Ann. § 16-123-105(a). ACRA claims are resolved in accordance with state and federal decisions [sic] authorities

that apply to § 1983 claims. *See* Ark. Code Ann. § 16-123-105(c). Consequently, to the extent that the allegations underpinning Plaintiff's state constitutional claims are the same as those giving rise to her § 1983 claims, the Court denies the City's motion for summary judgment on the Plaintiff's state constitutional claims. However, the City is granted summary judgment on the Plaintiff's claim for cruel and unusual punishment which, as the City points out (and Plaintiff does not contradict), does not apply to Raines as he was not a prisoner.

CONCLUSION

The City Defendants' [sic] for summary judgment (Document No. 77) is GRANTED on the state law claims of negligence and cruel and unusual punishment and is otherwise DENIED.

IT IS SO ORDERED this 7th day of October, 2016.

/s/ James M. Moody, Jr.
James M. Mood Jr.
United States District Judge

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**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 16-4141

John Morrison Raines, III, as Guardian of
the Estate of John Morrison Raines IV

Appellee

v.

Counseling Associates, Inc., et al.

Andrew Burningham, Conway Police Officer, et al.

Appellants

John & Jane Does, I-X, et al.

Appeal from U.S. District Court for the
Eastern District of Arkansas – Little Rock
(4:15-cv-00102-JM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Shepherd did not participate in the consideration or decision of this matter.

April 12, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans
