No. 18-

IN THE

# Supreme Court of the United States

PHIL PLUMMER, MONTGOMERY COUNTY SHERIFF, TED JACKSON, SERGEANT, BRIAN LEWIS, SERGEANT, DUSTIN JOHNSON, CORRECTIONS OFFICER, MATHEW HENNING, CORRECTIONS OFFICER, MICHAEL BEACH, CORRECTIONS OFFICER, KEITH MAYES, CORRECTIONS OFFICER, BRADLEY MARSHALL, CORRECTIONS OFFICER, MICHAEL STUMPFF, CORRECTIONS OFFICER, ANDREW WITTMAN, CORRECTIONS OFFICER,

*Petitioners,*

*v.*

DAVID M. HOPPER, SPECIAL ADMINISTRATOR OF THE ESTATE OF ROBERT ANDREW RICHARDSON, SR.,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Sixth Circuit upheld the denial of qualified immunity to a Montgomery County sheriff and jail officers on a claim that their restraint of a detainee who appeared to be having a seizure violated the constitutional rights of the detainee who died even though medical staff was present at the scene for the entirety of the twenty-two minute event monitoring and attempting to treat the detainee. In determining that the rights to be free from excessive force and deliberate indifference under the Fourteenth Amendment were "clearly established," the court of appeals cited no existing precedent that would have placed petitioners on clear and unambiguous notice that their actions violated a clearly established right: This case presents the following question:

1. Whether the Sixth Circuit defined the constitutional rights in question at too high a level of generality contrary to this Court's teachings on qualified immunity?

## PARTIES TO THE PROCEEDING BELOW

The petitioners, all of whom were defendants-appellants below, are:

1. Phil Plummer, Montgomery County Sheriff
2. Ted Jackson, Sergeant
3. Brian Lewis, Sergeant
4. Dustin Johnson, Corrections Officer
5. Mathew Henning, Corrections Officer
6. Michael Beach, Corrections Officer
7. Keith Mayes, Corrections Officer
8. Bradley Marshall, Corrections Officer
9. Michael Stumpff, Corrections Officer
10. Andrew Whitman, Corrections Officer

The respondent, plaintiff-appellee below, is:

1. David Hopper, Special Administrator of the Estate of Robert Andrew Richardson, Sr.

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Petitioners Phil Plummer, Ted Jackson, Brian Lewis, Dustin Johnson, Mathew Henning, Michael Beach, Keith Mayes, Bradley Marshall, Michael Stumpff and Andrew Whitman respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (App. A at 1a), is reported at 887 F.3d 744 (6th Cir. 2017). The opinion of the district court (App. C at 24a), is unpublished but available at 2017 U.S. Dist. LEXIS 163343 (S.D. Ohio Feb. 6, 2017) and 2017 WL 495511 (S.D. Ohio Feb. 6, 2017).

## JURISDICTION

The Sixth Circuit entered judgment on April 12, 2018. App. B at 32a. That court had jurisdiction under 28 U.S.C. § 1291. The petition for rehearing was denied by the court on May 1, 2018. App. D at 74a. This Court has jurisdiction pursuant to 18 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

The statutory provision involved is 42 U.S.C. § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

## STATEMENT OF THE CASE

The case arises out of the death of Robert Richardson ("Richardson") that occurred at the Montgomery County Jail on May 19, 2012. On May 19, 2014, Richardson's estate brought suit under 42 U.S.C. § 1983 against petitioners, all employees of the Montgomery County Sheriff's Office (collectively "county defendants" or "petitioners"), for alleged excessive force and deliberate indifference to serious medical needs. The estate also brought claims pursuant to *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978), against Sheriff Plummer, and state law claims of wrongful death against the individual petitioner. In addition to petitioners, the county defendants below, the estate also brought claims against the medical staff on scene, and their employer, NaphCare.

The parties consented to proceed under Magistrate Judge Newman. The county defendants and medical staff defendants both moved for summary judgment. The

medical staff defendants subsequently settled their claims with the estate, and their motion was denied as moot.

Magistrate Newman granted summary judgment to Sheriff Plummer on the state law claim, finding him immune under Chapter 2744 of the Ohio Revised Code. App. C at 71a. Magistrate Newman denied summary judgment on qualified and statutory immunity grounds. App. C at 52a-66a.

The county defendants appealed to the Sixth Circuit, which affirmed the district court's denial of qualified immunity. With respect to the excessive force claim, the court of appeals held that "'the prohibition against placing weight on [Richardson's] body after he was handcuffed was clearly established in the Sixth Circuit as of' May 2012," in light of the court's past decisions in *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893 (6th Cir. 2004) and *Lanman v. Hinson*, 529 F.3d 673 (6th Cir. 2008). App. A at 16a. More specifically, the Sixth Circuit concluded: "[W]e affirm the district court's conclusion that it '[w]as unconstitutional' on May 19, 2012, to create asphyxiating conditions by 'forcibly restraining an individual in a prone position for a prolonged period of time' when that individual posed no material threat." *Id.* at 19a.

Regarding the deliberate indifference claim, the Sixth Circuit largely ignored petitioners' argument on appeal that the right at issue was not clearly established under *Lanman*, *supra*, as set forth in the district court's opinion. It did so by concluding that petitioners' argument "merely" constituted "a repackaging [of] their argument that the presence and activities of medical personnel absolves them of liability. . . ." *Id.* at 17. The Sixth Circuit

went on to conclude: "We fail to see how, considering our precedent, a detainee like Richardson could have had no clearly established right to adequate medical care under circumstances even defendants admit indicated a need for medical attention." *Id.* at 27a.

### 1. Richardson's Jail Sentence

Richardson was arrested on May 17, 2012 on a capias issued by the Montgomery County Juvenile Court for failing to appear for child support enforcement proceedings. App. C. at 39a. Judge Capizzi of the Juvenile Court entered an order imposing on Richardson a thirty day jail sentence, from which Richardson could be released upon the payment of $2500 to Montgomery County Child Support Enforcement Agency.[1] *Id.* Magistrate Newman concluded that Judge Capizzi issued this sanction upon finding Richardson to be in contempt for failing to appear and/or failing to pay child support obligations. *Id.*

1. The Sixth Circuit affirmed the district court's conclusion that Richardson's excessive force claim and deliberate indifference claim arose under the Fourteenth Amendment on the basis that Richardson was a "classic civil contemptor detainee in that he 'carrie[d] the keys of his prison in his own pocket' and could 'end the sentence and discharge himself at any moment by doing what he had previously refused to do. . . .'" App. A at 13a. Petitioners challenged the applicability of this constitutional amendment in the courts below, but for purposes of this petition they center their argument on the issue of whether the Sixth Circuit erred in concluding that the rights at issue were clearly established under the Fourteenth Amendment for purposes of qualified immunity.

**2. Richardson's Medical Event Begins**

Richardson began suffering from an apparent medical issue on May 19, 2012, which was initially reported by Richardson's cellmate. R.95, Casto Depo, PAGEID#1882.[2] Richardson collapsed in his cell. *Id.*

Magistrate Newman found that it was undisputed that Richardson appeared to be having a seizure and was making seizure-type movements, including thrashing his body around. App. C at 40a. Dr. Leff, one of the estate's medical experts, opined that Richardson had a toxic level of THC in his system at the time of the incident, and this was causing him to have a toxic reaction to cannabis likely ingested by Richardson. R.102, Leff Depo, PAGEID#2527-2532. There is no other medical evidence in the record to explain what triggered Richardson's medical event. The county defendants' medical experts agreed that Richardson used marijuana within hours of his death. R.102, Leff Depo, PAGEID#2527, 2533; R.99, Spitz Depo, PAGEID#2408-2409. While Magistrate Newman found the cause of death to be in dispute, App. C at 40a, the coroner's report did list acute marijuana intoxication as a contributing factor to Richardson's death, and that fact is not disputed. R.94, Casto Depo, PAGEID#1734-1741.

Corrections officers and medical personnel responded to Richardson, and an overhead video camera captured

2. In addition to citing to the attached appendix ("App."), this petition refers to the record ("R.") in the district court, by specifying the docket number of the document cited and corresponding page identification number.

the event once the cell door was opened. The video was recorded at four frames per second, rather than the thirty frames per second needed for the human eye to see the events in fluid motion, which makes the video appear choppy, and essentially as a series of still frames when viewed. R.96, Faulkner Depo, PAGEID#1971. The video is part of the record below.

The incident occurred right around the shift change for the county defendants. R.84, Johnson Depo, PAGEID#1156. As such, some of the county defendants were present at the start of this incident, and others arrived later. Magistrate Newman recognized this in his decision, and there is no dispute with respect to who was on the scene, and when they were on the scene. App. C at 42a-43a.

**3. Initial Response by the County Defendants**

Sgt. Jackson was first on the scene after the cell door was opened, and he found Richardson's cellmate holding Richardson on the ground. R.83, Jackson Depo, PAGEID#1109. Because Richardson appeared unbalanced and uncoordinated, Jackson did not want him standing and decided to remove him from the cell where there were sharp metal objects -- such as the bed, toilet, and a bench -- in a very confined space. *Id.* at PAGEID#1118. Richardson was not responsive to commands, so Jackson and Corrections Officer Johnson pulled Richardson out of the second floor cell onto the walkway in front of the cells. *Id.* at PAGEID#1113.

Once removed from the cell, Richardson kept trying to stand up. *Id.* at PAGEID#1114. Magistrate

Newman recognized that because a "disoriented Richardson. . . posed a risk to his own safety—as well as the safety of others on the second floor walkway—Jackson made the decision to handcuff Richardson in an effort 'to gain more control over him.'" App. C at 41a. Due to Richardson thrashing around, Sgt. Lewis, and Corrections Officers Stumpff and Henning assisted in handcuffing Richardson. *Id.* Richardson was a large man, at six feet tall and weighing 280 pounds. *Id.* at 39a. Richardson was handcuffed in a face-down position. R.83, Jackson Depo, PAGEID#1113.

Due to Richardson's size, a second set of handcuffs was used (described as "handcuffing the handcuff"). R.84, Johnson Depo, PAGEID#1163. The double handcuffs were later replaced with leg shackles. R.85, Lewis Depo, PAGEID#1233. Once Richardson was handcuffed, he was rolled onto his side. *Id.* at PAGEID#1236.

**4. Medical Personnel Immediately Arrived On Scene**

There is no dispute that the medical personnel were on scene almost immediately. Magistrate Newman recounted the medical personnel's assessment and treatment of Richardson in his decision, which included attempting to apply oxygen to Richardson, wiping his face, talking to Richardson and trying to assess him, and trying to keep Richardson from hitting his head on the concrete. App. C at 43-44a. Richardson tried to bite Stockhauser as Stockhauser attended to him. R.108, Stockhauser Depo, at PAGEID#3281. Medic Stockhauser was on scene almost immediately, and Nurse Miles, Nurse Kruse, and Nurse Foster were on the scene at various times as well. *Id.* at PAGEID#4075-4076. The medical treatment was being

supervised by Dr. Ellis, who was in the jail but not on scene during the incident. R.106, Ellis Depo, PAGEID#3048, 3058.

**5. Officers Hold Richardson for Ativan Shot**

Dr. Ellis ordered that Richardson be given a shot of Ativan to calm him down. *Id.* at PAGEID#3048, 3058. The nurse's first attempt to administer the Ativan failed, as the medication to be injected spilled onto the floor. App. C at 44a. A second dose of Ativan was then ordered by Dr. Ellis, and Nurse Foster delivered it to the scene and administered it herself. R.107, Foster Depo, PAGEID#3165-3166. The county defendants on scene continued to hold Richardson while the medical personnel were attending to him, which was extended due to the failed initial Ativan injection.

Medical staff then wanted Richardson brought down to medical, R.106, Ellis Depo, PAGEID#3051, which was on the first floor, so Jackson called for the restraint chair to assist in transporting Richardson from the second floor to the first floor. R.83, Jackson Depo, PAGEID#1121. The restraint chair was brought to the pod, but Corrections Officer Limmer had only carried it halfway up the stairs to the second floor walkway before Richardson had stopped breathing, and Limmer then had to clear the stairs for the paramedics. R.86, Limmer Depo, PAGEID#1282.

The duration of this incident, as established from the video evidence in the record below, was twenty-two minutes, but Richardson was not held in a prone position for the entire twenty-two minutes. Magistrate Newman recognized this, and characterized Richardson as being

"in-and-out of a prone position over a twenty-two minute period." App. C at 56a. The estate's medical expert, Dr. Spitz, believed that Richardson was in a prone position from about the fifteen minute mark of the video through the twenty-one minute mark of the video, which is a six minute window. R.99, Spitz Depo, PAGEID#2411-2412.

The only factual dispute Magistrate Newman found with respect to the interaction between the county defendants and medical personnel was with Medic Stockhauser, who testified that he asked Sgt. Lewis to handcuff Richardson in the front while Richardson was in the process of being handcuffed, and all of the county defendants on scene testified they did not hear Medic Stockhauser make such a request. App. C at 41a. But Medic Stockhauser further testified that he requested that Richardson be handcuffed in front to better assess him for treatment, not to prevent asphyxia, and that the sergeant on scene addressed the concern and told him that inmates must be cuffed in the back. R. 108 Stockhauser Depo at PageID# 3267-68.

No other medical personnel on scene—including three nurses—made a request regarding the handcuffing and Medic Stockhauser did not renew his request at any point in time after Richardson had been initially handcuffed. The estate presented expert testimony that Medic Stockhauser should have done more than initially request that Richardson be repositioned, if Medic Stockhauser believed repositioning was necessary to assess and treat Richardson. R.103, Roscoe Depo, PAGEID#2767-2768.

**6. The Roles of the Individual County Defendants**

• Sgt. Jackson: As described above, he was the initial supervisor on scene, and his involvement in the incident is described above, which included making the decisions to remove Richardson from the cell, to handcuff him, and to call for the restraint chair to transport Richardson down the stairs to medical.

• CO Johnson: As described above, Johnson was an initial responder, along with Sgt. Jackson. After Richardson was handcuffed, Johnson straddled Richardson's legs. R.84, Johnson Depo, PAGEID#1163-1164. Johnson's shift was over, and he was relieved by CO Beach, and left the scene after approximately seven minutes. *Id.* at PAGEID#1169.

• CO Henning: Henning was a trainee at the time of this incident, and in fact, this was his first day on the job. R.82, Henning Depo PAGEID#1081. Henning was shadowing his field training officer, Johnson, at the time of the incident. *Id.* Henning arrived with Johnson, and after Richardson had been handcuffed, Henning held his knee over Richardson's legs to prevent Richardson from kicking the steel door frame or wall. *Id.* at PAGEID#1085. Henning's shift ended along with his field training officer, and Henning was only on the scene for approximately nine minutes. *Id.* at PAGEID#1087.

• CO Beach: Beach's shift started after the incident was already underway, and Beach replaced Johnson after Beach arrived on the scene. R.77, Beach Depo, PAGEID#816. Beach straddled Richardson's legs in the same manner Johnson had done—he did not sit on

Richardson's legs, but hovered over them, and Richardson still was able to move his legs. *Id.* at PAGEID#817.

• Sgt. Lewis: Sgt. Lewis arrived on scene after Sgt. Jackson, Johnson, and Henning had arrived and responded. R.85, Lewis Depo, PAGEID#1230-1231. Sgt. Lewis held Richardson's arms so Sgt. Jackson and Johnson could get Richardson handcuffed. *Id.* at PAGEID#1231. After this initial involvement, Sgt. Lewis did not have his hands on Richardson, and can be seen standing and walking around the area on the video. *Id.* at PAGEID#1244.

• CO Marshall: Marshall arrived on scene after Richardson had already been handcuffed. R.87, Marshall Depo, PAGEID#1308-1309. Richardson had already been rolled onto his side, and Marshall knelt down next to Richardson and tried to keep him from moving forward. *Id.* at PAGEID#1309. At times, Marshall squatted next to Richardson, and positioned his knee in front of Richardson's right shoulder to keep Richardson from moving forward. *Id.* at PAGEID#1309.

• CO Mayes: Mayes arrived on the scene approximately eleven minutes after the incident began. R.88, Mayes Depo, PAGEID#1350. At approximately fifteen minutes after the incident began, Mayes relieved Stockhauser, who was at Richardson's head. *Id.* at PAGEID#1351.

• CO Stumpff: Stumpff arrived on the scene just as Richardson was being handcuffed. R.89, Stumpff Depo, PAGEID#1381. Stumpff assisted Sgt. Jackson and Johnson moving Richardson from the cell to the walkway. *Id.* Stumpff assisted in switching from one pair of handcuffs to the double handcuffing technique.

*Id.* at PAGEID#1383. Stumpff was then positioned near Richardson's head and left shoulder. *Id.* at PAGEID#1385. When Richardson was on his side, Richardson's chest was facing Stumpff. *Id.*

• Deputy Wittman: Wittman arrived in the pod after Richardson had already been handcuffed. R.90, Wittman Depo, PAGEID#1413. Wittman was stationed at the control station on the first floor of the pod. *Id.* at PAGEID#1414. Wittman did go up to the second floor to see if the officers needed any help. *Id.* Wittman relieved Stumpff, and held Richardson's left arm. *Id.* at PAGEID#1417. Wittman relieved Stumpff nearly eighteen minutes after sheriff's office personnel had first responded. *Id.* at PAGEID#1426.

## REASONS FOR GRANTING THE PETITION

### I. This Court Has Repeatedly Stressed That Courts Considering Qualified Immunity Must Consider Whether A Reasonable Official Would have Known That His Conduct Violated The Law In Light Of The Particular Conduct At Issue And That A Right Is Clearly Established Only When Precedent Places The Constitutional Question Beyond Debate

"Public officials are immune from suit under 42 U.S.C. § 1983 unless they have 'violated a statutory or constitutional right that was *clearly established* at the time of the challenged conduct.'" *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (emphasis added, quoting *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014)). Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who

knowingly violate the law." *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (per curiam) (internal quotation marks omitted). "[The] 'clearly established' standard protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by ensuring that officials can 'reasonably . . . anticipate when their conduct may give rise to liability for damages.'" *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)) (internal quotation marks omitted).

"To be clearly established, a right must be sufficiently clear that *every* reasonable official would have understood that *what he is doing* violates that right." *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (emphasis added) (quoting *Reichle*, 132 S. Ct. at 2093). As this Court has repeatedly stressed, "[t]he dispositive question is 'whether the violative nature of [the defendants'] *particular* conduct is clearly established.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011)). "This inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Id.* (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)).

Although "this Court's caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *White* v. *Pauly*, 137 S. Ct. 548, 551 (2017) (*per curiam*)); *see also al-Kidd*, 131 S. Ct. at 2083. "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law

at the time of the conduct." *Id.* (quoting *Brosseau*, 543 U. S. at 198).

According to the this Court's reasoning in *Mullenix*, if the legal question at issue "is one in which the result depends very much on the facts of each case," then a public official is entitled to immunity if "[n]one of [the applicable case law] squarely governs the case." *Mullenix*, 136 S. Ct. at 309 (quoting *Brosseau*, 543 U.S. at 199). When circumstances "fall somewhere between . . . two sets of cases," qualified immunity applies, as the doctrine "protects actions at the 'hazy border between [impermissible and permissible conduct].'" *Id.* at 312 (quoting *Brosseau*, 543 U.S. at 201).

The reasoning set forth in *Mullenix i*s supported by a number of other decisions of this Court which have strongly indicated that where there is not an otherwise robust body of case law governing the matter, only one of its own opinions can clearly establish a right, such that the question is put "beyond debate" for purposes of a qualified immunity analysis. *See, e.g.*, *District of Columbia v. Wesby*, 138 S. Ct. 577, 591 n.8 (2018) ("We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity."); *Taylor*, 135 S. Ct. at 2044 ("No decision of this Court establishes a right to the proper implementation of adequate suicide prevention protocols. No decision of this Court even discusses suicide screening or prevention protocols."); *Sheehan*, 135 S. Ct. at 1775 ("To begin, nothing in our cases suggests the constitutional rule applied by the Ninth Circuit."); *Reichle*, 566 U.S. at 664–65 (reserving the question of whether court of appeals decisions can be "a dispositive source of clearly established law" and holding

that "[t]he 'clearly established' standard is not satisfied here" since "[t]his Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause. . . ."). Where the Court looks to the jurisprudence of the courts of appeals for whether a right is clearly established, its opinions hedge. *Kisela*, 138 S. Ct. at 1153 ("The Court of Appeals made additional errors in concluding that its own precedent clearly established that Kisela used excessive force. To begin with, 'even if a controlling circuit precedent could constitute clearly established law in these circumstances, it does not do so here.'") (citation omitted); *Sheehan*, 135 S. Ct. at 1778 ("Finally, to the extent that a 'robust consensus of cases of persuasive authority' could itself clearly establish the federal right respondent alleges, no such consensus exists here.") (citation omitted) (emphasis added); *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (per curiam) ("Assuming for the sake of argument that a controlling circuit precedent could constitute clearly established federal law in these circumstances, [a prior Third Circuit case] does not clearly establish that Carroll violated the Carmans' Fourth Amendment rights.") (emphasis added).

## II. The Sixth Circuit Ignored This Court's Teachings By Defining the Right to Be Free From Excessive Force At Too High A Level of Generality Rather Than Based On The Particular Circumstances Confronting Petitioners

Against the above backdrop, the Sixth Circuit erred in applying the clearly-established-law component of the qualified immunity doctrine at too high a level of generality. Preliminarily, the Sixth Circuit did not cite

any precedent of this Court which held that officers acting under the same or similar circumstances used excessive force. Nor did it cite a robust body of case law that governed the matter. Instead, it concluded that its own precedent, namely, *Champion* and *Lanman*, *supra*, clearly established that petitioners used excessive force. Even if the Sixth Circuit's own precedent could constitute clearly established law, *Champion* and *Lanman* are factually distinguishable and thus could not have provided "fair notice" to petitioners that their actions constituted objectively unreasonable force. *Kisela*, 138 S. Ct. at 1152. Specifically, neither case involved officers restraining an individual for purposes of medical treatment while medical personnel were on the scene monitoring the events and treating the individual, and where on-the-scene medical personnel did not intervene during the twenty-two minute period at issue to stop the officers from restraining the individual in the manner deemed to constitute objectively unreasonable excessive force.

In *Champion*, police responded to reports of a mentally disturbed man hitting and biting himself. Several officers pepper sprayed the man and took him to the ground, where he continued "to squirm and move around," and "kick[] violently." 380 F.3d at 897. Officers "put pressure on [the man's] back while he was prone on the ground" and handcuffed him immediately precipitating his death. *Id.* at 898. The Sixth Circuit held that "[c]reating asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect constitutes objectively unreasonable excessive force." *Id.* at 903. It reasoned that "[n]o reasonable officer would continue to put pressure on that arrestee's back after the arrestee was subdued by

handcuffs, an ankle restraint, and a police officer holding the arrestee's legs." *Id.* at 905.

In *Lanman*, the decedent was admitted to a psychiatric hospital after he was found wandering the countryside by the sheriff's department. 529 F.3d at 677. The next day, "while suffering psychiatric delusions, he attacked a staff member." *Id.* The decedent was "immediately restrained by staff and administered medication to calm him down." *Id.* During the attempt to restrain decedent, which included putting his face down on the floor and pressure placed on his back to hold him down, he stopped breathing, never regained consciousness and subsequently died. *Id.; see also id. at 678.* The Sixth Circuit held that the defendants use of "dangerous restraint techniques" posed a known "substantial risk of asphyxiation." *Id.* at 689. It stated specifically that the defendants actions were "objectively unreasonable *given the fact* that plaintiff's eyewitness testified that defendants continued to restrain [decedent] in this dangerous position five minutes after he wasn't resisting at all and looked like he was passed out." *Id.* (emphasis added). The court of appeals reasoned that "[i]t would have been clear to defendants that it was not necessary to *continue restraining a patient after he wasn't resisting at all and looked like he passed out*," and that a "reasonable official in defendants' positions would understand that his actions violated [decedent's] constitutional right to freedom from undue bodily restraint." *Id.* (emphasis added).

Neither *Champion* nor *Lanman* supports denying petitioners qualified immunity even though they both involved the use of a prone restraint. Turning first to *Champion*, the officers' conduct there was not monitored

by medical personnel throughout the entirety of an event that lasted twenty-two minutes and involved efforts by those on-the-scene medical personnel to provide medical treatment while the detainee was being restrained by officers. More specifically, medical personnel were not on the scene actively attempting to treat the decedent during the entire time that officers were engaged in restraining the decedent in *Champion*. *Champion* merely addressed the nature of the restraint at issue. It thus could not put petitioners on notice that using such a restraint is unlawful where medical personnel are present and never intervene to alter the officers' efforts to restrain the detainee for purposes of receiving medical treatment.[3]

While the Sixth Circuit noted in its opinion that several inmates stated that Richardson said he couldn't breathe in an apparent effort to show that petitioners acted unreasonably, App. A at 5a, if Richardson made such statements they would also have been heard by medical personnel. Yet, medical personnel on the scene

3. The Sixth Circuit noted in its opinion that one medic testified that he and "a nurse 'told corrections' at the outset to handcuff Richardson 'in the front' and to put him on his back so medical staff could 'better assess' him." App. A at 5a. This does not reflect medical personnel intervening to stop or change the petitioners' efforts to restrain Richardson. The Sixth Circuit ignored Medic Stockhauser's further testimony that he requested that Richardson be handcuffed in front to better assess him for treatment, *not to prevent asphyxia*, and that the sergeant on scene addressed the concern and told him that inmates must be cuffed in the back. R. 108 Stockhauser Depo at PageID# 3267-68. Neither Medic Stockhauser nor any other trained medical professional renewed this request at any point in time after Richardson had been initially handcuffed, and none intervened to change petitioners' course of conduct during the medical emergency.

did not intervene and change the officers course of restraining Richardson. Under these circumstances it was not objectively unreasonable for petitioners to use the restraint techniques they used so that medical personnel could administer treatment.

The Sixth Circuit failed to find that the presence of medical personal was significant for purposes of accessing the reasonableness of the petitioners' conduct. It stated that "neither the presence of a third party at the scene nor defendants' professed reason for using force would excuse defendants' use of an otherwise unreasonable amount of force or alter relevant, clearly established constitutional guarantees." App. A at 17a. But trained medical personnel are not just any "third party," and failing to acknowledge this underscores the Sixth Circuit's improper focus on just the restraint techniques that were used, versus the particular circumstances in which those techniques were used. This failing is especially significant in light of the testimony of Medic Stockhauser, which the Sixth Circuit ignored, that the medical staff on scene had the responsibility to make sure that Richardson was breathing and to advise if there was an improper use of restraints. R. 108, Stockhauser Depo at PageID #3279, #3312. By failing to give due consideration to the distinguishing presence of medical personnel in their reliance on *Champion*, the Sixth Circuit flouted this Court's precedent which holds that the question of whether the violative nature of petitioners' particular conduct was clearly established must be assessed "in light of the specific context of the case." *Mullenix*, 136 S. Ct. at 308.

*Lanman* likewise failed to give petitioners "fair notice" that their conduct was unlawful. *Kisela*, 138 S. Ct.

at 1152. It also involved a prone restraint, but there the Sixth Circuit concluded that the medical officials' conduct was unlawful because they "continue[d] restraining a patient after he wasn't resisting at all and looked like he was passed out." 529 F.3d at 689. Continuing restraint that went on for approximately five minutes after the patient passed out is the basis of the Sixth Circuit's holding in *Lanman* that the officials' conduct was objectively unreasonable. As the video evidence in this case shows, that it not what happened here. Richardson was "in-and-out of a prone position over a twenty-two minute period," and promptly received medical treatment when he stopped breathing. App. C at 56a.

The legal question here "is one in which the result depends very much on the facts of each case," and accordingly petitioners are entitled to immunity as "[n]one of [the applicable case law] squarely governs the case." *Mullenix*, 136 S. Ct. at 309 (quoting *Brosseau*, 543 U.S. at 199). At best, the circumstances here "fall somewhere between . . . two sets of cases," and qualified immunity still applies as the doctrine "protects actions at the 'hazy border between [impermissible and permissible conduct].'" *Id.* at 312 (quoting *Brosseau*, 543 U.S. at 201). This Sixth Circuit erred in defining the right at issue too broadly and considering it only in the context of the restraint technique used. In short, the Sixth Circuit misunderstood the "clearly established" analysis: It failed to identify a case where an officer acting under similar circumstances as petitioners was held to have violated a right to be free from excessive force under the Fourteenth Amendment.

## III. The Sixth Circuit Ignored This Court's Teachings By Likewise Defining The Right To Be Free From Deliberate Indifference At Too High A Level of Generality

As set forth above, the Sixth Circuit largely ignored petitioners' argument on appeal that the right to be free from deliberate indifference to serious medical needs was not clearly established under *Lanman*, *supra*. It did so by concluding that petitioners' argument "merely" constituted "a repackaging [of] their argument that the presence and activities of medical personnel absolves them of liability. . . ." App. A at 26a. The Sixth Circuit went on to conclude: "We fail to see how, considering our precedent, a detainee like Richardson could have had no clearly established right to adequate medical care under circumstances even defendants admit indicated a need for medical attention." *Id.* at 27a.

The Sixth Circuit, however, failed to engage in any meaningful analysis on the issue of whether past precedent put petitioners on notice that they were deliberately indifferent to Richardson's serious medical needs given that they were engaged in restraining him so that medical personnel on the scene could treat him for his seizure-like condition. Instead, it defined the right at issue broadly as the "right to adequate medical care." Not a single case was cited by the Sixth Circuit that put petitioners on notice that it was beyond debate that their actions *in this particular context* violated Richardson's clearly established right to be free from deliberate indifference to his serious medical needs. Instead, it appears that the Sixth Circuit once again relied on *Champion* and

*Lanman*, *supra*, which for the reasons set forth above, are factually distinguishable.[4]

The Sixth Circuit's erroneous reliance on the factually distinguishable cases of *Champion* and *Lanman* is laid bare in a later opinion issued by the court in the case of *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988 (6th Cir. 2017). There, the Sixth Circuit held that the deliberate indifference claim asserted against officers was not clearly established and reversed the district court's denial of summary judgment on qualified immunity grounds. *Id.* at 992-93. The decedent had been arrested for disturbing the peace at a Lowe's store. *Id.* at 990. He was "rambling" and "ranting" and was delivered to jail for processing and intake. *Id.* at 991. The erratic behavior continued after his intake at the jail and he attacked an officer. Police officers responded by jumping on his back, *id.* at 992, and pulling him into a restraint

4. The Sixth Circuit also pointed to the district court decision of *May v. Bloomfield*, No. 11-14453, 2013 WL 2319323 (E.D. Mich. May 28, 2013), for a discussion of the "longstanding precedent establishing that a detainee has a constitutional right to medical care when an officer becomes aware that the detainee needs medical attention." App. A at 26a. First, this case is cited for a right that is defined at too high a level of generality. Second, even assuming a district court's opinion could qualify as controlling authority for purposes of qualified immunity, the opinion was decided after the events at issue. It thus could not have given "fair notice" to petitioners "because a reasonable officer is not required to foresee judicial decisions that do not yet exist. . . ." *Kisela*, 138 S. Ct. at 1154. The case of *Fitzke v. Shappell*, 468 F.2d 1072, 1076 (6th Cir. 1972), is also cited for the general right to medical care. App. A at 26a. But again, this right is defined at too high a level of generality that is divorced from the unique circumstances of this case.

chair. *Id.* The officers then noticed that something was wrong, the emergency squad was called, and decedent was transported to the hospital where he was pronounced dead. *Id.*

The Sixth Circuit concluded that the officers were entitled to qualified immunity "[b]ecause no case clearly established the unlawfulness of the decisions made during [decedent's] arrest and detention." *Id.* In rendering this ruling, the court of appeals cited to this Court's ruling in *White* v. *Pauly*, *supra*, for the proposition that "a plaintiff must clearly identify a case *with a similar fact pattern* that would have given 'fair and clear warning to officers' about what the law requires." *Id.* at 993 (quoting *White v. Pauly*, 137 S. Ct. at 552) (emphasis added). The Sixth Circuit then went on to state: "Arrington-Bey has not pointed to, and we have not found, any case like this one—a case showing that the officers at the scene immediately needed to seek medical treatment or that the jailers had to do the same once he arrived at the prison." *Id.* at 993. The Sixth Circuit proceeded to assess the right at issue based on the unique facts of the case, and rejected the case citations submitted by decedent's estate on the basis that they were "at least one step removed from this fact pattern." *Id.*

The Sixth Circuit engaged in the appropriate analysis in *Arrington-Bey*. If it had done so here, it would have had to acknowledge that the cases of *Champion* and *Lanman* are also "at least one step removed" from this fact pattern. As such, neither put petitioners on notice that they were violating a clearly established right. They are simply too factually distinct to speak clearly to the specific circumstances here.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED APRIL 12, 2018**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-3175

DAVID M. HOPPER, SPECIAL ADMINISTRATOR OF THE ESTATE OF ROBERT ANDREW RICHARDSON, SR.,

*Plaintiff-Appellee,*

v.

PHIL PLUMMER, MONTGOMERY COUNTY SHERIFF; TED JACKSON, SERGEANT; BRIAN LEWIS, SERGEANT; DUSTIN JOHNSON, CORRECTIONS OFFICER; MATHEW HENNING, CORRECTIONS OFFICER; MICHAEL BEACH, CORRECTIONS OFFICER; KEITH MAYES, CORRECTIONS OFFICER; BRADLEY MARSHALL, CORRECTIONS OFFICER; MICHAEL STUMPFF, CORRECTIONS OFFICER; ANDREW WITTMAN, CORRECTIONS OFFICER,

*Defendants-Appellants.*

December 5, 2017, Argued
April 12, 2018, Decided
April 12, 2018, Filed

*Appendix A*

Before: BATCHELDER, GRIFFIN and WHITE, Circuit Judges

**OPINION**

GRIFFIN, Circuit Judge.

Robert Richardson suffered a seizure two days after he was booked into the Montgomery County Jail in Dayton, Ohio. Corrections officers and medical staff responded to the medical call. Despite both a jail policy that prohibited placing restrained inmates in a prone position and a medic's appeal to handcuff Richardson in front, the officers handcuffed him behind his back and restrained him face down on the floor outside his cell. Richardson died after a twenty-two minute struggle during which record testimony indicates he continually stated he could not breathe.

Plaintiff David Hopper, in his capacity as Special Administrator of Richardson's estate, brought this 42 U.S.C. § 1983 action against the corrections officers and Montgomery County Sheriff Phil Plummer.[1] The district court denied defendants' motion for summary judgment on qualified- and statutory-immunity grounds. They appeal that order, and raise the precedential issue of whether Richardson, a civil contemnor detainee, falls within the protections of the Eighth or the Fourteenth Amendment. Because Richardson was sanctioned outside the criminal

1. Plaintiff also sued certain medical staff, but those defendants settled with plaintiff and are not involved in this appeal.

context, we hold that the Fourteenth Amendment governs his § 1983 claims. The remaining issues either lack merit or fall outside the limited scope of our jurisdiction on interlocutory appeal. We therefore affirm in part and dismiss in part.

I.

A.

In 2009, then-Ohio Governor Ted Strickland issued Executive Order 2009-13S, which addressed the use of prone restraints "across all state systems" and acknowledged "that there is a risk of sudden death when restraining an individual in a prone position." The Ohio Department of Rehabilitation and Correction, among other state departments, was ordered to adopt a policy prohibiting the use of prone restraints, "defined as all items or measures used to limit or control the movement or normal functioning of any portion, or all, of an individual's body while the individual is in a face-down position for an extended period of time." The Montgomery County Jail adopted a use-of-restraints policy that prohibited "placing prisoners who are in restraints in prone or 'spread-eagle' positions."

B.

On May 17, 2012, Richardson was arrested on a capias warrant after failing to appear at a child-support enforcement hearing, and was booked into the Montgomery County jail. That same day, a Juvenile

Court judge imposed a sentence of up to thirty days on Richardson for civil contempt, but the contempt could be purged and Richardson released upon payment of $2,500 to the Montgomery County Child Support Enforcement Agency.

Two days later, Richardson collapsed in his cell and his cellmate called for medical help. An overhead video camera recorded the twenty-two-minute incident that followed.[2]

The first officer to respond described Richardson as suffering an apparent seizure. Defendants Sergeant Ted Jackson and Officer Justin Johnson arrived "[l]ess than a minute" later. Richardson seemed lethargic and unbalanced, with blood and saliva coming from his mouth. He was sitting against the wall of his cell, trying to stand up. The officers told Richardson, who was a large man, to "stay down" because they were afraid he would fall down inside his small cell and hurt himself. Jackson and Johnson then pulled Richardson from his cell and placed him face down on the floor a few feet away.

A disoriented Richardson continued trying to stand so Jackson decided "to get him cuffed." By this point, several other defendant officers had arrived, including Sergeant Brian Lewis, Officer Michael Stumpff, Officer Bradley

2. This video lacks sound and the image stutters because the camera recorded at a frame rate of only four frames per second. Accordingly, the following factual account is informed not only by the video, but also by other record evidence including deposition testimony.

Marshall, and Officer Mathew Henning. A medic and a nurse had arrived as well. Jackson and Johnson, assisted by Lewis, Stumpff, and Henning, cuffed Richardson's hands behind his back. No defendant testified to hearing any instruction to do otherwise.

But the medic testified that he and a nurse "told corrections" at the outset to handcuff Richardson "in the front" and to put him on his back so medical staff could "better assess" him. Sergeant Lewis, said the medic, "overrode" that instruction. According to the medic, it was "impossible to do a thorough exam" of Richardson because he was on his stomach. Once Richardson was handcuffed, the medic tried to administer oxygen. The nurse said she told the officers "that they need[ed] [to] make sure [Richardson] was on his side" to "keep that oxygen on him," and to "get him up and get him to medical." Although Jackson requested a restraint chair at some point during the incident, Richardson stopped breathing and died before defendants attempted to move him.

C.

The district court found that the defendant officers each participated in restraining Richardson during a struggle that waxed and waned in intensity. Sergeants Lewis and Jackson helped handcuff Richardson and supervised the other officers. Officer Johnson placed his knees on either side of Richardson's legs and straddled the "thigh area." Officer Henning was behind Johnson, and placed his left knee on Richardson's lower legs. Officer Stumpff positioned himself near Richardson's head, and

was "trying to hold onto [Richardson's left] shoulder[.]" Officer Marshall knelt down next to Richardson's head, placed his knee in front of his right shoulder "to stop him from moving forward," and kept at least one hand on Richardson's shoulders or upper back throughout the incident, applying pressure as needed to control Richardson's movements. The video appears to show Marshall placing his knee on Richardson's arm during the last few minutes of the incident.

Other defendants replaced several of these officers as the incident progressed. Officer Michael Beach replaced Officer Johnson about seven minutes into the incident. After fifteen minutes, Officer Keith Mayes relieved the medic positioned at Richardson's head, and used his hands to prevent Richardson from lifting his head up. Mayes also took control of Richardson's shoulders so he would not roll over. Officer Andrew Wittman arrived last, relieving Stumpff after about eighteen minutes, and held Richardson's left arm to the ground.

After twenty-two minutes, the officers realized Richardson was not breathing and began CPR. Officer Stumpff later acknowledged that Richardson "may have said" during the incident that he could not breathe. Officer Wittman agreed there was concern over Richardson's ability to breathe while restrained. Jason Haag, an inmate housed in the cell next to Richardson's, stated that Richardson "repeatedly . . . said he couldn't breathe," and tried "to get up to breathe," but "[defendants] kept pushing him back down until he stopped moving." Keith Wayne, another inmate, testified that he also heard Richardson say "I can't breathe[.]"

Defendants' efforts to revive Richardson were unsuccessful, and a doctor pronounced him dead less than an hour after the incident began. The deputy coroner concluded that Richardson's death was caused by "[c]ardiac arrhythmia." But one of plaintiff's medical experts determined that Richardson suffered a "fatal cardiac arrhythmia" only because the "manner of restraint impaired [his] ability to breath[e.]" Plaintiff's other medical expert agreed Richardson died from restraint asphyxiation. He elaborated that asphyxiation resulted from the "compression of Mr. Richardson's torso, including his upper back and neck[,] while he was subdued in a prone position with his hands cuffed behind his back." This expert explained that if an individual's arms and legs are restrained like Richardson's were, that individual cannot use them to alleviate the compressive pressure, will fatigue "[o]ver time," and his "[r]espiratory movements will ultimately stop."

D.

Plaintiff brought this § 1983 action against defendants. Relevant here, plaintiff alleged that the officers violated Richardson's rights under the Eighth or Fourteenth Amendment by using excessive force against him and by acting with deliberate indifference to his medical needs. Plaintiff further alleged that the officers violated Ohio state law by causing Richardson's wrongful death. Plaintiff also brought official-capacity claims against Sheriff Plummer alleging failure to train and supervise, and unconstitutional jail policy or custom.

The district court denied the officers summary judgment on qualified- and statutory-immunity grounds. Taking the evidence in the light most favorable to plaintiff, the district court determined that jurors "could reasonably conclude that officers applied compressive force upon a restrained Richardson's back, shoulder blades, shoulders, neck, hands, waist, thighs and lower legs throughout much of the twenty-two minute ordeal" and "that Richardson died as a result of position or restraint asphyxia while being restrained in a prone position by multiple corrections officers." It also held that genuine issues of material fact precluded summary judgment in favor of Sheriff Plummer on plaintiff's official-capacity claims.

The officers and Sheriff Plummer timely filed this interlocutory appeal.

## II.

Qualified immunity shields public officials from civil liability under 42 U.S.C. § 1983 unless their actions violate clearly established rights "of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). It is "an *immunity from suit* rather than a mere defense to liability," *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985), and protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). We review de novo a district court's denial of summary judgment in this context, and "draw all inferences in the evidence in favor of the

nonmovant." *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 992 (6th Cir. 2017). To defeat defendants' motion on qualified-immunity grounds, plaintiff must come forward with evidence from which a jury could find "(1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (internal quotation marks omitted).

Defendants raise four issues on appeal. The officers argue that (1) the district court's application of the Fourteenth Amendment to plaintiff's excessive-force claim was erroneous, and that no constitutional guarantee was clearly established at the time of the alleged misconduct, (2) the district court should have granted them qualified immunity on plaintiff's deliberateindifference claim, and (3) the district court erroneously denied them statutory immunity under Ohio law. Sheriff Plummer maintains that (4) we should exercise pendent jurisdiction over, and should dismiss, plaintiff's official-capacity claims against him. We address each argument in turn.

## III.

### A.

First, we must decide which constitutional guarantee plaintiff's excessive-force claim implicates. An excessive-force claim may arise under the Fourth, Eighth, or Fourteenth Amendments. While the Fourth Amendment's prohibition against unreasonable seizures bars excessive

force against free citizens, *see Graham v. Connor*, 490 U.S. 386, 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), the Eighth Amendment's ban on cruel and unusual punishment bars excessive force against convicted persons. *See Whitley v. Albers*, 475 U.S. 312, 318-19, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986). When an individual does not clearly fall within either category, the Fourteenth Amendment's Due Process Clause prohibits a governmental official's excessive use of force. *See Phelps v. Coy*, 286 F.3d 295, 299-300 (6th Cir. 2002).

The question is not merely academic because the standards of liability differ depending upon which amendment applies.[3] *Graham*, 490 U.S. at 393 ("We reject [the] notion that all excessive force claims brought under § 1983 are governed by a single generic standard;" courts must consider "whether the particular application of force might implicate a more specific constitutional right governed by a different standard."). When assessing excessive-force claims under the Fourth or Fourteenth Amendments, for example, we inquire whether the plaintiff has shown "that the force purposely or knowingly used against him was objectively unreasonable." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472-73, 192 L. Ed. 2d 416 (2015) (holding in this § 1983 suit brought by a pretrial detainee alleging a violation of the Fourteenth

3. Defendants argue that we should "re-evaluate" the differing standards of liability because corrections officers need bright-line rules. We may not do so, however, because we are bound by precedent. *See, e.g., Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473, 192 L. Ed. 2d 416 (2015) (declining to decide whether a subjective standard still applies in the context of Eighth Amendment excessive-force claims).

Amendment's Due Process Clause that, in determining "whether force deliberately used is, constitutionally speaking, 'excessive,'" . . . courts must use an objective standard; thus "a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable."); *Graham*, 490 U.S. at 397 (the "reasonableness" inquiry in this excessive force claim brought under the Fourth Amendment "is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."). But a "prisoner must satisfy both an objective and a subjective component" to make out an excessive-force claim under the Eighth Amendment. *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011).

Defendants maintain that the Eighth Amendment applies here because Richardson was serving a definite jail sentence. Importantly, defendants do not appeal the district court's finding under the Fourteenth Amendment that "genuine issues of material fact remain concerning the reasonableness of the force used in this case." Indeed, "[h]ow much force [defendants] applied and for how long are disputed factual issues a jury must decide." *See Martin v. City of Broadview Heights*, 712 F.3d 951, 955 n.1 (6th Cir. 2013). Instead, defendants contend that we must reverse the district court because it did not make any factual findings relevant to the subjective prong of our Eighth Amendment analysis. Because the district court correctly determined that the Fourteenth Amendment governs, and thus obviated the need for any analysis under the Eighth Amendment's subjective prong, we disagree.

Richardson was sanctioned for contempt "in an ordinary civil proceeding." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994). Unlike civil contempt, "[c]riminal contempt is a crime in the ordinary sense," thus one cannot be punished for it without being "afforded the protections that the Constitution requires of . . . criminal proceedings." *Id.* at 826. But Eighth Amendment protections have not been held to apply "outside the criminal context." *Agg v. Flanagan*, 855 F.2d 336, 343 n.7 (6th Cir. 1988); *Aldini v. Johnson*, 609 F.3d 858, 864 (6th Cir. 2010) (The Eighth Amendment "applies to excessive-force claims brought by convicted criminals serving their sentences.").

While a criminal contempt sanction is punitive and seeks "to vindicate the authority of the court," a civil contempt sanction is remedial and designed to coerce a future act for the benefit of the complainant. *See Bagwell*, 512 U.S. at 827-28 (citations omitted); *see also Uphaus v. Wyman*, 360 U.S. 72, 81, 79 S. Ct. 1040, 3 L. Ed. 2d 1090 (1959). Richardson was to be detained for up to thirty days, but with the proviso that he could be released upon payment of $2,500 to the county Child Support Enforcement Agency—a sentence imposed to coerce Richardson to complete a future remedial act for the benefit of the Complainant State of Ohio. That Richardson had a discharge date does not compel a different conclusion because "[i]mprisonment for a fixed term . . . is coercive when the contemnor is given the option of earlier release if he complies." *Bagwell*, 512 U.S. at 828 (citing *Shillitani v. United States*, 384 U.S. 364, 370 n.6,

86 S. Ct. 1531, 16 L. Ed. 2d 622 (1966) (upholding as civil "a determinate sentence which includes a purge clause")). A criminal sentence, by contrast, "cannot [be] avoid[ed] or abbreviate[d] . . . through later compliance." *Id.* at 828-29. And to the extent the relief provided in Richardson's case was a fine payable to a child support services agency in addition to his child support obligations, a fine "is remedial when it is paid to the complainant" rather than to the court. *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 632, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988). Richardson was thus the classic civil contemnor detainee in that he "carrie[d] the keys of his prison in his own pocket" and could "end the sentence and discharge himself at any moment by doing what he had previously refused to do" for the benefit of the complainant. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442, 31 S. Ct. 492, 55 L. Ed. 797 (1911) (citation omitted).

The Fourteenth Amendment therefore governs plaintiff's excessive-force claim. In arguing the Eighth Amendment applies instead, defendants contend that the use of terms like "punish" and "penalty" in Ohio's contempt statutes indicates Richardson was being punished, not merely coerced. *See* Ohio Rev. Code § 2705.02, 2705.031, 2705.05. It is true that "[m]ost contempt sanctions . . . to some extent punish a prior offense as well as coerce an offender's future obedience," but any definitive "conclusions about the civil or criminal nature of a contempt sanction" must be drawn "from an examination of the character of the relief itself" as opposed to a sanction's "stated purposes" or "the subjective intent of a State's laws and its courts." *See Bagwell*, 512 U.S. at 828 (quoting *Hicks*,

485 U.S. at 635-36). In short, state statutory labels are not determinative. *See Hicks*, 485 U.S. at 631 ("[T]he labels affixed either to the proceeding or to the relief imposed under state law are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law"); *cf. Liming v. Damos*, 133 Ohio St. 3d 509, 2012- Ohio 4783, 979 N.E.2d 297, 301 (Ohio 2012) (distinction between civil and criminal contempt "usually based on the purpose to be served by the sanction"). As discussed above, whether Richardson was held in contempt for failure to appear or failure to pay child support, or both, the character of the relief underscores the civil nature of his sanction.

Defendants' reliance on two district court opinions that applied the Eighth Amendment to a civil contemnor's excessive-force claim is equally unavailing. In *Lewis v. Stellingworth*, the district court did so because the civil contemnor was "in custody" when the alleged misconduct occurred. No. 07—CV—13825, 2009 U.S. Dist. LEXIS 40724, 2009 WL 1384149, at *6 (E.D. Mich. May 14, 2009). Although a civil contemnor has been found to be in contempt, any detention sanction would be imposed outside the criminal context and would not necessarily be primarily punitive in nature. *Lewis* goes astray in not considering any of the Supreme Court contempt precedent discussed above, and in relying instead on district court cases applying the Eighth Amendment to *criminal* contemnors' excessive-force claims. *See* No. 07—CV—13825, 2009 U.S. Dist. LEXIS 40724, 2009 WL 1384149, at *6; *see also* Fed. R. Crim. Pro. 42. Because *Hammond v. Lapeer County* simply adopts the *Lewis*

court's reasoning, it evidences the same analytical gaps. *See* 133 F.Supp.3d 899, 916-19 (E.D. Mich. 2015). Neither opinion is persuasive.

Richardson was not a free citizen at the time of the incident, but he had not been convicted of, and was thus not being punished for, any past criminal offense either. Even if Richardson's contempt sanction could be considered "quasi-criminal [in] nature" (as defendants maintain it should), by that very label it was not entirely so—leaving him, an individual within "some gray area" between free citizen and convicted criminal, protected by the Fourteenth Amendment's Due Process Clause. *See Burgess v. Fischer*, 735 F.3d 462, 472 (6th Cir. 2013); *see also Aldini*, 609 F.3d at 865.

For the reasons stated above, we affirm the district court's application of the Fourteenth Amendment to this plaintiff's excessive-force claim.

B.

Defendants also argue that no clearly established law barred unreasonable force against civil contemnor detainees in 2012. Plaintiff relies primarily on this court's opinion in *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893 (6th Cir. 2004), as notice to defendants that their "conduct was unlawful in the situation [they] confronted." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), *modified on other grounds by Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). In *Champion*, we considered an excessive-

force claim brought by the family of a severely autistic man who died after several arresting officers restrained him, prone on the ground and handcuffed behind his back, for seventeen minutes. 380 F.3d at 897. Several witnesses described how the officers were "laying on top of" the man while "he was prone on the ground with his face towards the carpet." *See id.* at 898. We affirmed the denial of qualified immunity to the officers and explained that "[c]reating asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect constitutes objectively unreasonable excessive force." *Id.* at 903. Although the man was also pepper sprayed, the application of asphyxiating force "by itself violated a clearly established right." *Id.* at 904.

Thus "the prohibition against placing weight on [Richardson's] body after he was handcuffed was clearly established in the Sixth Circuit as of" May 2012. *See Martin*, 712 F.3d at 961 (discussing *Champion*); *cf. Kulpa v. Cantea*, 708 F. App'x 846, 852-53 (6th Cir. 2017) (considering Fourteenth Amendment excessive-force claim in light of *Champion*); *Lanman v. Hinson*, 529 F.3d 673, 688-89 (6th Cir. 2008) (defendants violated clearly-established Fourteenth Amendment right to be free of undue restraint by restraining prone and subdued patient using "techniques that pose a substantial risk of asphyxiation"). Although not every defendant may have placed his weight on Richardson's torso, we have cautioned against taking "too cramped a view" of our precedent, and have explained that *Champion* "proscribes the use of 'substantial or significant pressure' that creates

asphyxiating conditions in order to restrain a subject who does not pose a material danger to the officers or others." *Martin*, 712 F.3d at 961. Even though "*Champion* arose in the context of an arrest, the conduct at issue, the risk of death to the detainee, and the minimal threat posed by a bound and incapacitated detainee to officer safety is the same in a" jail. *Kulpa*, 708 F. App'x at 853.

In response to *Champion*'s admonition, defendants maintain that the presence of medical personnel distinguishes this case because defendants claim they restrained Richardson only to facilitate his medical treatment. No medical personnel were present while force was used on Champion, but defendants do not explain how this distinction is material to our clearly-established analysis here. There is no dispute that Richardson was suffering a medical emergency, or that while he may have kicked and thrashed, defendants did not consider him a threat to anyone after he was handcuffed. Champion, who had created a disturbance in a store and "kick[ed] violently" while on the ground, arguably posed a threat. *Champion*, 380 F.3d at 897.

In any event, neither the mere presence of a third party at the scene nor defendants' professed reason for using force would excuse defendants' use of an otherwise unreasonable amount of force or alter relevant, clearly established constitutional guarantees. *See Kingsley*, 135 S. Ct. at 2476 (when viewing excessive-force claim through lens of Fourteenth Amendment, error to suggest that jury weigh officers' subjective reasons for using force); *see also Champion*, 380 F.3d at 904 ("motive is irrelevant"). We

are cognizant that plaintiff must identify a case with a fact pattern similar enough to have given "fair and clear warning to officers" about what the law requires. *White*, 137 S. Ct. at 552 (quotation omitted). But such a case need not "be on all fours in order to form the basis for the clearly established right." *See Burgess*, 735 F.3d at 474; *cf. White* 137 S. Ct. at 552 ("[G]eneral statements of the law are not inherently incapable of giving fair and clear warning to officers" where the unlawfulness is apparent).

Defendants also argue that they cannot be held liable for their actions because it was not clear in 2012 whether civil contemnor detainees fell within the Eighth or the Fourteenth Amendment. Although some district courts in this circuit may have applied the Eighth Amendment to civil contemnor detainee excessive-force claims, the Supreme Court long ago "t[ook] the position that the Eighth Amendment is inapplicable to [a civil contempt] sentence." *United States v. Dien*, 598 F.2d 743, 745 (2d Cir. 1979) (per curiam) (citing *Ingraham v. Wright*, 430 U.S. 651, 667-68, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977)). Moreover, it is well-established that "the qualified immunity doctrine is an objective one[.]" *Champion*, 380 F.3d at 904; *see Harlow*, 457 U.S. at 818. We decline to accept the defense of qualified immunity based on defendants' "dubious proposition that, at the time the officers acted, they were on notice only that they could not have a reckless or malicious intent and that, as long as they acted without such an intent, they could apply any degree of force they chose." *See Kingsley v. Hendrickson*, 801 F.3d 828, 832-33 (7th Cir. 2015) (per curiam).

Nor can defendants escape liability merely because the incident in question occurred before the Supreme Court made it clear that the standard of liability applicable to Fourteenth Amendment excessive-force claims is purely an objective one. *Kingsley*, 135 S. Ct. at 2473. As defendants acknowledge, we have rejected this argument before because "a defendant is not entitled to qualified immunity simply because the courts have not agreed upon the precise formulation of the [applicable] standard." *Guy v. Metro. Gov't of Nashville*, 687 F. App'x 471, 476 (6th Cir. 2017) (internal quotation marks omitted) (quoting *Harris v. City of Circleville*, 583 F.3d 356, 367 (6th Cir. 2009)); *see also Katz*, 533 U.S. at 202-03; *Pearson*, 555 U.S. at 236; *Kulpa*, 708 F. App'x at 853. Rather, the relevant question under the clearly established prong is whether defendants had notice "that [their] conduct was unlawful in the situation [they] confronted." *Katz*, 533 U.S. at 202.

We agree with the district court that *Champion*, among other precedent, gave such notice to defendants here. Accordingly, we affirm the district court's conclusion that it "[w]as unconstitutional" on May 19, 2012, to create asphyxiating conditions by "forcibly restraining an individual in a prone position for a prolonged period of time" when that individual posed no material threat.

## IV.

Defendants argue they are also entitled to qualified immunity on plaintiff's deliberateindifference claim. We analyze a Fourteenth Amendment claim for deliberate indifference to a serious medical need "under the same

rubric as Eighth Amendment claims brought by prisoners." *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013). Proving deliberate indifference requires that plaintiff demonstrate both: (1) the existence of a "sufficiently serious" medical need; and (2) that defendants "perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded that risk." *Comstock v. McCrary*, 273 F.3d 693, 702-03 (6th Cir. 2001) (citation omitted).

A.

As a threshold matter, defendants assert that the district court failed to conduct a sufficiently individualized qualified-immunity assessment in the context of plaintiff's deliberateindifference claim. "[I]t is well-settled that qualified immunity must be assessed in the context of each individual's specific conduct." *Stoudemire v. Mich. Dep't of Corr.*, 705 F.3d 560, 570 (6th Cir. 2013). The district court acknowledged at the outset that it was required to conduct an individualized assessment. When considering plaintiff's excessive-force claim, the district court determined that "all of the [defendants] either actively participated in the use of allegedly excessive force or supervised the other officers" and made individualized factual findings about each officer's actions during the incident that led to Richardson's death. The district court also referenced Haag and Wayne's testimony that Richardson "continually told officers that he could not breathe" while the "officers applied compressive force."

The district court emphasized this circumstantial evidence upon turning to the subjective component of plaintiff's deliberate-indifference claim. The district court again cited Haag's testimony that Richardson was "continually" telling "those on the scene" that he could not breathe. Haag's testimony was corroborated by that of inmate Wayne. The district court added that Stumpff "agrees that Richardson may have indicated" that he was having difficulty breathing and that Wittman also "testified that there was cause to be concerned about Richardson's ability to breathe." Building on its excessive-force analysis, the district court concluded that plaintiff's evidence taken in the light most favorable to him "demonstrates that Richardson continually told those on the scene that he could not breathe" but "[d]espite this cause for concern, the individual [defendants] each participated — or supervised — in Richardson's restraint for up to twenty-two minutes" rather than cede control of the scene to medical personnel.

Defendants fault the district court for failing to specify in the record where each officer testified that he heard Richardson's breathing complaints or to reference record evidence establishing that each officer was present "when Richardson was making such complaints." But no testimony concerning Richardson's breathing complaints links those complaints to a particular moment in time, and some witnesses, such as Stumpff, were present throughout the entire incident. A reasonable jury could infer that Richardson's pleas were ongoing and any of the officers could have heard them at the time that they were on the scene. Although the video has no sound, it does not

blatantly contradict the district court's conclusion because it shows each defendant in close proximity to Richardson and would thus allow a reasonable juror to conclude that his voice could have reached them. *See Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.").

The district court inferred from this evidence that each of the officers may have been aware of the contextual facts indicating Richardson's need for medical treatment because he was struggling to breathe while in a prone position. And "a defendant may not challenge the inferences the district court draws from th[e] facts, as that . . . is a prohibited fact-based appeal." *DiLuzio v. Vill. of Yorkville*, 796 F.3d 604, 609 (6th Cir. 2015) . Because the district court's finding of a genuine issue of material fact as to defendants' "knowledge of a substantial risk of serious harm" is premised on Richardson's continuous complaints about his inability to breathe, its qualified immunity inquiry was sufficiently individualized, even if it referred to "those on the scene" and the "individual" defendants rather than list each officer by name. *Cf. Phillips v. Roane Cty.*, 534 F.3d 531, 542 (6th Cir. 2008) ("[W]e do not read *Garretson* as prescribing a rule that plaintiffs cannot present general allegations to prove that each individual defendant has the requisite knowledge for deliberate indifference.") Defendants' argument provides no basis for relief.

B.

Defendants also maintain that they did not disregard any substantial risk to Richardson because they were "working alongside" medical personnel. Because this argument is premised on factual disputes, we lack jurisdiction to consider it on interlocutory appeal. *DiLuzio*, 796 F.3d at 609-10. It is well-established that "[a] defendant challenging the denial of summary judgment on qualified immunity grounds must be willing to concede the most favorable view of the facts to the plaintiff for purposes of the appeal." *Thompson v. Grida*, 656 F.3d 365, 367 (6th Cir. 2011) (internal quotation marks omitted). We are precluded from deciding an interlocutory appeal premised on a challenge either to the inferences a district court draws from its record-supported factual determinations or to "'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." *See DiLuzio*, 796 F.3d at 609-10.

Defendants do not accept the district court's conclusion that there was sufficient evidence to create a genuine issue of material fact. For example, defendants contend the district court failed to "factor into [its] analysis that medical staff was on the scene throughout" and "the undisputed evidence is that corrections officers were holding Richardson so the medical personnel could assess and treat him." Yet the district court pointed to specific facts about the medical staff response, and underscored that defendants may have refused a medic's and a nurse's request to reposition Richardson to allow for a proper medical assessment. Defendants also do

not accept the district court's finding that the plaintiff presented evidence that "Richardson continually told those on the scene that he could not breathe." Instead, they inappropriately argue that the evidence is insufficient to support that conclusion because not every officer testified to hearing Richardson's complaints or to being present when the complaints were made. We have noted that "the deliberate indifference threshold is higher for correctional officers where . . . an inmate is receiving medical treatment[.]'" *Shaver v. Brimfield Twp.*, 628 Fed. Appx. 378, 383 (6th Cir. 2015). But our reasoning is premised on non-medical prison officials reasonably relying on or deferring to medical staff expertise, and it is sharply disputed whether and to what extent defendants did so here. *See id.; see also Ruiz-Bueno v. Scott*, 639 F. App'x 354, 360 (6th Cir. 2016).

Our decision in *McKinney v. Lexington-Fayette Urban County Government* is instructive. 651 F. App'x 449 (6th Cir. 2016). In that case, McKinney suffered a seizure while incarcerated and died after corrections officers placed him in a prone position while handcuffed behind his back. *Id.* at 451-56. As in this case, multiple officers responded when McKinney began displaying seizure activity and used "force to restrain and subdue McKinney." *Id.* at 451. And like the officers here, the defendant officers in *McKinney* relied on the presence of medical staff in support of their qualified immunity defense. *Id.* at 460 n.6. We declined to consider that argument on interlocutory appeal, concluding that:

> [t]he officers' arguments about the medical staff . . . pose questions of fact capable of resolution by competent evidence, including evidence about the officers' observations of facts that indicated that McKinney was in medical distress, the training that the officers received about how to care for an inmate who was in medical distress, and the officers' perceptions about the adequacy of the treatment that the medical staff provided to McKinney.

*Id.* This reasoning is equally applicable here.

"When the legal arguments advanced rely entirely on a defendant's own disputed version of the facts, the appeal boils down to issues of fact and credibility determinations that we cannot make." *Thompson*, 656 F.3d at 367. Because defendants' medical-personnel argument turns on such determinations, we cannot consider it on interlocutory appeal. *See DiLuzio*, 796 F.3d at 609-10 (allowing excision of "the prohibited challenge").

C.

Defendants also assert in a conclusory fashion that Richardson's right to medical care was not clearly established. They argue the district court erroneously relied on *Lanman v. Hinson*, in which we held in 2008 that the defendants violated a mental-health patient's clearly-established Fourteenth Amendment right to freedom from undue bodily restraint by continuing to restrain him in a prone position using "techniques that pose a substantial

risk of asphyxiation" after the patient was subdued. 529 F.3d at 688-89. According to defendants, *Lanman* is irrelevant because it does not specifically involve "law enforcement officers working alongside qualified medical staff in dealing with an inmate not responding to commands and struggling with officers." To the extent defendants are merely repackaging their argument that the presence and activities of medical personnel absolves them of any liability, we have explained why that is a determination for a jury in this case.

Moreover, defendants neglect to mention the other cases referenced by the district court such as *May v. Township of Bloomfield*, which includes a discussion of our longstanding precedent establishing that a detainee has a constitutional right to medical care when an officer becomes aware that the detainee needs medical attention. *See* No. 11-14453, 2013 U.S. Dist. LEXIS 74437, 2013 WL 2319323, at *13-16 (E.D. Mich. May 28, 2013). We made it clear in 1972 that "fundamental fairness and our most basic conception of due process mandate that medical care be provided to one who is incarcerated and may be suffering from serious illness or injury . . . where the circumstances are clearly sufficient to indicate the need of medical attention for injury or illness[.]" *Fitzke v. Shappell*, 468 F.2d 1072, 1076 (6th Cir. 1972).

Here, the district court found that "reasonable minds could conclude that Richardson was suffering from an obvious serious medical need" as he lay prone, handcuffed, and complaining he could not breathe for the better part of twenty-two minutes. Defendants conceded in their

motion for summary judgment that they each "were aware this was a medical situation, where Richardson was having some sort of medical issue," and that "this is not a case where [defendants] failed to get Richardson medical attention." We fail to see how, considering our precedent, a detainee like Richardson could have had no clearly established right to adequate medical care under circumstances even defendants admit indicated a need for medical attention.

In sum, defendants' medical-personnel argument is fact-bound and beyond our limited jurisdiction.

V.

Plaintiff also brings an Ohio tort claim for wrongful death against the officers, and defendants argue they should have been granted statutory immunity. Ohio law does not immunize "acts or omissions [done] with malicious purpose, in bad faith, or in a wanton or reckless manner." Ohio Rev. Code § 2744.03(A)(6)(b). As relevant here, recklessness is conduct "characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Argabrite v. Neer*, 149 Ohio St. 3d 349, 2016- Ohio 8374, 75 N.E.3d 161, 164 (Ohio 2016).

The district court relied on its "analysis of Plaintiff's deliberate indifference claim" in concluding the officers were not entitled to statutory immunity because "a reasonable jury could find recklessness sufficient to

overcome employee immunity" under Ohio law. When federal qualified immunity and Ohio state-law immunity under § 2744.03(A)(6) rest on the same questions of material fact, we may review the state-law immunity defense "through the lens of the federal qualified immunity analysis." *Chappell v. City of Cleveland*, 585 F.3d 901, 907 n.1 (6th Cir. 2009); *cf. Stefan v. Olson*, 497 Fed. Appx. 568, 580-81 (6th Cir. 2012) (noting similarities between the Eighth Amendment "deliberate indifference" standard and Ohio's "wanton or reckless manner" standard). Just as a district court's denial of a federal qualified immunity claim is appealable only to the extent that the denial turns on an issue of law, *Mitchell*, 472 U.S. at 530, the Ohio Supreme Court has stated that a court of appeals "may resolve the appeal" of a trial court's denial of summary judgment on the basis of statutory immunity "if [after de novo review of the law and facts] only questions of law remain[.]" *See Hubbell v. City of Xenia*, 115 Ohio St. 3d 77, 2007- Ohio 4839, 873 N.E.2d 878, 882 (Ohio 2007).

Defendants make the same arguments here as they made in challenging the district court's deliberate-indifference findings: that there was an insufficient individualized inquiry as to each defendant's qualified immunity defense, and that the district court did not consider the presence of medical personnel throughout the incident. As discussed above, the district court's qualified immunity analysis was sufficiently individualized.

In support of their renewed medical-personnel argument, defendants rely on our decision in *Ruiz-Bueno v. Scott*. There, a pretrial detainee's estate sued jail

officials under federal and Ohio law after the detainee died from a preexisting heart condition of which no one at the jail was aware. 639 F. App'x 354 at 355. We held that two deputies were entitled to statutory immunity against the plaintiff's state-law wrongful death and loss-of-consortium claims "[f]or the same reasons" they were entitled to federal qualified immunity against the plaintiff's deliberate-indifference claim. *Id.* at 365. In so concluding, we noted that the defendants "reasonably relied on the judgment of numerous doctors and nurses" treating the decedent and that there was no evidence that either deputy was subjectively aware of the detainee's condition. *See id.* at 356, 360-61. There is such evidence of subjective awareness here, therefore *Ruiz-Bueno* does not help defendants (who in any case allegedly did not "rel[y] on the judgment of" medical staff at the scene). *See id.* at 360.

Defendants' statutory immunity defense stands or falls with their federal qualified immunity defense. *Cf. Martin*, 712 F.3d at 963 (holding that "[a]s resolution of the state-law immunity issue is heavily dependent on the same disputed material facts as the excessive-force determination under § 1983, the district court properly denied summary judgment to the officers on the estate's state-law claims"). For the same reasons that we declined to accept defendants' defense of qualified immunity on plaintiff's deliberate-indifference claim, we decline to accept their defense of statutory immunity under Ohio law.

VI.

Finally, defendant Sheriff Plummer appeals from the district court's denial of summary judgment on plaintiff's § 1983 claims brought against him in his official capacity.[4] That is not an independently appealable "final decision" under 28 U.S.C. § 1291. *See Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 43, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995). Accordingly, we may exercise our pendent appellate jurisdiction over Sheriff Plummer's appeal only if his motion for summary judgment is "inextricably intertwined with the qualified immunity analysis properly before the Court." *Lane v. City of LaFollette*, 490 F.3d 410, 423 (6th Cir. 2007). In other words, only "when the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well." *Mattox v. City of Forest Park*, 183 F.3d 515, 524 (6th Cir. 1999) (quoting *Moore v. City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995)).

That is not the case here. The officers' appeal of the qualified immunity issues is not "inextricably intertwined" with Sheriff Plummer's appeal because their "liability turns on whether the force they used to restrain [Richardson] violated his clearly established constitutional rights," while municipal liability turns on separate questions of the jail's training and supervision obligations and practices

4. "Official-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) (quoting *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 691 n.55, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)).

as well as its policies and customs. *See Martin*, 712 F.3d at 963. Because pendent jurisdiction is inapplicable, we cannot consider Sheriff Plummer's interlocutory appeal. *See id.* ("[I]n the face of a constitutional violation, we lack subject-matter jurisdiction to entertain an appeal of the municipal-liability claim"); *see also Courtright v. City of Battle Creek*, 839 F.3d 513, 523-24 (6th Cir. 2016) (same); *Floyd v. City of Detroit*, 518 F.3d 398, 410-11 (6th Cir. 2008) (same).

## VII.

For these reasons, we affirm in part and dismiss in part.

**APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED APRIL 12, 2018**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-3175

DAVID M. HOPPER, SPECIAL ADMINISTRATOR OF THE ESTATE OF ROBERT ANDREW RICHARDSON, SR.,

*Plaintiff-Appellee,*

v.

PHIL PLUMMER, MONTGOMERY COUNTY SHERIFF; TED JACKSON, SERGEANT; BRIAN LEWIS, SERGEANT; DUSTIN JOHNSON, CORRECTIONS OFFICER; MATHEW HENNING, CORRECTIONS OFFICER; MICHAEL BEACH, CORRECTIONS OFFICER; KEITH MAYES, CORRECTIONS OFFICER; BRADLEY MARSHALL, CORRECTIONS OFFICER; MICHAEL STUMPFF, CORRECTIONS OFFICER; ANDREW WITTMAN, CORRECTIONS OFFICER,

*Defendants-Appellants.*

Before: BATCHELDER, GRIFFIN, and WHITE, Circuit Judges.

*Appendix B*

**JUDGMENT**

On Appeal from the United States District Court
for the Southern District of Ohio at Dayton.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED IN PART and DISMISSED IN PART.

**ENTERED BY ORDER OF THE COURT**
/s/: _____
Deborah S. Hunt, Clerk

**APPENDIX C — DECISION AND ENTRY OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION AT DAYTON, FILED FEBRUARY 6, 2017**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Case No. 3:14-cv-158

DAVID M. HOPPER, SPECIAL ADMINISTRATOR OF THE ESTATE OF ROBERT ANDREW RICHARDSON, SR., DECEASED,

*Plaintiff,*

vs.

MONTGOMERY COUNTY SHERIFF, *et al.*,

*Defendants.*

February 6, 2017, Decided
February 6, 2017, Filed

Michael J. Newman, United States Magistrate Judge.

*Appendix C*

**DECISION AND ENTRY: (1) GRANTING PLAINTIFF'S MOTION TO VOLUNTARILY DISMISS ALL CLAIMS AGAINST DEFENDANT KRUSE; (2) GRANTING SHERIFF PLUMMER'S MOTION FOR SUMMARY JUDGMENT (DOC. 114) WITH REGARD TO STATE LAW CLAIMS ASSERTED AGAINST HIM IN HIS OFFICIAL CAPACITY, BUT OTHERWISE DENYING THE COUNTY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DOC. 114); (3) DENYING THE NAPHCARE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DOC. 112) AS MOOT; AND (4) DENYING THE COUNTY DEFENDANTS' MOTION TO STRIKE (DOC. 150) ON THE MERITS IN PART AND OTHERWISE DENYING SUCH MOTION AS MOOT**[1]

This 42 U.S.C. § 1983 case, for which the parties have consented, is before the Court on the motions for summary judgment filed by: (1) Defendants Sheriff Phil Plummer, Sergeants Ted Jackson and Brian Lewis, Corrections Officers Dustin Johnson, Mathew Henning, Michael Beach, Keith Mayes, Bradley Marshall, Michael Stumpff, and Sheriff Deputy Andrew Wittman (collectively referred to as the "County Defendants"); and (2) Defendants NaphCare, Inc., Nurses Kristy Kruse,[2] Krisandra Miles,

1. Insofar as Defendants seek to strike witness statements from certain Montgomery County Jail inmates, the Court **DENIES** such motion (doc. 150) as moot because the Court did not rely on any of these statements in issuing this Decision and Entry.

2. Plaintiff seeks to voluntarily dismiss all claims against Defendant Kruse. *See* doc. 124 at PageID 3696. The Court hereby

Medic Steven Stockhauser, and Brenda Garrett Ellis, M.D. Docs. 112, 114. Plaintiff filed memoranda opposing these motions. Docs. 123, 124. Thereafter, Defendants filed reply memoranda. Docs. 148, 149. Following the briefing of these motions, Plaintiff and the Naphcare Defendants settled their dispute, leaving only the County Defendants before the Court.

The County Defendants also filed a motion to strike certain evidence relied upon by Plaintiff to oppose summary judgment. Doc. 150. Plaintiff filed a memorandum in opposition to the motion to strike. Doc. 154. Thereafter, the County Defendants filed a reply memorandum. Doc. 155.

The Court has carefully considered all of the foregoing, including the evidence cited in support thereof. Accordingly, the County Defendants' motions are ripe for review and decision.

**I.**

A motion for summary judgment should be granted if the evidence submitted to the Court demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986);

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**GRANTS** Plaintiff's request to voluntarily dismiss claims against Defendant Kruse and hereby **DISMISSES** Kruse as a party to this suit pursuant to Fed. R. Civ. P. 21.

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "Summary judgment is only appropriate '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.'" *Keweenaw Bay Indian Comm. v. Rising*, 477 F.3d 881, 886 (6th Cir. 2007) (quoting Fed. R. Civ. P. 56(c)). "Weighing of the evidence or making credibility determinations are prohibited at summary judgment -- rather, all facts must be viewed in the light most favorable to the non-moving party." *Id.*

Once "a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading[.]" *Viergutz v. Lucent Techs., Inc.*, 375 F. App'x 482, 485 (6th Cir. 2010) (citation omitted). Instead, the party opposing summary judgment has a shifting burden and "must -- by affidavits or as otherwise provided in this rule -- set out specific facts showing a genuine issue for trial." *Id.* (citation omitted). Failure "to properly address another party's assertion of fact as required by Rule 56(c)" could result in the Court "consider[ing] the fact undisputed for purposes of the motion." Fed. R. Civ. P. 56(e)(2).

Finally, "there is no duty imposed upon the trial court to 'search the entire record to establish that it is bereft of a genuine issue of material fact.'" *Buarino v. Brookfield Twp. Trustees*, 980 F.2d 399, 404 (6th Cir. 1992) (citations omitted). Instead, "[i]t is the attorneys, not the judges, who have interviewed the witnesses and handled the physical exhibits; it is the attorneys, not the judges, who have been

present at the depositions; and it is the attorneys, not the judges, who have a professional and financial stake in case outcome." *Id.* at 406. In other words, "the free-ranging search for supporting facts is a task for which attorneys in the case are equipped and for which courts generally are not." *Id.*

**II.**

As ordered by the undersigned, Defendants filed a statement of proposed undisputed facts (docs. 112-1, 114-1), to which Plaintiff responded -- by admitting certain facts are undisputed or otherwise citing portions of the record demonstrating the existence of a material dispute of facts (docs. 123-9, 124-5). The parties support these statements by citing to evidence filed with the Court -- including approximately thirty depositions of the individual Defendants and other witnesses. *See* docs. 77-99, 102-08, 110. The Court incorporates these statements of facts herein, including those disputed facts viewed in a light most favorable to Plaintiff. *See supra.*

This case concerns the death of Robert Richardson at the Montgomery County, Ohio Jail ("Jail") on May 19, 2012. The Montgomery County Sheriff's Office ("MCSO") is in charge of operating and managing the Jail. Doc. 124-5 at PageID 3795-96. On May 19, 2012, the MCSO employed Defendants Jackson, Lewis, Henning, Beach, Mayes, Marshall, Stumpff, and Wittman. *Id.* Defendant NaphCare, Inc. ("NaphCare") is a correctional healthcare provider that provides medical services at the Jail pursuant to a contract with the MCSO. *Id.* at PageID 3795. Defendants Felicia Foster, R.N.; Krisandra Miles,

LPN; and Steven Stockhauser, EMT were employees of NaphCare on May 19, 2012. *Id.* Brenda Garrett Ellis, M.D. was a contractor of NaphCare. *Id.*

On May 17, 2012, Richardson was arrested on a *capias* issued from the Montgomery County, Ohio Juvenile Court as a result of his failure to appear for child support enforcement proceedings. Doc. 123-4 at PageID 3638; doc. 123-9 at PageID 3671. Richardson was found and arrested, then booked into the Jail on May 17, 2012. *Id.* Later that same day, without having appeared before any court, Montgomery County Juvenile Judge Anthony Capizzi entered an order imposing upon Richardson a 30-day jail sentence, from which Richardson could be released upon the payment of $2,500.00 to Montgomery County Child Support Enforcement Agency ("SEA"). *See* doc. 123-6 at PageID 3630. Although no other Juvenile Court records or transcripts are before the Court on summary judgment, the undersigned presumes -- construing all reasonable inferences in Plaintiff's favor -- that Judge Capizzi issued this sanction upon finding Richardson in contempt for failing to appear and/or for failing to pay child support obligations. *See* docs. 123-4, 123-6.

Upon arriving at the Jail, Richardson underwent a medical screening. Doc. 124-5 at PageID 3796. Records from such screening show that Richardson was six feet tall, weighed 280 pounds, had high blood pressure, and was not taking any medications. *Id.* At the Jail, Richardson shared a cell with Marcus Maxwell. *See* doc. 123-9 at PageID 3671. On May 19, 2012, upon returning to his cell after visiting with his fiancé, Richardson began suffering from an apparent medical issue. *Id.*; *see also* doc. 78 at

PageID 843-44. According to responding corrections officers, Richardson appeared to be having a seizure and was making seizure type movements, such as thrashing his body around. *See* doc. 78 at PageID 845.[3]

Defendant Ted Jackson, a Sergeant with the MCSO, was the first to arrive at Richardson's cell, along with Defendant Justin Johnson, a MCSO corrections officer. Doc. 83 at PageID 1109. When Jackson and Johnson arrived, Richardson was sitting on the floor, attempting to stand. *Id.* at PageID 1109. Richardson had blood and saliva coming from his mouth. *Id.* at PageID 1111. He was disoriented ("he's looking at you, but he isn't"), had accelerated breathing, was lethargic, and was unable to comprehend officers' verbal commands. *Id.* at PageID 1109-11. Throughout the entire incident, MCSO corrections officers consistently testified that Richardson neither hurt anyone nor attempted to hurt anyone in his disoriented state. Doc. 83 at PageID 1118. Because Richardson appeared unbalanced and uncoordinated, MCSO officers did not want him standing and decided to remove him from the cell where there were sharp metal objects -- such as the bed, toilet, and a bench -- in a very confined space. *Id.*

**Initial Response and Handcuffing of Richardson**

MCSO officers successfully removed Richardson from his cell without issue. *Id.* at PageID 1113. Once removed,

3. Richardson's autopsy revealed cannabis in his system as a result of his apparent use of marijuana within hours of his death. Doc. 99 at PageID 2408-09; doc. 102 at PageID 2527-32.

Richardson was in a face down position on the concrete floor outside the cell on the second floor walkway. *Id.* Once removed from the cell and lying face down on the ground on the upper level walkway of the cell block, Richardson kept "drawing his arms into -- under his body . . . in a natural position to lift himself up, because he's still trying to stand up at this point." *Id.* at 1114. Because a disoriented Richardson was attempting to stand up and posed a risk to his own safety -- as well as the safety of others on the second floor walkway -- Jackson made the decision to handcuff Richardson in an effort "[t]o gain more control over him[.]" *Id.*

Officer Michael Stumpff, Sergeant Brian Lewis, and Officer Matthew Henning all arrived on the scene after Jackson and Johnson, and assisted in cuffing Richardson by holding his arms. Doc. 85 at PageID 1230-31; doc. 89 at PageID 1381. Officer Marshall and Defendant Stockhauser -- a NaphCare medic -- were also on the scene while officers were handcuffing Richardson. Doc. 87 at PageID 1309; doc. 108 at PageID 3266, 3274-76. Although all County Defendants state otherwise, Medic Stockhauser testified that, as MCSO Defendants were handcuffing Richardson, he and one of the NaphCare nurses "told corrections [officers]," namely Lewis, "to cuff [Richardson] in the front so [medical staff] could better assess [him]." Doc. 108 at PageID 3266, 3274-76. Medic Stockhauser's medical recommendation was not followed by corrections officers.[4] *Id.*

4. The County Defendants argue that "it is undisputed that none of the [County Defendants] heard any medical personnel give instructions on how Mr. Richardson should be positioned during

*Appendix C*

**Restraint of Richardson Following Handcuffing**

Richardson was cuffed in under one minute and, thereafter, officers remained on the scene to restrain Richardson to the floor. Doc. 83 at PageID 1117. Marshall restrained Richardson's right shoulder, applying pressure when needed to control Richardson from moving. *Id.* at PageID 1309-10. Marshall admitted that, at times, he placed one to two hands on Richardson's back to control his movements. *Id.* Stumpff was positioned at Richardson's left shoulder near his head -- where he saw blood and mucus coming from Richardson's mouth and nose -- and restrained Richardson from lifting his shoulder. Doc. 89 at PageID 1385. Johnson assisted by straddling Richardson's lower body at his thigh/hip area. Doc. 84 at PageID 1163-64. Officer Henning assisted in kneeling over Richardson's legs. Doc. 82 at PageID 1085.

After about seven minutes on the scene, Johnson's shift ended and he was relieved of duty by Officer Beach, who took over straddling Richardson legs. Doc. 84 at PageID 1169; doc. 77 at PageID 816-17. Officer Henning was relieved of duty and left the scene after nine minutes and the record is unclear as to whether Henning -- a trainee who was completing his first day

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the course of the incident." Doc. 148 at PageID 3957. The Court disagrees that such fact is undisputed. *See* doc. 123-9 at PageID 3680. Plaintiff admits only that the County Defendants *testified* that they did not hear any instructions from medical personnel, but Stockhauser's testimony -- that Lewis specifically overrode his medical instruction -- creates an issue of fact in this regard. Doc. 108 at PageID 3266, 3274-76.

on the job -- was specifically replaced on the scene. Doc. 82 at PageID 1087. Fifteen minutes into the incident, Officer Mayes entered the scene for Medic Stockhauser and took over restraining Richardson's head -- he placed one hand under Richardson's head and his other hand on top of Richardson's head to prevent him from putting his head up. Doc. 88 at PageID 1351. Officer Wittman came onto the scene approximately sixteen minutes into the incident and relieved an officer near Richardson's left arm -- presumably Stumpff. Doc. 90 at PageID 1426.

**Medical Response**

With regard to medical care, once Richardson was handcuffed and the scene was safe, Medic Stockhauser -- noting at that time Richardson's disorientation and that he was suffering a likely seizure -- began wiping bloody sputum from Richardson's face and trying give him oxygen. *See* doc. 108 at PageID 3281-82 (stating that "oxygen is the first . . . thing to use on somebody that just had a seizure"). Medic Stockhauser also placed a towel under Richardson's head to prevent it from striking the concrete. Doc. 105 at PageID 2938. Nurse Miles, who arrived on the scene around the same time as Medic Stockhauser, was trying to talk to Richardson and assess him. Doc. 105 at PageID 2930-32. Otherwise, Nurse Miles stood and watched Medic Stockhauser. *Id.* at PageID 2934.

Nurse Foster arrived on the scene after Richardson had been handcuffed and left after a couple of minutes to speak with Dr. Ellis. Doc. 107 at PageID 3162-63. Dr. Ellis, after being advised by Nurse Foster, ordered that Richardson be given Ativan. Doc. 105 at PageID 2875,

2959; doc. 107 at PageID 3165. Nurse Miles delivered the Ativan syringe to Nurse Kruse, which was not successfully injected and, instead, spilled onto the floor. *Id.* A second dose of Ativan was then ordered, which Nurse Foster delivered to the scene and administered herself in Richardson's gluteal muscle. Doc. 107 at PageID 3165-66. Notably, no Ativan was detected in Richardson's blood on autopsy, however. *See* doc. 94 at PageID 172. Nurse Foster then left the scene shortly after administering the second Ativan shot. *Id.* at PageID 3175.

Soon thereafter, all medical staff backed away from the scene so that Richardson could presumably be placed into a restraint chair. Doc. 105 at PageID 2886. During Richardson's restraint, inmates at the jail state they heard him tell those on the scene that he could not breathe. Doc. 92 at PageID 1587. Officer Stumpff himself testified that Richardson may have indicated he could not breathe while being restrained. *See* doc. 89 at PageID 1375.

**Richardson's Death**

After approximately twenty-two minutes of being restrained on the floor, MCSO officers realized that Richardson had stopped breathing. *Id.* at PageID 1387-88. Richardson subsequently died. *Id.* at PageID 1389. While the parties dispute the ultimate cause of Richardson's death, Plaintiff presents evidence that, when construed in his favor, shows that Richardson died as a result of positional or restraint asphyxia while being restrained in a prone position by multiple corrections officers at the Jail on May 19, 2012. Doc. 123-1 at PageID 3582; doc. 124-2 at PageID 3758-59.

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**Policies Regarding Prone Restraint**

Plaintiff presents expert evidence from Michael Berg, a corrections expert, who states that, within the field of corrections, it has long been understood that pinning individuals to the ground in prone restraint for unreasonably long periods of time is dangerous and likely to cause death. Doc. 123-8 at PageID 3636. Berg further testifies that corrections facilities must develop clear policies governing the restraint of individuals in prone position and that it is necessary to adequately train officers on such policies. *Id.*

On August 3, 2009, prior to Richardson's death, then-Ohio Governor Ted Strickland issued Executive Order 2009-13S, titled "*Establishing Restraint Policies Including a Ban on Prone Restraints*," wherein he ordered a number of state agencies, including the Ohio Department of Rehabilitation and Corrections,[5] to immediately adopt a policy on the use of, among other uses of force, prone restraint. Doc. 96-2 at PageID 2109. Specifically, the Executive Order -- consistent with the opinion of Berg -- states that "[a]ccepted research has shown that there is a risk of sudden death when restraining an individual in a prone position," and further ordered implementation of the following policy:

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5. Under Ohio law, "[t]he sheriff shall have charge of the county jail and all persons confined therein" and "shall keep such persons safely, attend to the jail, and govern and regulate the jail according to the minimum standards for jails in Ohio promulgated by the department of rehabilitation and correction." Ohio Rev. Code § 341.01.

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> PRONE RESTRAINT: The use of the prone restraint is prohibited across all state systems. Prone restraint is defined as all items or measures used to limit or control the movement or normal functioning of any portion, or all, of an individual's body while the individual is in a face-down position for an extended period of time. Prone restraint includes physical or mechanical restraints.

*Id.* at PageID 2110. The policy advanced in the Executive Order permitted, under certain conditions, a "*brief* physical positioning of an individual face down for the purpose of quickly and effectively gaining physical control of that individual in order to prevent harm to self and others, or prior to transport to enable the individual to be transported safely." *Id.* at 2110-11 (emphasis added).

Similar to the prohibition advanced by former Governor Strickland in Executive Order 2009-13S, the Montgomery County Jail's official policies prohibit "placing prisoners who are in restraints in prone . . . position[][.]" Doc. 96-4 at PageID 2131. Despite existence of this policy, however, County Defendants testified that there was "nothing in our training that says we cannot have somebody in a prone position and handcuffed." Doc. 85 at PageID 1238; doc. 90 at PageID 1420 (wherein Defendant Stumpff testified that "I've been through many trainings, and I've never been told not to do that"). In fact, some County Defendants testified that they are trained to do the opposite, *i.e.*, place people in a prone position with hands cuffed behind their back. Doc. 88 at PageID 1339.

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## III.

The County Defendants move for summary judgment on all of Plaintiff's claims. Doc. 114. Specifically, Plaintiff has asserted the following constitutional claims under 42 U.S.C. § 1983: (A) an excessive use of force claim against the individual County Defendants; (B) a deliberate indifference to medical needs claim against all of the individual Defendants; and (C) a claim for municipal liability under *Monell* for failure to supervise, train, discipline, or conduct an adequate investigation. Doc. 73. Plaintiff also asserts a state law wrongful death claim against the County Defendants premised on an alleged claim of assault and battery. *Id.* The Court will address the arguments on each of these claims in turn.

### A. Excessive Force

The Court first addresses Plaintiff's § 1983 claim asserting excessive force, which Plaintiff alleges arises from the forcible restraint of Richardson in a prone position for a prolonged period of time while he was suffering from a medical episode, ultimately leading to his death by restraint asphyxia. Doc. 123 at PageID 354. The County Defendants argue that they are entitled to qualified immunity on this claim. Doc. 114 at PageID 3437-43.

"Government officials, including police officers, are immune from civil liability unless, in the course of performing their discretionary functions, they violate the plaintiff's clearly established constitutional rights."

*Aldini v. Johnson*, 609 F.3d 858, 863 (6th Cir. 2010). Simply put, qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 743, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (citing *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)). With regard to the individual County Defendants, they are entitled to qualified immunity unless "the evidence produced, when viewed in the light most favorable to the plaintiff, would permit a reasonable juror to find that (1) the defendant violated a constitutional right; and (2) the right was clearly established." *Aldini*, 609 F.3d at 863; *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

**1. Applicable Constitutional Amendment**

"In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham v. Connor*, 490 U.S. 386, 394, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). "In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct." *Id.*

"The Fourth Amendment's prohibition against unreasonable seizures of the person applies to excessive-force claims that 'arise[ ] in the context of an arrest or

investigatory stop of a free citizen,' while the Eighth Amendment's ban on cruel and unusual punishment applies to excessive-force claims brought by convicted criminals serving their sentences." *Aldini*, 609 F.3d at 864 (citations omitted). "When neither the Fourth nor the Eighth Amendment serves to protect citizens, courts have applied the Fourteenth Amendment." *Id.* (citing *Lanman v. Hinson*, 529 F.3d 673, 680-81 (6th Cir. 2008)). "[W]hich amendment applies depends on the status of the plaintiff at the time of the incident, whether free citizen, convicted prisoner, or something in between." *Id.* at 865 (citing *Gravely v. Madden*, 142 F.3d 345, 348-49 (6th Cir. 1998)).

Here, Richardson was arrested on a *capias* issued by the Montgomery County Juvenile Court because of his failure to appear at child-support related hearings. *See* doc. 123-4 at PageID 3627-28. As noted, later on the same day of his arrest -- without having ever appeared before a judge following his arrest, the Juvenile Court -- presumably having found Richardson in contempt for his failure to appear, failure to pay child support obligations, or both -- issued an entry imposing a 30-day sentence on Richardson, but also stating that he could be released from jail upon the payment of $2,500.00 to the SEA. Doc. 123-6 at PageID 3630.

From the Court's perspective, to identify the Amendment applicable to Plaintiff's excessive force claim, the critical determination is whether the sentence or sanction imposed upon Richardson by the Juvenile Court was criminal or civil. If the contempt sanction is civil, "the Eighth Amendment is inapplicable to such a sentence[.]"

*United States v. Dien*, 598 F.2d 743, 745 (2d Cir. 1979) (citing *Uphaus v. Wyman*, 360 U.S. 72, 81, 79 S. Ct. 1040, 3 L. Ed. 2d 1090 (1959); *Ingraham v. Wright*, 430 U.S. 651, 667-68, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977)); *see also Spallone v. United States*, 487 U.S. 1251, 1257, 109 S. Ct. 14, 109 S. Ct. 20, 101 L. Ed. 2d 964 (1988) (stating that "it appears settled that the Cruel and Unusual Punishments Clause does not apply to civil contempt sanctions"); *Wronke v. Champaign Cty. Sheriff's Office*, 132 F. App'x 58, 61 (7th Cir. 2005) (noting that "Eighth Amendment does not apply to a civil contempt sentence").[6] On the other hand, if the sanction imposed was for criminal contempt, the Eighth Amendment applies to Plaintiff's excessive force claim. *See United States v. United Mine Workers of Am.*, 330 U.S. 258, 365 n.30, 67 S. Ct. 677, 91 L. Ed. 884 (1947) (noting that "the protection against cruel and unusual punishments in the Eighth Amendment applies to criminal contempt").

"[T]he characterization of [a] proceeding and the relief given as civil or criminal in nature, for purposes of determining the proper applicability of federal constitutional protections, raises a question of federal law rather than state law." *Hicks on Behalf of Feiock v.*

6. Based upon this Supreme Court authority, the Court finds unpersuasive the reasoning in *Lewis v. Stellingworth*, No. 07-CV-13825, 2009 U.S. Dist. LEXIS 40724, 2009 WL 1384149, at *6 (E.D. Mich. May 14, 2009), in which that court -- citing Michigan *state* law -- concluded "[t]he distinction between civil contempt and criminal contempt in the context of deciding the appropriate constitutional standard to be applied to Lewis' excessive force claim is inconsequential."

*Feiock*, 485 U.S. 624, 630, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988). Under federal law,[7] if the sanction or relief imposed "is for civil contempt the punishment is remedial, and for the benefit of the complainant." *Id.* at 631. If, however, the sanction or relief imposed "is for criminal contempt the sentence is punitive, to vindicate the authority of the court." *Id.* at 630-31 (citation omitted). Courts can ascertain "[t]he character of the relief imposed . . . by applying a few straightforward rules." *Id.* at 631. Namely, "the relief provided is a sentence of imprisonment, it is remedial if 'the defendant stands committed unless and until he performs the affirmative act required by the court's order[.]" *Id.* However, the sanction "is punitive if 'the sentence is limited to imprisonment for a definite period.'" *Id.*

Here, the sanction imposed by the Juvenile Court was a 30-day sentence in jail unless and until Richardson paid $2,500 to SEA. *See* doc. 123-6 at PageID 3630. Accordingly, under the circumstances, the Court concludes that Richardson was being held for civil contempt and,

7. Similarly, under Ohio law, "it is usually said that offenses against the dignity or process of the court are criminal contempts, whereas violations which are on their surface offenses against the party for whose benefit the order was made are civil contempts." *State v. Kilbane*, 61 Ohio St. 2d 201, 400 N.E.2d 386, 390 (Ohio 1980). Further, as a general principle, "civil contempt is characterized by conditional sanctions, *i.e.*, the contemnor is imprisoned until he obeys the court order[,]" whereas "[c]riminal contempt . . . is usually characterized by an unconditional prison sentence or fine." *Denovchek v. Bd. of Trumbull Cty. Comm'rs*, 36 Ohio St. 3d 14, 520 N.E.2d 1362, 1364 (Ohio 1988).

as a result, the Eighth Amendment Cruel and Unusual Clause cannot and does not apply. *See Spallone*, 487 U.S. at 1257. Instead, because Richardson was neither a convicted prisoner nor a free citizen, the undersigned concludes that he falls within the "gray area" where "the Fourteenth Amendment's more generally applicable Due Process Clause governs to bar a governmental official's excessive use of force." *Burgess v. Fischer*, 735 F.3d 462, 472 (6th Cir. 2013); *see also Walters v. Cty. of Charleston*, No. CA 2:01-0059-18, 2002 U.S. Dist. LEXIS 28691, 2002 WL 34703346, at *3 (D.S.C. Feb. 7, 2002).[8]

### 2. Fourteenth Amendment Excessive Force Violation

Under the Fourteenth Amendment, Plaintiff's burden is to "show . . . that the force purposely or knowingly used against him was objectively unreasonable." *Morabito*, 628 F. App'x at 357 (citing *Kingsley*, 135 S.Ct. at 2473).

8. Because the Court finds that the Eighth Amendment does not apply to this case in the absence of a criminal punishment, what the Court is left with is a claim arising either under the Fourth or Fourteenth Amendment, and the analysis under both is the same. *See Clay v. Emmi*, 797 F.3d 364, 369 (6th Cir. 2015) (stating that, following the Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S.Ct 2466, 2473, 192 L. Ed. 2d 416 (2015), an "excessive force claim brought under the Fourteenth Amendment's Due Process Clause is subject to the same objective standard as an excessive force claim brought under the Fourth Amendment"); *see also Morabito v. Holmes*, 628 F. App'x 353, 357 (6th Cir. 2015). Thus, the same outcome would result regardless of whether the Court applies the Fourth Amendment or the Fourteenth Amendment.

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In *Kingsley*, the Supreme Court held that an excessive force analysis under the Fourteenth Amendment -- as opposed to under the Eighth Amendment -- contains no subjective reasonableness inquiry. *See Kingsley*, 135 S. Ct. at 2472-73. Thus, the Court's only inquiry under a Fourteenth Amendment excessive force analysis is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Clay*, 797 F.3d at 370.

In determining objective reasonableness, courts consider a number of factors, such as "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." *Kingsley*, 135 S. Ct. at 2466. Under this objective inquiry, "[a]n officer's evil intentions will not make a Fourth Amendment violation" just as "officer's good intentions [will not] make an objectively unreasonable use of force constitutional." *Graham*, 490 U.S. at 397.

The County Defendants argue that Plaintiff cannot show a genuine issue of material fact concerning objective unreasonableness because no evidence shows that any of the County Defendants applied compressive force to Richardson's torso during the five minutes before his death. Doc. 114 at PageID 3340. The County Defendants argue that, to survive summary judgment, Plaintiff must

show an issue of fact within these limited confines based upon the testimony of Plaintiff's expert Daniel Spitz, M.D., who the County Defendants contend testified that: (1) restraint asphyxia occurs only when force is applied to the torso; and (2) the relevant time period at issue is the last five minutes of the twenty-two minute event. Doc. 114 at PageID 3429, 3340.

The Court finds the County Defendants' limited focus, concerning the time frame and the type of compressive force applied, to be unfounded. First, Dr. Spitz's testimony is equivocal on whether compressive force to the torso itself is the only use of force that can lead to asphyxia of restrained individuals held in a prone position. *See* doc. 99 at PageID 2414. Further, Dr. Spitz's testimony does not support the County Defendants' contention that the five minutes before Richardson's death is the only relevant period of time in which the force applied should be assessed. *Id.* Specifically, Dr. Spitz testified:

> Q. So really, when we're talking about positional asphyxia, restraint asphyxia, I guess the defining feature to that is going to be some sort of pressure on the subject, correct?
>
> A. Correct. *Some type of compressional force not allowing the chest to expand fully.*
>
> Q. And we're talking about compressional force on the torso,[9] right?

9. It should be noted that Dr. Spitz defines "torso" to include

A. Correct.

Q. Not the legs?

A. Well, I would say that you're correct but many times people use their arms and their legs in order to help with respiratory movements. In other words, if I have a compressive force on my back and I'm able to use my arms to give myself some leverage to take pressure off of my chest, that's going to allow me to breathe more effectively even with pressure on my back. If I'm able to bend my knees so that I can take pressure off my torso, again, that's going to allow me to facilitate respiratory movements even with a compressive force on the back.

*If you completely immobilize or limit movement of the legs and arms and put pressure on the back, there's no way to alleviate any of that pressure. Over time, you're going to basically tire. Respiratory movements will ultimately stop. And if this is prolonged like it was in this case, the outcome is going to be what we have here.*

Q. From your review of the literature and your experience, is there a time period that you look at to define prolonged or does it depend

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the upper back and neck. *See* doc. 99 at PageID 2417; doc. 123-1 at PageID 3582, 3605.

on the situation? I guess what do you mean by prolonged?

A. Well, many cases where somebody is put in a prone position does not result in a fatal outcome because it's brief. In other words, even if you completely limit someone's ability to breathe and you do it over a period of seconds, the outcome is not going to be bad in most situations. *You don't even need to have full compressive force to cause death if it's going to be over a prolonged period of time. Certainly, 22 minutes is a prolonged period of time*. And as I indicated, most of that, there were periods of prone restraint and then there were are periods of where the body [wasn't] entirely prone. There may be some slight recovery during that period of time where the individual is not entirely prone. It's the last five, six minutes that are the most detrimental. But, obviously, *Mr. Richardson is already in a compromised state leading into those last five minutes because he's already been involved in an active restraint and struggling and having extreme energy expenditure and stress on the organs leading up to that last five minutes.*

*Id.* (emphasis added). A reasonable juror could conclude, based upon Dr. Spitz's testimony, that compressive restraint of Richardson's entire body -- including some force applied to his back and legs -- in-and-out of a prone position over a twenty-two minute period, led to his death. *Id.*

Further, contrary to the County Defendants' contention, evidence has been presented showing compressive restraint of Richardson (including to his torso) for much of the twenty-two minute period of time, including during the five minutes before Richardson's death. Jurors viewing the jail video of the incident could reasonably conclude that officers applied compressive force upon a restrained Richardson's back, shoulder blades, shoulders, neck, hands, waist, thighs and lower legs throughout much of the twenty-two minute ordeal. *See* doc. 116 (*i.e.*, the jail video filed manually with the Court at the request of all parties); *see also Jennings v. Fuller*, 659 Fed. Appx. 867, 2016 WL 4727274, at *3 (6th Cir. 2016) (stating "[a] jury looking at the video could readily conclude" that significant pressure was applied to an inmate's back).

In addition to the jail video, witnesses Jason Haag and Keith Wayne -- both inmates at the Jail at the time of the incident -- testified that officers applied compressive force to Richardson's neck, head, shoulders and back as he continually told officers that he could not breathe. *See* doc. 92 at PageID 1587, 1593, 1603-06; doc. 93 at PageID 1637. The County Defendants urge the Court to exclude the testimony of these two witnesses as a matter of law under *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007), as inherently not credible based upon their limited or completely obstructed view. In *Scott*, the Supreme Court held that, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for

purposes of ruling on a motion for summary judgment." *Scott* 550 U.S. at 380. In that case, a video of the incident at issue -- a high speed car chase -- told "quite a different story" than respondent's testimony offered in opposition to summary judgment. *Id.* at 379-80. Here, a reasonable jury could conclude that the aforementioned Jail video actually corroborates much of the testimony offered by Haag and Wayne concerning what they allegedly saw on May 19, 2012.[10] Thus, the Court declines to exclude the testimony of Haag and Wayne under *Scott* or otherwise assess the credibility of such testimony for purposes of summary judgment.[11]

Further, the Court is cognizant that "[e]ach defendant's liability must be assessed individually based on his [or her] own actions." *Pollard v. City of Columbus, Oh.*, 780 F.3d 395, 402 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 217, 193 L. Ed. 2d 130 (2015) (citing *Binay v. Bettendorf*, 601 F.3d 640, 650 (6th Cir. 2010)). Specifically, with regard to excessive force claims, "a plaintiff must prove that the officer (1) actively participated in the use of excessive force, (2) supervised the officer who used excessive force, or (3) owed the victim a duty of protection against the use of excessive force." *Id.* (citation omitted).

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10. The County Defendants provide no basis upon which the Court could exclude the testimony of Haag and Wayne concerning what they heard during the incident.

11. The Court declines to find, based upon the jail video or still photos provided by Defendants, that any of the jail inmates were wholly unable to view events from their vantage points in their cells. Credibility on this basis should be determined by the fact-finder at trial based upon the evidence as a whole.

In this instance, all of the County Defendants either actively participated in the use of allegedly excessive force or supervised the other officers. The Court, as set forth above, declines to limit its inquiry to the five minutes immediately preceding Richardson's death and, instead, considers the incident as a whole. Doc. 99 at 2414 (wherein Dr. Spitz testified "Richardson is already in a compromised state leading into those last five minutes because he's already been involved in an active restraint and struggling and having extreme energy expenditure and stress on the organs leading up to that last five minutes").

As noted previously, evidence shows that Jackson, Lewis, Johnson, Stumpff and Beach all participated in cuffing Richardson while in a prone position. *See* doc. 89 at 1381. Marshall applied pressure to Richardson's right shoulder while he was restrained to control Richardson's movement, and he admitted that, at times, he placed one to two hands on Richardson's back. Doc. 87 at PageID 1309-10. Stumpff restrained Richardson near his head at the left shoulder to prevent him from lifting his shoulder. Doc. 89 at PageID 1385. Johnson straddled Richardson's lower body at his thigh/hip area. Doc. 84 at PageID 1163-64. For up to nine minutes, Henning kneeled over Richardson's legs. Doc. 82 at PageID 1085. Beach relieved Johnson after about seven minutes and continued straddling Richardson legs. Doc. 84 at PageID 1169; doc. 77 at PageID 816-17. Fifteen minutes into the incident, Mayes restrained Richardson's head, doc. 88 at PageID 1351, and video evidence can reasonably be construed to show he placed significant pressure on the back of Richardson's head

and neck. *See* doc. 116. Finally, Wittman came onto the scene approximately sixteen minutes into the incident and restrained Richardson's left arm. Doc. 90 at PageID 1426.

In addition to the foregoing, both Jackson and Lewis were supervisors on the scene. A supervising official can be individually liable under § 1983 where "the supervisor either encouraged the specific incident of misconduct or in some other way directly participated in it." *Peatross v. City of Memphis*, 818 F.3d 233, 242 (6th Cir. 2016). Thus, "'at a minimum,' the plaintiff must show that the defendant 'at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.'" *Id.* (citing *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999)).

Here, issues of fact remain concerning the individual supervisor liability of Jackson and Lewis based upon -- at a minimum -- the fact that Jackson and Lewis participated in cuffing Richardson; were on the scene while Richardson pleaded to officers that he could not breathe; and were on the scene while subordinate officers restrained Richardson to the floor for what a jury could conclude was an extended and unreasonable period of time. Doc. 83 at PageID 1112-17; doc. 83 at PageID 1231. In addition, a disputed issue of fact remains as to whether Lewis (and potentially Jackson) refused Medic Stockhauser's medical advice to cuff Richardson's hands in the front and to place him on his back so that he could be properly assessed. Doc. 108 at PageID 3266, 3274-76.

Based upon all of the foregoing, the undersigned finds no merit to Defendants' arguments in this regard and finds that genuine issues of material fact remain concerning the reasonableness of the force used in this case.[12]

### 3. Clearly Established Right

The next step in the qualified immunity analysis concerns whether the right allegedly violated by the individual County Defendants was "clearly established" at the time of Richardson's death. *See supra*. A right is "clearly established" when "existing precedent . . . placed the statutory or constitutional question beyond debate." *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1774, 191 L. Ed. 2d 856 (2015) (citing *al-Kidd*, 563 U.S. at 741). The Supreme Court has instructed courts to "not define clearly established law at a high level of generality[,]" such as "that an unreasonable search or seizure violates the Fourth Amendment[.]" *al-Kidd*, 563 U.S. at 742. Instead, "[t]he dispositive question is 'whether the violative nature of particular conduct is clearly established'"; an inquiry that "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix v. Luna*, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015) (citations and internal quotations omitted).

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12. The undersigned would reach the same conclusion if utilizing a heightened standard for analyzing the reasonableness of the force used under the Eighth Amendment. *See McKinney v. Lexington-Fayette Urban Cty. Gov't*, No. 5:12-CV-360-KKC, 2015 U.S. Dist. LEXIS 85319, 2015 WL 4042157, at *8 (E.D. Ky. July 1, 2015), *aff'd in part, rev'd in part sub nom. McKinney v. Lexington-Fayette Urban Cty. Gov't*, 651 F. App'x 449 (6th Cir. 2016).

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In finding a right "clearly established," the Court need not rely upon "a case on point," *id.*, or even "a prior case [that is] 'fundamentally' or 'materially' similar to the present case[.]" *Baynes v. Cleland*, 799 F.3d 600, 613 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 1381,194 L. Ed. 2d 361 (2016). Instead, such a right need only be defined "in a particularized context," such as finding a Fourth Amendment violation when state actors use "excessively forceful or unduly tight handcuffing." *Baynes*, 799 F.3d at 614. Such a "level of particularity in defining the constitutional right easily meets the standards set out by the Supreme Court[.]" *Id.*

With regard to the constitutional violations alleged here, the Sixth Circuit, in 2004, held that "[c]reating asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect constitutes objectively unreasonable excessive force." *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004). Further, it is "clearly established that putting substantial or significant pressure on a suspect's back while that suspect is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force." *Id.* at 903. In fact, "[t]he prohibition against placing weight on [a person's] body *after* [that person is] handcuffed[,]" even if not in a prone position, is "clearly established[.]" *Martin v. City of Broadview Heights*, 712 F.3d 951, 961 (6th Cir. 2013) (emphasis in original) (finding that such prohibition was clearly established at the time of the August 2007 incident in that case).

Based upon the foregoing, the undersigned concludes that, at the time of the May 19, 2012 incident in this case, it was "clearly established" that forcibly restraining an individual in a prone position for a prolonged period of time is unconstitutional.[13] As a result, the undersigned finds the County Defendants' request for qualified immunity without merit.

## B. Deliberate Indifference

"The Eighth Amendment's prohibition on cruel and unusual punishment generally provides the basis to assert a § 1983 claim of deliberate indifference to serious

13. The parties suggest that the Supreme Court in *Kinsgley* announced a new standard for determining excessive force claims under the Fourteenth Amendment. *See* doc. 114 at PageID 3428; doc. 123 at PageID 3559. Some courts, however, find that "the central holding of *Kingsley* . . . had been the law since *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)." *Shuford v. Conway*, No. 16-12128, 666 Fed. Appx. 811, 2016 U.S. App. LEXIS 20717, 2016 WL 6820764, at *4 (11th Cir. Nov. 18, 2016) (citing *Kingsley*, 135 S.Ct. at 2473-74) (noting that the objective standard applicable to excessive force claims asserted by pretrial detainees under the Fourteenth Amendment "is consistent with our precedent"). The Sixth Circuit notes that the standard applicable to excessive force claims under the Fourteenth Amendment "was unclear" "[u]ntil very recently" when the Supreme Court issued its decision in *Kingsley. See Coley v. Lucas Cty., Oh.*, 799 F.3d 530, 538 (6th Cir. 2015) Regardless of whether *Kingsley* affirmed previously existing Supreme Court precedent or clarified unsettled law, the undersigned concludes that it does not impact the qualified immunity analysis set forth herein. *See Morabito*, 628 F. App'x at 357-58 (finding a clearly established constitutional right despite the intervening holding of *Kingsley*).

medical needs, but where that claim is asserted on behalf of a pre-trial detainee, the Due Process Clause of the Fourteenth Amendment is the proper starting point." *Phillips v. Roane Cnty., Tenn.*, 534 F.3d 531, 539 (6th Cir. 2008) (citing *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983)). As noted above, Richardson was not a convicted criminal inmate and, therefore, the Eighth Amendment cannot govern the deliberate indifference claims alleged in this case. *See supra*.

The determination as to whether a state actor acted with deliberate indifference in violation of either the Eighth or Fourteenth Amendment consists of an objective and subjective inquiry. *Smith v. Erie Cnty. Sheriff's Dep't*, 603 F. App'x 414, 419 (6th Cir. 2015) (citations omitted).[14]

14. Following the Supreme Court's recent holding in *Kingsley, supra*, "it is unclear whether courts should continue to use the Eighth Amendment's deliberate-indifference standard to analyze inadequate-medical-care claims brought by pretrial detainees pursuant to the Due Process Clause." *Wilber*, 2016 U.S. Dist. LEXIS 29784, 2016 WL 892800, at *6. The Sixth Circuit -- while noting *Kingsley* in the context of assessing an excessive force claim under the Fourteenth Amendment -- has continued to "require [ ] plaintiff to establish a subjective component" to demonstrate a deliberate indifference claim under the Fourteenth Amendment, albeit, without specifically considering the applicability of *Kingsley* to a deliberate indifference claim. *See Morabito*, 628 F. App'x at 358. Absent argument to the contrary by Plaintiff, *see* doc. 124 at PageID 3719 (arguing applicability of a subjective inquiry to the deliberate indifference claim in this case), and relying on *Morabito, supra*, the undersigned declines to find that *Kingsley* altered the deliberate indifference test under the Fourteenth Amendment.

"The objective criterion requires a plaintiff to show a 'sufficiently serious medical need[,]'" whereas "[t]he subjective requirement demands a 'showing of more than mere negligence, but something less than specific intent to harm or knowledge that harm will result is required.'" *Smith*, 603 F. App'x at 419.

Here, because facts of record -- when viewed in a light most favorable to Plaintiff -- sufficiently create a dispute of fact as to whether Richardson laid restrained in a predominately prone position for a substantial length of time, *i.e.*, twenty-two minutes, reasonable minds could conclude that Richardson was suffering from an obvious serious medical need. *Cf. Jones v. City of Cincinnati*, 507 F. App'x 463, 469 (6th Cir. 2012); *May v. Twp. of Bloomfield*, No. 11-14453, 2013 U.S. Dist. LEXIS 74437, 2013 WL 2319323, at *14 (E.D. Mich. May 28, 2013) (finding the existence of an obvious serious medical need where decedent, "after physically exerting himself in a struggle with . . . [o]fficers" "was face down on the ground, with his arms handcuffed behind his back, for approximately three minutes").

Further, genuine issues of material fact remain concerning the subjective component of the deliberate indifference claim. Evidence, viewed in a light most favorable to Plaintiff, demonstrates that Richardson continually told those on the scene that he could not breathe. Doc. 92 at PageID 1587. Officer Stumpff agrees that Richardson may have indicated to those on the scene his inability to breathe. Doc. 89 at PageID 1375. Officer Wittman testified that there was cause to be concerned

about Richardson's ability to breathe. Doc. 90 at PageID 1424. Despite this cause for concern, the individual County Defendants each participated -- or supervised -- in Richardson's restraint for up to twenty-two minutes. *See supra*; *see also Lanman*, 529 F.3d at 685-89. These disputed facts preclude summary judgment with regard to the individual County Defendants. *Lanman*, 529 F.3d at 685-89. Further, Richardson's right to be free from such conduct was clearly established as of May 19, 2012. *See supra*; *see also Lanman*, 529 F.3d at 685-89.

### C. *Monell* Liability; Failure to Train, Supervise and Investigate

Section 1983 imposes liability on any "person who, under color of any statute, ordinance, regulation, custom or usage, of any State" subjects another to "the deprivation of any rights, privileges, or immunities secured by the Constitution or laws." 42 U.S.C. § 1983. Local governments -- such as municipalities, counties or townships -- are considered persons under § 1983, and "may be sued for constitutional deprivations." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). However, such entities cannot be held liable for the acts of its officials on a *respondeat superior* theory. *Id.* at 693. Instead, an official policy or custom must be the "moving force" behind the alleged constitutional deprivation. *See City of Canton v. Harris*, 489 U.S. 378, 389, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989). To demonstrate *Monell* liability, one must: (1) identify the policy or custom; (2) connect the policy to the governmental entity; and (3) show a particular injury of a constitutional magnitude incurred because of

that policy's execution. *Alkire v. Irving*, 330 F.3d 802, 815 (6th Cir. 2003) (internal citations omitted).

A governmental entity's "failure to [adequately] train and supervise" employees "about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983[.]'" *Shadrick v. Hopkins Cty., Ky.*, 805 F.3d 724, 737 (6th Cir. 2015) (citations omitted); *see also Gregory v. City of Louisville*, 444 F.3d 725, 753 (6th Cir. 2006) (stating that "courts recognize a systematic failure to train police officers adequately as custom or policy which can lead to city liability" under § 1983).

To prevail on these claims against a government entity under §1983, Plaintiff must show training and supervision provided: (1) "is inadequate to the tasks that the officers must perform; (2) that the inadequacy is the result of the [County's] deliberate indifference; and (3) that the inadequacy is closely related to or actually caused the plaintiff's injury." *Brown v. Chapman*, 814 F.3d 447, 463 (6th Cir. 2016); *see also Shadrick*, 805 F.3d at 737 (stating that a plaintiff's "burden under § 1983 is to prove that [the entity's] failure to train and supervise its [employees] . . . amounted 'to deliberate indifference to the rights of persons with whom the [employees] come into contact"); *Glowka v. Bemis*, No. 3:12-CV-345, 2015 U.S. Dist. LEXIS 166997, 2015 WL 8647702, at *5 (S.D. Ohio Dec. 14, 2015). "[E]vidence of a policy of deliberate indifferences" can also be found where a Sheriff's Office fails "to investigate [the] incident and punish the responsible parties." *Leach v. Shelby Cty. Sheriff*, 891 F.2d 1241, 1248 (6th Cir. 1989).

Here, with regard to training and supervision, Berg, a corrections expert, testifies that, within the field of corrections, it has long been understood that pinning individuals to the ground in prone restraint for unreasonably long periods of time is dangerous and likely to cause death. Doc. 123-8 at PageID 3636. Berg further testifies that it is necessary to adequately train officers on such policies. *Id.* The 2009 Ohio Executive Order discussed above prohibited all state systems, including the ODRC -- who is responsible for setting minimum standards for Ohio jails -- from "limit[ing] or control[ling] the movement or normal functioning of any portion, or all, of an individual's body while the individual is in a face-down position for an extended period of time." Doc. 96-2 at PageID 2110. Similarly, written policies of the Jail itself prohibit "placing prisoners who are in restraints in prone . . . position[][.]" Doc. 96-4 at PageID 2131.

Despite the foregoing and the existence of an actual Jail policy, however, County Defendants -- specifically supervising officer Sergeant Lewis -- testified that there was "nothing in our training that says we cannot have somebody in a prone position and handcuffed." Doc. 85 at PageID 1238; doc. 90 at PageID 1420 (wherein Defendant Stumpff testified that "I've been through many trainings, and I've never been told not to do that"). In fact, evidence of record suggests that officers are trained to do the opposite, *i.e.*, place people in a prone position with hands cuffed behind their back. Doc. 88 at PageID 1339. Such evidence creates a genuine issue of material fact precluding summary judgment on behalf of the Sheriff in his official capacity. *See Martin v. City of Broadview*

*Heights*, No. 1:08 CV 2165, 2011 U.S. Dist. LEXIS 92466, 2011 WL 3648103, at *9-10 (N.D. Ohio Aug. 18, 2011), *amended*, No. 1:08 CV 2165, 2011 U.S. Dist. LEXIS 125743, 2011 WL 5361062 (N.D. Ohio Oct. 31, 2011), *and aff'd*, 712 F.3d 951 (6th Cir. 2013) (finding an issue of act concerning "deliberate indifference" in a positional asphyxia case where "the City knew, as evidenced by the promulgation of its Policies, that its police officers would use force to restrain and arrest citizens, yet failed to follow accepted professional standards in training its officers of how to properly apply such force").[15]

Further, evidence of record -- demonstrating that subsequent investigation into the incident involved no interview of any of the officers involved (doc. 79 at PageID 887), no review of the Jail's policies (doc. 81 at PageID 1053), no use of force investigation (doc. 81 at PageID 1040), and that Sheriff Plummer approved a finding that the Defendant officers provided basic medical care to Richardson (doc. 79-1 at PageID 912) -- create an issue of material fact as to whether an adequate and meaningful investigation was conducted. *Baker v. Union Twp., Ohio*, No. 1:12-CV-112, 2013 U.S. Dist. LEXIS 119475, 2013 WL

15. In their motion to strike (doc. 150), the County Defendants seek to strike the testimony of Berg concerning the adequacy of officer training. Defendants argue that such opinion should be stricken because it is improperly based solely "on the fact that the incident itself occurred." Doc. 150 at PageID 4000-01. However, Berg's opinion is based on more than just the occurrence of the incident itself, and is also based upon the testimony of the County Defendants themselves. *See* doc. 98 at PageID 2325. Accordingly, the County Defendants' motion (doc. 150) in this regard is **DENIED**.

4502736, at *24 (S.D. Ohio Aug. 22, 2013), *aff'd in part, appeal dismissed in part sub nom. Baker v. Union Twp.*, 587 F. App'x 229 (6th Cir. 2014).

Based upon the foregoing, the Court finds Plaintiff has presented evidence creating a genuine issue of material fact as to the County's maintenance of a policy permitting the unconstitutional use of prone restraint and its failure to train and supervise concerning the use of such restraint and the high risk of asphyxia that may result from the use of such force. *See Martin*, 2011 U.S. Dist. LEXIS 92466, 2011 WL 3648103, at *9-10 (finding an issue of act concerning "deliberate indifference" in a positional asphyxia case where "the City knew, as evidenced by the promulgation of its Policies, that its police officers would use force to restrain and arrest citizens, yet failed to follow accepted professional standards in training its officers of how to properly apply such force").

**D. State Law Claims**

Finally, the County Defendants move for summary judgment on Plaintiff's state law wrongful death claims premised on the County Defendants' alleged assault and battery of Richardson. *See* doc. 114 at PageID 3450-52. The County Defendants argue that, insofar as Plaintiff asserts an assault and battery claim against Sheriff Plummer in his official capacity, the Sheriff is immune under Ohio Rev. Code § 2744.02. *Id.* at PageID 3451-52. Plaintiff sets forth no specific argument in opposition to the County's motion in this regard (*see* doc. 123 at PageID 3573) and, therefore, the Court finds the County

Defendants' argument in this regard to be unopposed and such claim abandoned. *Brown v. VHS of Michigan, Inc.*, 545 F. App'x 368, 372 (6th Cir. 2013) (stating that "a plaintiff is deemed to have abandoned a claim when a plaintiff fails to address it in response to a motion for summary judgment").

Even assuming, *arguendo*, that such claim has not been abandoned, summary judgment on the wrongful death claim as asserted against Sheriff Plummer in his official capacity is proper. Under Ohio law, Ohio political subdivisions -- such as Montgomery County, Ohio and the MCSO -- are entitled to immunity for torts, subject to limited exceptions not applicable here. *See* Ohio Rev. Code § 2744.02(A)(1) (stating that, subject to specific exceptions not applicable here, "a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental[16] or proprietary function"). Claims against Sheriff Plummer in his official capacity are, in essence, claims against the political subdivision itself. *See Petty v. Cty. of Franklin, Oh.*, 478 F.3d 341, 349 (6th Cir. 2007). In light of the foregoing, and absent specific opposition by Plaintiff, the Court finds Sheriff Plummer is entitled to immunity on Plaintiff's state law claims under Ohio Rev. Code § 2744.02.

16. The operation of a jail "is a governmental function." *Stefan v. Olson*, 497 F. App'x 568, 580 (6th Cir. 2012).

However, the individual County Defendants -- Jackson, Lewis, Johnson, Henning, Beach, Mayes, Marshall, Stumpff, and Wittman -- are not entitled to immunity under Ohio Rev. Code § 2744.02. Instead, under Ohio law, employees of political subdivisions are entitled to immunity under Ohio Rev. Code § 2744.03(A)(6) unless "[t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[.]" While "the threshold for liability" under a recklessness standard "appears to be slightly higher under Ohio law" -- as opposed to a federal "deliberate indifference standard" -- the Court concludes, based upon the foregoing analysis of Plaintiff's deliberate indifference claim, that a reasonable jury could find recklessness sufficient to overcome employee immunity under Ohio Rev. Code § 2744.03(A)(6)(b). *Stefan v. Olson*, 497 F. App'x 568, 581 (6th Cir. 2012). Therefore, summary judgment on Plaintiff's state law wrongful death claims asserted against the individual County Defendants is not appropriate.

**IV.**

Based upon the foregoing, the Court **ORDERS** as follows:

(1) Plaintiff's motion to voluntarily dismiss all claims against Defendant Kruse (doc. 124 at PageID 3696) is **GRANTED** and such claims are hereby **DISMISSED** pursuant to Fed. R. Civ. P. 21 with prejudice;

(2) The County Defendants' motion for summary judgment (doc. 114) is **GRANTED** with regard to state claims asserted against Sheriff Plummer in his official capacity, but otherwise **DENIED**;

(3) The NaphCare Defendants' motion for summary judgment (doc. 112) is **DENIED AS MOOT**; and

(4) The County Defendants' motion to strike (doc. 150) is **DENIED** on the merits as to the testimony of Michael Berg, but otherwise **DENIED AS MOOT** with regard to witness statements.

**IT IS SO ORDERED**.

Date: February 6, 2017

/s/ Michael J. Newman
Michael J. Newman
United States Magistrate Judge

## APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED MAY 1, 2018

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID M. HOPPER, SPECIAL ADMINISTRATOR OF THE ESTATE OF ROBERT ANDREW RICHARDSON, SR., DECEASED

*Plaintiff-Appellee,*

v.

MONTGOMERY COUNTY SHERIFF, PHIL PLUMMER; TED JACKSON, SERGEANT; BRIAN LEWIS, SERGEANT; DUSTIN JOHNSON, CORRECTIONS OFFICER; MATHEW HENNING, CORRECTIONS OFFICER; MICHAEL BEACH, CORRECTIONS OFFICER; KEITH MAYES, CORRECTIONS OFFICER; BRADLEY MARSHALL, CORRECTIONS OFFICER; MICHAEL STUMPFF, CORRECTIONS OFFICER; ANDREW WITTMAN, CORRECTIONS OFFICER

*Defendants-Appellants.*

BEFORE: BATCHELDER, Circuit Judge; GRIFFIN, Circuit Judge; WHITE, Circuit Judge;

Upon consideration of the petition for rehearing filed by the appellants,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

**ENTERED BY ORDER OF THE COURT**
Deborah S. Hunt, Clerk
/S/:_____

Issued: May 01, 2018