No. 22-1958

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JENNIFER ROOT BANNON,

Plaintiff-Appellant,

v.

DAVID GODIN, Boston Police Officer;
JOSEPH McMENAMY, Boston Police Officer;
LEROY FERNANDES, Boston Police Officer;
BRENDA FIGUEROA, Boston Police Officer;
COREY THOMAS, Boston Police Officer;
PAUL CONNEELY, Massachusetts State Trooper; and
CITY OF BOSTON,

Defendants-Appellees.

On Appeal From the United States District Court for the District of Massachusetts in Case No. 1:20-cv-11501, Judge Richard G. Stearns

BRIEF FOR PLAINTIFF-APPELLANT JENNIFER ROOT BANNON

Dated: January 24, 2023 *Counsel Listed Inside Cover*

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Federal Rule of Appellate Procedure 34(a)(1) and First Circuit Rule 34.0(a), Plaintiff-Appellant Jennifer Root Bannon ("Plaintiff") respectfully submits that oral argument will help the Court resolve this appeal. This appeal presents important and complex questions about the constitutionality of police use of force and the standards applicable to a court's analysis of motions for summary judgment. Oral argument will aid in the Court's consideration of these issues.

JURISDICTIONAL STATEMENT

Plaintiff filed a complaint in the District Court bringing the following claims[1]:

- **Counts 1 and 3**: 42 U.S.C. § 1983 claims against the Individual Defendants;
- **Counts 2 and 4**: Mass. G.L. c. 12, §§ 11H and 11I claims against the Individual Defendants;
- **Counts 5 and 6**: 42 U.S.C. § 1983 and Mass. G.L. c. 12, §§ 11H and 11I claims against Defendant McMenamy;

[1] Defendants are referred to as follows:

- Boston Police ("BPD") Officers David Godin, Joseph McMenamy, Leroy Fernandes, Brenda Figueroa, and Corey Thomas are individually called "Defendant [Last Name]" and collectively called the "BPD Defendants."
- State Trooper Paul Conneely is called "Defendant Conneely."
- The BPD Defendants and Defendant Conneely are called the "Individual Defendants."
- The City of Boston is called the "City."
- The Individual Defendants and the City are called "Defendants."

- **Count 7**: 42 U.S.C. § 1983 claims against the City;
- **Count 8**: Claim for assault and battery against the Individual Defendants; and
- **Count 9**: Mass. G.L. c. 229, § 2 wrongful death claim against the Individual Defendants.

R.A. 1-37. Plaintiff voluntarily moved to dismiss Counts 3 and 4, which the District Court allowed. Dkts. 98, 100.[2]

The District Court had federal question jurisdiction over Plaintiff's Section 1983 claims under 28 U.S.C. § 1331 and supplemental jurisdiction over Plaintiff's state law claims under 28 U.S.C. § 1367. The District Court entered final judgment in Defendants' favor on December 5, 2022. Addendum 20. Plaintiff timely appealed. R.A. 2814-2815. This Court has jurisdiction under 28 U.S.C. § 1291 because this appeal is from a final judgment disposing of all claims.

STATEMENT OF ISSUES

1. Whether there are genuine issues of material fact about the reasonableness of the Individual Defendants' use of deadly force precluding the entry of summary judgment in their favor.
2. Whether Juston Root's constitutional rights were clearly established such that a reasonable officer would have known that the Individual Defendants' conduct violated those rights.
3. Whether there are genuine issues of material fact about the reasonableness of Defendant McMenamy's uses of force against Root.

[2] District Court docket entries are denoted by "Dkt."

4. Whether there are genuine issues of material fact precluding the entry of summary judgment for the City.

STATEMENT OF THE CASE

I. Factual Background

A. Defendant Godin and Another BPD Officer Shot Root at BWH.

On the morning of February 7, 2020, Plaintiff's brother Juston Root died after the Individual Defendants shot at him 31 times. R.A. 39, 72, 74 (¶¶ 1, 160-166, 178). Earlier that day, Root had driven to the intersection of Fenwood Road and Vining Street in Boston near Brigham & Women's Hospital ("BWH"). R.A. 39 (¶¶ 1, 4). Defendant Godin and BPD Officer Michael St. Peter responded to a call about a person with a gun near BWH. R.A. 39 (¶¶ 5-7). Defendant Godin saw Root's parked car, got out of his cruiser, and then saw Root walking toward him on the sidewalk on Vining Street. R.A. 39 (¶ 8). St. Peter got out of his cruiser in the intersection and stood by the cruiser's engine block. R.A. 40-41, 47-49 (¶¶ 11, 16). As Root's back was turned toward Defendant Godin, Defendant Godin drew his firearm and pointed it at Root. R.A. 41-46 (¶ 16); R.A. 475 (01:25-01:35). Root turned, saw Defendant Godin with his gun drawn, removed a clear plastic paintball gun from his waist, and pointed it below Defendant Godin's waist. R.A. 40, 41-46 (¶¶ 9, 16). Defendant Godin testified that during this interaction, Root twice said, "I'm law enforcement." R.A. 39-40 (¶ 8). Defendant Godin and St. Peter contend they heard gunshots and then fired their weapons at Root. R.A. 40 (¶¶ 10, 12). Both

believed they shot Root, and St. Peter believed Root would "succumb to his injuries." R.A. 40-41, 50, 67 (¶¶ 10, 12-13, 18, 130). Root limped back to his car and drove away. R.A. 50 (¶¶ 17, 22). Neither Defendant Godin nor St. Peter knew the other was at the scene. R.A. 50 (¶¶ 19-20).

The District Court stated that Root "pulled the trigger" of the paintball gun, and that Defendant Godin "returned fire." Addendum 2, 9; *see also id*. at 9 n.3. The evidence does not support these findings. Although Defendant Godin testified that Root pulled the trigger (R.A. 40 (¶ 9)), there is no evidence that the pump action paintball gun was loaded with paintballs or was pumped and ready to fire (R.A. 476-493). Root could not have discharged the paintball gun, and, consequently, Defendant Godin could not have "returned fire." Any assertion to the contrary is disputed.

B. Defendant McMenamy Intentionally "Rammed" Root's Car During the Ensuing Vehicle Pursuit.

After Root got into his car, he drove down Fenwood Road and turned onto Huntington Avenue. R.A. 50 (¶¶ 22-23). Defendant Godin and St. Peter returned to their cruisers and pursued Root. R.A. 50 (¶ 24). Other officers joined the pursuit, including the other Individual Defendants. R.A. 51, 56 (¶¶ 29-31, 55). During the pursuit, Defendant Godin stated over BPD radio for all units to hear that Root had been shot, and the BPD dispatcher said over the radio that Root had been shot. R.A. 51 (¶¶ 25-26); R.A. 470 (01:15-01:19). Defendant Fernandes heard those radio

calls that Root had been shot. R.A. 51, 63 (¶¶ 27, 103). Defendant Thomas was a passenger in the cruiser driven by Defendant Fernandes when those radio calls were made. R.A. 51 (¶¶ 27, 30). Defendant Figueroa did not recall whether she heard the calls. R.A. 51 (¶ 28).

Initially, Defendant Godin was the lead police vehicle in the pursuit, but other BPD cruisers—including one driven by Defendant McMenamy at, according to him, approximately 20 to 30 miles per hour—passed him early on. R.A. 52 (¶¶ 32-33, 36). In violation of BPD Rule 301, § 7.4.3, Defendant McMenamy neither informed Defendant Godin that he was going to pass him nor sought or received permission before doing so. R.A. 52 (¶¶ 34-35); R.A. 1985-86. After passing Defendant Godin and another BPD cruiser, Defendant McMenamy, again in violation of BPD Rule 301 § 7.6.7, used his cruiser to "ram[]" Root's car on Huntington Avenue, which has trolley tracks embedded in it. R.A. 52-54 (¶¶ 37, 39-42, 45-46); R.A. 468 (02:59-03:05); R.A. 1988. Defendant McMenamy described this as a "PIT maneuver." R.A. 52 (¶ 38). He testified that at the time of the PIT maneuver, the pursuit was moving at a "noticeably slow" pace and "as slow as molasses." R.A. 52 (¶ 36); R.A. 468 (03:09-03:13); R.A. 2813 (video showing speed of pursuit before PIT maneuver). The PIT maneuver brought Defendant McMenamy's cruiser and Root's car to a stop. R.A. 52-53 (¶ 39). Defendant McMenamy exited his cruiser and drew his firearm, but Root drove away. R.A. 55 (¶¶ 52-53).

C. Root Was in a Severe Car Accident.

The pursuit continued down Huntington Avenue and onto Route 9 in Brookline. R.A. 56 (¶ 54). At the intersection of Route 9 and Hammond Street in Brookline, Root's car struck other vehicles and was extensively damaged: the airbags deployed, glass shattered, two wheels fell off, and a third tire came off its rim. R.A. 56-57 (¶¶ 56-64, 66). Defendant Conneely "couldn't believe [Root] got out of" the car after the crash, and Defendant Figueroa assumed Root was injured in the crash. R.A. 56 (¶ 58, 61). Root's car came to a stop a few feet away at the entrance to a shopping center parking lot. R.A. 57 (¶ 65); R.A. 471-72.

D. The Individual Defendants Shot and Killed Root.

Root got out of his car, limped around the front of it, and fell onto the adjacent sidewalk. R.A. 57 (¶¶ 67-69); R.A. 471 (00:22-00:42). He got up, limped toward a mulched area next to the sidewalk, and fell again. R.A. 58 (¶¶ 70-72); R.A. 471 (00:42-00:54).

Shelly McCarthy, a bystander with prior EMS certification, had been sitting nearby in her parked car. R.A. 58 (¶¶ 73-74). She observed Root exit his car holding his chest and stumbling aimlessly. R.A. 432 (26:5-7). Because Root was "holding his chest," McCarthy believed he might be having "a cardiac event." R.A. 433 (29:20-22). She did not take her eyes off of him; she ran to his side to help and reached him just as he fell the second time. R.A. 58 (¶¶ 75-76); R.A. 432, 434 (26:7-

10, 34:1-6); R.A. 473 (00:27-00:30). According to McCarthy, Root was having a "medical crisis": he appeared to be covered in blood, did not speak, "was struggling to breathe," "making a lot of gurgling noises," "gurgling blood," appeared to have the "[l]ights on[,] no one home," and his eyes were "bouncing around like ping-pong balls" and then went to the back of his head and stopped moving. R.A. 434-35 (34:12, 39:5-40:2); R.A. 58-59 (¶¶ 77-81). The entire time she saw Root, "his right hand remained on his chest," "[h]is left hand remained hanging down," he did not try to get up, and, in McCarthy's opinion, he could "absolutely not" have gotten up onto his feet. R.A. 59 (¶¶ 82-83).

While McCarthy was attempting to help Root, police arrived simultaneously screaming different commands. R.A. 59-62 (¶¶ 84-100). According to the Individual Defendants, the commands included: "Let me see your hands," "Get on the ground," "Show us your hands," "Stay on the ground and show me your hands," "Get down," "Let me see your hands," and "Stay down." R.A. 60-62 (¶¶ 90-91, 94, 99, 100); R.A. 1439-40 (¶ 2). Although some Individual Defendants claimed in their initial interviews with law enforcement investigators that they demanded that Root "drop the gun," the audio from Defendant Figueroa's BWC recording of the shooting does not support this claim, and none of the Individual Defendants made this claim during their later depositions. R.A. 467 (00:29-00:38). To McCarthy, the commands were unintelligible, "confus[ing]," and "chao[tic]." R.A. 59-60 (¶¶ 84).

Defendants McMenamy, Thomas, and Conneely agreed that the scene was chaotic. R.A. 60 (¶ 89). Notwithstanding the sirens and screaming, according to McCarthy, Root had no reaction. R.A. 437-48 (48:12-49:4).

Massachusetts State Police ("MSP") training materials for Defendant Conneely's recruit class warn that multiple officers on-scene "tend to all give commands/directions at the same time, creating confusion. The key to verbalization is simplicity. If feasible, give simple commands in a clear, loud voice. … If there is more than one officer present, the contact (initiating) officer should be the only one to issue commands." R.A. 62 (¶ 101). Along with yelling commands at Root, officers yelled at McCarthy to get away. R.A. 60 (¶¶ 85, 86).

While the Individual Defendants were yelling different commands at Root, he—according to the Individual Defendants—was "on the ground," was on his knees, was sitting on the ground, was "like in a half lying, half kneeling type of position," "was stumbling," was "lying, kneeling" but "was never able to get up," and was not fleeing. R.A. 60-61, 66, 68-70 (¶¶ 90-91, 120-121, 124-125, 134, 138-140, 148-150).

The Individual Defendants knew Root had been in a serious car accident (R.A. 56-57, 67 (¶¶ 57-64, 130-131)), and at least Defendants Godin and Fernandes believed he had been shot at BWH (R.A. 51 (¶¶ 25, 27)). The Individual Defendants did not attempt to converse with Root, try to assess his condition, or ascertain

whether he was capable of understanding commands. R.A. 63, 67 (¶¶ 103-107, 126, 132). Defendants Fernandes, Figueroa, Thomas, and Conneely testified that they did not hear Root say anything. R.A. 62-63, 67 (¶¶ 102, 105, 126, 132).

While Root was "crouching down" and "fumbling around" in the mulched area, Defendant McMenamy "got real close," "put [his] leg up, and kicked" Root at a "90-degree angle … down to the ground" with "the flat of [his] foot like … a soccer kick." R.A. 63-64 (¶ 108); *see also* R.A. 64 (¶ 109-110).

While McCarthy observed Root clutching his chest with his right hand the entire time she saw him (R.A. 59 (¶ 82)), the BPD Defendants could not see Root's hands or do not remember whether they could see his hands; they acknowledged that his right hand was in his chest area but claim that when they fired at Root, they believed he must have been reaching for a weapon. R.A. 64-70 (¶¶ 112-115, 120, 123, 127, 133, 135-136, 141, 144, 153); R.A. 1439-40 (¶ 1).

Defendant Fernandes did not give Root any warning that he intended to use deadly force (R.A. 65 (¶ 118)); there is no evidence that any officer gave Root any verbal warning either. The Individual Defendants did not take cover and did not use any de-escalation techniques or less-lethal force options like OC spray[3] or a baton.

[3] "OC spray" refers to pepper spray. *See* Oleoresin Capsicum: Pepper Spray as a Force Alternative, National Institute of Justice, United States Depart of Justice (Mar. 1994), *available at* https://www.ojp.gov/pdffiles1/nij/grants/181655.pdf.

R.A. 35-36 (¶¶ 167-172).

After Defendant McMenamy kicked Root, the Individual Defendants opened fire. R.A. 64-72 (¶¶ 110-159). Defendants Figueroa and Conneely claim that they fired because they thought they saw the handle of a gun. R.A. 66, 70-71 (¶¶ 122-123, 154, 156). Defendants Fernandes and Thomas claim that they fired because they heard a gunshot. R.A. 65, 69-70 (¶¶ 116, 146-147). Defendant Godin claims that he fired because he heard another officer say the word "gun." R.A. 67 (¶ 128). Defendant McMenamy claims that he fired because he saw Root stand up and open his jacket, "saw a floating gun in [Root's] chest," and saw Root "reach" in that direction. R.A. 68 (¶¶ 134-135). No other Individual Defendant saw Root stand, and none of the Individual Defendants saw a gun in Root's hand before firing at him. R.A. 64-71 (¶¶ 111, 114-115, 120-121, 125, 129, 133, 138-141, 144-145, 148-150, 153, 157). Root did not possess a firearm. R.A. 76 (¶ 186).

A cell phone video reflects that approximately 15 seconds elapsed between when McCarthy approached Root and when the Individual Defendants opened fire. R.A. 71 (¶ 158); R.A. 473 (00:28-00:43). The entire shooting lasted approximately four seconds. R.A. 72 (¶ 159). When the Individual Defendants fired, they were in a loose line approximately 5-10 feet from Root. R.A. 65-70 (¶¶ 116, 120, 126, 136, 141, 151).

An unloaded plastic bb gun pistol with a metal rod extending from its barrel was recovered in Brookline near Root's body. R.A. 76 (¶ 182). Besides claiming that Root was "reaching" before the shooting, Defendant Conneely claimed that when he rolled Root's body over after the shooting, he recovered the bb gun from Root's right hand. R.A. 1556-57 (¶ 47); R.A. 361 (176:1-7). The bb gun was not damaged and did not have blood on it when it was recovered. R.A. 76 (¶¶ 183-185).

E. The Individual Defendants Did Not Give Root Medical Assistance and Instead Crassly Described their Conduct.

The BPD Defendants testified that they did not provide medical aid to Root after the shooting, and BWC footage reflects that they did not. R.A. 74 (¶¶ 176-177); R.A. 467-68. Instead, after the shooting, Defendant Godin told other officers, "I killed the motherf*cker" and "I emptied my magazine on him." R.A. 73 (¶ 173). Defendant Conneely shook Defendant McMenamy's hand after learning that he too had shot Root; Defendant Conneely then told Defendant McMenamy to "shut your f*ckin' mouth," to which Defendant McMenamy replied, "I won't talk." R.A. 73-74 (¶¶ 174-175).

F. Forensic Evidence and Officers' Statements Show Root Was Not Holding the bb Gun When He Was Shot.

Root sustained four gunshot wounds to his right hand (three perforating and one penetrating). R.A. 74-76 (¶¶ 179-181); R.A. 1440 (¶¶ 3-4). Plaintiff's forensic medical expert Dr. Jennifer Lipman opined that if Root had the bb gun "in his [right]

hand at the time that he was shot in Brookline, it would have had blood on it" and, because of the gunshot wounds to Root's right hand, it necessarily would have been damaged. R.A. 1440-41 (¶¶ 5-7).

An officer and a detective from the Brookline Police Department who were at the scene after the shooting told investigators that when Root's body was rolled over, they saw a gun fall out of his chest area (R.A. 1441 (¶¶ 8-9)), not out of his hand.

G. The BPD Defendants Violated BPD Rules by Meeting Together Before Being Interviewed by Law Enforcement Investigators.

Unlike the many witnesses who were interviewed on the day of the fatal shooting, the BPD Defendants were not interviewed by law enforcement investigators until five days later, and Defendant Conneely was not interviewed until seven days later. R.A. 76 (¶ 187); R.A. 364. The BPD Defendants were represented by the same attorney, and between the shooting and the interviews, the BPD Defendants met together as a group with their attorney to prepare for their interviews. R.A. 77 (¶ 188). BPD union president Larry Calderone also attended a portion of that meeting. R.A. 77 (¶¶ 189-190).

BPD Rule 303, § 11 provides that witnesses to a use of force incident must be separated before being interviewed. R.A. 590. BPD Sergeant Detective Marc Sullivan, who signed the BPD's Firearm Discharge Investigation Team's final report on the events of February 7, testified that "it's very important" that officers involved in a deadly use of force incident not speak to each other about the incident before

being interviewed by investigators because "everybody is going to have a different perception of the incident, and … everybody's recollection is going to be different. I want their recollection of the incident." R.A. 77 (¶ 192). Sullivan implied that Calderone has a history of allowing BPD officers to talk to each other before being interviewed; he testified that he has "had several meetings with … Calderone. And it's been confrontational, but we've instilled upon him the importance that his [union] membership shouldn't talk." R.A. 77-78 (¶ 193). Sullivan testified that before learning it at his deposition, he did not know that the BPD Defendants met together to prepare to be interviewed. R.A. 78 (¶ 194). He added that the BPD Defendants having met together to prepare "would taint the interview[s]." R.A. 78 (¶ 195). It was at the post-group-meeting interviews that the BPD Defendants first stated that Root was supposedly reaching before the shooting.

H. The BPD Failed to Discipline the BPD Defendants.

The BPD has not disciplined or retrained the BPD Defendants over their conduct surrounding the events of February 7. R.A. 1460-61 (¶¶ 63-67).

I. The BPD Made Misleading Statements to the Press.

On February 7, the BPD's then-Superintendent-in-Chief Gregory Long made statements to the press.[4] R.A. 1442 (¶ 10). He was reported as having said:

[4] The press conference is at https://www.youtube.com/watch?v=Vew9Lk_4WBs ("YouTube").

(1) In Brookline, "[t]he man got out [of his car] and pulled out the apparent gun again, which officers repeatedly told him to drop, Long said." R.A. 1443 (¶ 16); YouTube at 01:02-01:32.

(2) "After the [vehicle] pursuit played out, authorities were told a 49-year-old valet at Brigham had suffered what appeared to be a gunshot wound, Long said. It's not clear who shot the man, and it's not clear if the man who eventually died ever fired his gun, Long said." R.A. 1442 (¶ 12); YouTube at 01:38-01:57.

(3) "Police fired their own guns at the man [at BWH], but it's not clear if they hit him, and it's not clear if he returned fire, Long said." R.A. 1442 (¶ 13).

(4) "The man then physically assaulted one of the officers [at BWH], leaving the officer mildly injured, Long said." R.A. 1443 (¶ 15); YouTube at 00:41-00:50, 09:31-09:49.

As to Long's first statement, there is no evidence that Root pulled anything out, let alone an apparent gun, in Brookline, and multiple witnesses testified that they never heard any officer instruct Root to drop a gun. R.A. 60, 62 (¶¶ 87, 96-97). As to the second and third statements, Sullivan testified that at no point on February 7 did the BPD have any information that Root had in his possession a firearm that fired bullets. R.A. 1442-43 (¶ 14). As to the fourth statement, there is no evidence

that Root physically assaulted an officer, and Defendant Godin has never claimed that Root physically assaulted him. R.A. 183 (159:19-160:6). Long's statements are baseless, raising the inference that he made them to protect the BPD Defendants at the expense of the truth.

The BPD Defendants' conduct was also ratified by the then-mayor who, at the press conference, praised the officers without any investigation into the appropriateness of their conduct. YouTube at 06:38-07:06.

J. The City Failed to Train its Officers.

1. Vehicle Pursuits

BPD Rule 301 governs pursuit driving and defines the responsibilities of the "Primary Pursuit Unit" ("PPU") and "Secondary Pursuit Unit" ("SPU"). R.A. 1443 (¶¶ 17-18). The PPU, the police vehicle that initiates a pursuit, is supposed to "continue[] as the first police vehicle in the pursuit"; the SPU may not pass the PPU "unless requested to do so over the radio by the [PPU]." R.A. 568, 573 (§§ 3.5, 3.6, 7.4.3). When BPD Officer John Downey—who teaches the Emergency Vehicle Operations Course ("EVOC") at the BPD's Academy—was asked at his deposition whether BPD recruits are taught that they generally should not pass the PPU, he appeared not to know whether recruits are taught that because he responded, "If it's in the rule, yes, they would be taught that, yes." R.A. 1443-44 (¶ 20). But the EVOC training materials do not address that rule. R.A. 1444 (¶ 21). Defendants Figueroa

and McMenamy testified that they were not familiar with the terms PPU and SPU; Defendant McMenamy was not familiar with the rule prohibiting the SPU from passing the PPU. R.A. 1444-45 (¶¶ 25, 27).

Under Rule 301, if the PPU loses sight of the pursued vehicle, he "shall discontinue the pursuit" and turn off lights and sirens. R.A. 1443 (¶ 19). Defendant McMenamy testified that he was not familiar with this requirement. R.A. 1445 (¶ 27). During the February 7 vehicle pursuit, BPD officers lost sight of Root's car but continued driving at a high rate of speed on Route 9 with their sirens on in hopes of finding him. R.A. 1445 (¶ 29).

Rule 301, § 7.6.7 prohibits BPD officers from "us[ing] their police vehicle to deliberately make contact with a pursued vehicle." R.A. 55 (¶ 50). The EVOC training materials do not address that rule. R.A. 1444 (¶ 22). When Defendant McMenamy performed the PIT maneuver, he was not thinking about BPD policy and did not alert anyone that he was planning to hit Root. R.A. 54-55 (¶¶ 48-49).

Defendant McMenamy was not disciplined, retrained, or even spoken to about his violations of Rule 301 on February 7. R.A. 1460 (¶¶ 63, 65-67).

Defendant Godin "do[es] not recall being trained on vehicle pursuits/emergency driving." R.A. 1445 (¶ 26).

2. Use of Force

The BPD's use of force training manuals do not address containment, creating time and distance between an officer and the suspect before using force, or establishing a perimeter around a potentially armed suspect. R.A. 1477 (¶ 121[5]). Defendants Fernandes, Figueroa, and Godin testified that they did not consider using any de-escalation techniques with Root. R.A. 72-73 (¶¶ 167-170). The version of BPD Rule 303 governing the use of deadly force effective as of February 7 did not address de-escalation techniques, and it was not until 2021 that it was revised to require officers to engage in de-escalation. R.A. 1475 (¶ 114). The only de-escalation technique that any Individual Defendant identified during their depositions was talking to a suspect. R.A. 1461, 1464, 1466-67 (¶¶ 68, 80-81, 85.g). Rather than attempting to talk to Root, they simultaneously screamed commands at him in a manner that made it impossible to comprehend, let alone comply. R.A. 59-62 (¶¶ 84-100); R.A. 1439-40 (¶ 2). They did not try to assess Root's condition or ascertain whether he was capable of understanding commands. R.A. 63, 67 (¶¶ 103-106, 126, 132).

[5] This paragraph cites the Use of Force Manuals used to train Defendants Fernandes, Figueroa, and McMenamy. The BPD no longer has the use of force training materials used with Defendant Godin. R.A. 1647. Defendant Thomas' interrogatory answers cite COB 17286-17426 as the Bates numbers of the use of force training manual used to train his 2018 recruit class, but that document is a draft version of the 2019 training manual. R.A. 1679; R.A. 2376-2517.

Plaintiff's use of force expert Scott DeFoe testified that "run[ing] into an open air environment that does not afford [officers] any cover and yell[ing] and scream[ing] commands, many of which are contradictory, simultaneously to an individual at all regardless of the mental state of that individual"—exactly what the BPD Defendants did—"does not comport with … standard police practices." R.A. 1479 (¶ 130). He also testified that the BPD Defendants should have been "looking at containment," "establish[ing] a perimeter," and taking advantage of police "assets and resources" that "afford the officers the opportunity to slow things down and create time and distance." R.A. 1479 (¶ 131). Further, DeFoe testified that their approach of "yelling and running up to someone … is not de-escalating. It's actually escalating the situation." R.A. 1480 (¶ 133).

BPD Officer Darryl Owens, who teaches the use of force and defensive tactics courses at the BPD Academy, testified that officers take a "very fluid" approach to assigning which officer should primarily communicate with a suspect and which should take backup roles. R.A. 1468-71 (¶¶ 96-97). But there is no evidence that any BPD Defendant engaged in any process to assign these roles. When Owens was asked how recruits are trained to give commands in a multi-officer scenario, he could not give an example and, after reiterating that "[w]ho will [take each role] is a very fluid, on-the-job decision," simply responded that officers will "revert to their training." R.A. 1472 (¶ 99).

When Owens was asked, "How is a subject supposed to respond [to] simultaneous commands of, 'Show me your hands,' and 'Don't move'?" he responded, "I don't know how they're supposed to respond. I know how we intend for them to respond is to comply to the commands, hands up and not moving," but he acknowledged that a subject would have to move to show their hands. R.A. 1472-74 (¶¶ 100, 109). Owens admitted that training instructors do not "have discussions with [recruits]" about the juxtaposition and meanings of commands like "Show me your hands" and "Don't move." R.A. 1472-74 (¶¶ 101, 109). He also admitted that it would be "beneficial" if BPD officers had more than 12 hours of use of force training. R.A. 1475 (¶ 113). In addition, the BPD's use of force training materials contain no information similar to what is in the MSP's training that warns against giving simultaneous commands due to the risk of confusion. R.A. 1474-75 (¶ 110).

While BPD training refers to the concept of the "totality of the circumstances," Owens' testimony identifies deficiencies in the training. For example, he testified:

- "[T]he totality of the circumstances is a very broad idea, and sometimes it gets difficult to teach recruits what I mean by it, but it is what the police officer knew going into that moment."
- Whether a suspect is injured and whether other police officers are near an incident each is only "a small part" of the totality of the circumstances.
- Owens does not "personally … teach about how to" evaluate someone's physical condition as part of assessing the totality of the circumstances.

- Assessing whether someone can understand police commands "might be mention[ed]" but is not something he spends a lot of time on.

R.A. 1472-73 (¶¶ 102-107)

As to when deadly force may be justifiable, Owens was unable to answer questions about whether BPD recruits are trained concerning the (in)appropriateness of firing their weapon merely because they hear gunfire. R.A. 1477 (¶ 122). When asked whether BPD recruits are trained to give a warning before using deadly force, Owens responded that commands like "Show me your hands. Don't move. Stay right there. Drop the gun." constitute warnings "depending on the tone" an officer uses. R.A. 1477-78 (¶ 123). He acknowledged that "going hands-on" rather than using deadly force may be appropriate if "officers can't see the hands" even "where there's a reasonable certainty that there's weapons." R.A. 1478 (¶ 124).

The City does not equip patrol officers with less-lethal weapons, like Tasers or shotguns that fire beanbags. R.A. 1478 (¶¶ 125-129).

3. BWCs

BPD Rule 405, § 2.2 requires BPD officers to activate BWCs during vehicle pursuits and "dispatched calls for service involving contact with civilians." R.A. 2031. Officers must "[p]osition and adjust the BWC to record events." R.A. 2034 (§ 3.1.2.b).

Defendants Figueroa, Godin, and McMenamy were required to activate their BWCs during the pursuit and the ensuing shooting; only Defendant Figueroa

activated her BWC before the shooting, but she did not do so until approximately 23 seconds before the pursuit ended. R.A. 53 (¶¶ 43-44, 98); R.A. 1447-48, 1459 (¶¶ 35-36, 60); R.A. 467 (00:00-00:23). In violation of Rule 405, § 3.1.2.b, her arm totally obscured her BWC during seconds before the shooting and during the shooting itself; as a result, there is no video recording of Root immediately before the shooting. R.A. 467 (00:33-00:39); R.A. 1518-19 (¶ 53). Defendant McMenamy turned on his BWC only after the shooting. R.A. 53-54 (¶¶ 43-44). Defendant Godin repeatedly claimed falsely that his BWC was in his duty bag on February 7; BWC footage of him in Brookline and an audit of his BWC establish that he indeed was wearing his BWC on February 7 and recorded two videos with it before interacting with Root. R.A. 1448-59 (¶¶ 36-59); Dkts. 47-53. Defendants Figueroa, Godin, and McMenamy have not been disciplined for violating Rule 405; Defendant Godin also has not been disciplined for his false statements about his BWC. R.A. 1460-61 (¶¶ 63-67).

II. Procedural History

Plaintiff filed the Complaint on August 10, 2020, R.A. 1-34, which the Individual Defendants answered, Dkts. 17-21, 31. The City moved to dismiss for failure to state a claim, which Plaintiff opposed and the District Court denied. Dkts. 22, 32, 33.

On August 8, 2022, the Parties cross-moved for summary judgment ("MSJ").[6] R.A. 2816-27. Each Party opposed the MSJ(s) filed against it. Dkts. 103-116. The District Court heard argument on September 28, 2022. Addendum 21-68. In response to the District Court's questions at the hearing, Plaintiff sought leave to file a post-hearing brief about the City's failure to train its officers, which the District Court allowed. Dkts. 118-120. The City sought leave to file a responsive brief, which the District Court allowed. Dkts. 121, 122. On December 5, 2022, the District Court denied Plaintiff's MSJ, granted Defendants' MSJs, and entered final judgment for Defendants. Addendum 1-20. Plaintiff timely appealed. R.A. 2814-15.

III. Summary Judgment Rulings

The District Court issued five rulings, each of which should be reversed:

First, the Individual Officers' use of deadly force was reasonable because they "were aware that Root was reportedly armed and dangerous"; Root "fled" from BWH and led police "on a dangerous car chase through a densely populated area, culminating in Root's violent collision with vehicles driven by civilian[s]"; and Root "reached into his jacket" while surrounded by officers in Brookline. Addendum 9-12.

[6] Plaintiff moved for summary judgment on the claims against the Individual Defendants but did not move for summary judgment against the City.

Second, the Individual Defendants are entitled to qualified immunity with respect to the shooting. Addendum 12-16.

Third, Defendant McMenamy did not use excessive force when he used his cruiser to ram Root's car or when he kicked Root. Addendum 16-18.

Fourth, the Individual Defendants did not violate the Massachusetts Civil Rights Act ("MCRA"), G.L. c. 12, §§ 11H & 11I. Addendum 18.

Fifth, because the BPD Defendants did not violate Root's constitutional rights, Plaintiff's claim against the City for failure to train and supervise must fail. Addendum 18-19.

SUMMARY OF THE ARGUMENT

The District Court's summary judgment rulings should be reversed for three reasons:

First, there are genuine factual issues concerning the (un)reasonableness of the Individual Defendants' use of deadly force that preclude summary judgment on Counts 1, 2, 8, and 9. The District Court improperly viewed the evidence in the light most favorable to the moving party Individual Defendants and accepted their accounts as true, despite contradictory evidence and significant issues with their credibility. The Individual Defendants are not entitled to qualified immunity because longstanding case law clearly established that their conduct, when viewed in the light most favorable to Plaintiff, was unreasonable. Rather than consider those

cases, the District Court relied on cases that post-date the fatal shooting and are factually distinguishable.

Second, there are genuine factual issues concerning the (un)reasonableness of Defendant McMenamy's uses force when he rammed Root's car and kicked Root that preclude summary judgment on Counts 5 and 6. The District Court's factual findings concerning the PIT maneuver are unsupported by the evidence, and the District Court did not engage in any factual analysis regarding the kick.

Third, the factual issues precluding summary judgment as to the Individual Defendants' use of deadly force also preclude summary judgment for the City on Count 7. The District Court did not consider the evidence of the deficiencies in the City's police training.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment *de novo*. *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 69 (1st Cir. 2016). Summary judgment is warranted only "if the movant can demonstrate that 'there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)). "A 'genuine' dispute exists when a jury can reasonably interpret the evidence in the non-movant's favor. A 'material' fact is 'one that might affect the outcome of the suit under the governing law.'" *Miranda-Rivera*, 813 F.3d at 69 (citations omitted). The Court views the evidence in the light

most favorable to the non-movant and must draw all reasonable inferences in the non-movant's favor. *Bienkowski v. Northeastern Univ.*, 285 F.3d 138, 140 (1st Cir. 2002). "No credibility assessment may be resolved in favor of the party seeking summary judgment." *Woodman v. Haemonetics Corp.*, 51 F.3d 1087, 1091 (1st Cir. 1995).

ARGUMENT

I. The District Court Erred in Granting Summary Judgment to the Individual Defendants.

A. There Are Factual Disputes about the Individual Defendants' Use of Deadly Force.

Count 1 asserts a civil rights claim against the Individual Defendants under 42 U.S.C. § 1983, which "is a method for vindicating federal rights" that have been violated by persons acting under color of law. *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (quotation marks and citation omitted). The Fourth Amendment protects against "a police officer's use of excessive force in effectuating a seizure." *Stamps v. Town of Framingham*, 813 F.3d 27, 35 (1st Cir. 2016). Force is excessive when the amount used is objectively unreasonable. *See Graham*, 490 U.S. at 395-97. "[D]eadly force is deemed a seizure under the Fourth Amendment, and such an extreme action is reasonable (and therefore constitutional) only when 'at a minimum, a suspect poses an immediate threat to police officers or civilians.'" *McKenney v. Mangino*, 873 F.3d 75, 81 (1st Cir. 2017) (quoting *Jarrett v. Town of Yarmouth*, 331

F.3d 140, 149 (1st Cir. 2003) (per curiam)); *see also Tenn. v. Garner*, 471 U.S. 1, 7 (1985) ("[A]pprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."). The reasonableness analysis requires "careful balancing" and is "a fact-intensive inquiry that is highly sensitive to the circumstances of a particular case." *Jarrett*, 331 F.3d at 148. The officer's conduct is "judged from the perspective of a reasonable officer on the scene." *Graham*, 490 U.S. at 396.

Factors to be evaluated in determining whether the use of force was objectively reasonable include "the severity of the crime at issue, whether the suspect poses an immediate threat," and "whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*. "[T]he most relevant factors … are the immediacy of the danger posed by the decedent and the feasibility of remedial action." *McKenney*, 873 F.3d at 84. The ultimate question is "whether the totality of the circumstances justified" the use of force. *Garner*, 471 U.S. at 8-9. In answering that question, the court need not "accept the officers' subjective view of the facts." *Jacobs v. Alam*, 915 F.3d 1028, 1041 (6th Cir. 2019). Further, this Court has explained that "the use of deadly force, even if reasonable at one moment, may become unreasonable in the next if the justification for the use of force has ceased. Put another way, a passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect." *McKenney*, 873 F.3d at 82 (quotation marks and

citations omitted). Because the stakes of using deadly force are absolute, "[w]hen feasible, a police officer must give some sort of warning before employing deadly force." *Id*.

1. The District Court Did Not Fully Assess the *Graham* Factors and Improperly Credited the Individual Defendants' Statements.

The District Court failed to fully assess the *Graham* factors or the totality of the circumstances at the scene in Brookline. Rather than engage with the complex record, the District Court decided that the shooting was justified because officers "were aware that Root was reportedly armed and dangerous," Root had fled the scene at BWH and led the police on a car chase that ended with a "violent collision," and he "reached into his jacket." Addendum 9-10. As explained below, this decision was made in error because it was based on disputed evidence. Indeed, the critical fact the District Court relied on—that Root "reached into this jacket"—is vigorously disputed. The other facts the court considered are not sufficiently tied to the circumstances immediately before the Brookline shooting.

i. There Was No Immediate Danger.

A reasonable jury could decide that Root did not pose any immediate risk. According to the Individual Defendants themselves, Root was "on the ground," "never able to get up," and not fleeing. R.A. 60-61, 66-68, 70 (¶¶ 90-91, 120-121, 124-125, 134, 138-139, 148, 150). Root was gravely injured, and the Individual

Defendants knew he had been in a severe car accident. R.A. 56-57, 63, 67 (¶¶ 57-64, 103, 130). At least Defendants Godin and Fernandes believed that Root had been shot at BWH. R.A. 51, 63, 67 (¶¶ 25, 27, 103, 130).

Despite this knowledge, none of the Individual Defendants sought to determine the extent of Root's injuries or to assess his physical or mental condition or whether he was capable of responding to, or even comprehending, commands. R.A. 63, 67 (¶¶ 103-107, 126, 132). Instead, they all simultaneously shouted multiple, sometimes inconsistent commands. R.A. 59-62 (¶¶ 84-100).[7] The Individual Defendants did not take cover, use de-escalation techniques, use less-lethal force options like OC spray or a baton, or warn Root that deadly force may be used. R.A. 65, 72-73 (¶¶ 118, 167-172). None of the Individual Defendants saw Root holding a gun. R.A. 64-71 (¶¶ 114-115, 120, 129, 133, 141, 144-145, 148, 153, 157).

[7] Beyond MSP training materials that specifically warn that only one officer should give commands (R.A. 62 (¶ 101)), law enforcement-related websites have published articles emphasizing the importance of having one officer give clear commands. *See* Duane Wolfe, *Why Loud & Repetitive Verbal Commands Can Hinder Compliance* (Jan. 16, 2018), https://www.police1.com/evergreen/articles/why-loud-repetitive-verbal-commands-can-hinder-compliance-PXizJoAkV8JIIr45/; Gordon Graham, *Conflicting Commands* (May 7, 2019), https://www.lexipol.com/resources/todays-tips/conflicting-commands/; Von Kliem, *Rethinking "Show Me Your Hands!"* (Jan. 28, 2021), https://www.lexipol.com/resources/blog/rethinking-show-me-your-hands/.

McCarthy testified that Root was in extreme distress. R.A. 58-59 (¶¶ 77-83). He appeared to be covered in blood and in the midst of a medical crisis, he was not talking and McCarthy did not think he was capable of speaking, his eyes were bouncing "like ping-pong balls," he was struggling to breathe and was gurgling blood, and he looked like the lights were on but no one was home. R.A. 58-59 (¶¶ 77-81). McCarthy thought he was having a heart attack or was in shock and that he "[a]bsolutely [could] not" have gotten up onto his feet. R.A. 59 (¶¶ 81, 83). She did not take her eyes off of him from the time he exited his vehicle until he collapsed in the mulch. R.A. 432, 436 (26:5-13, 42:17-43:1). According to McCarthy, during that entire time "his right hand remained on his chest," and "[h]is left hand remained hanging down." R.A. 59 (¶ 82). An EMT reported that Root lost 2,000CC of blood in his car. R.A. 1924. Large blood clots were on the street outside of Root's car. R.A. 500-502.

This evidence rebuts what the District Court considered to be a critical undisputed fact—that Root "reached into his jacket." Addendum 10. As explained further in Argument Sections I.A.2 and I.A.3 below, whether Root was reaching—or capable of reaching—is indeed disputed. Further, the Individual Defendants' own statements do not definitively establish that he was reaching. Regardless, the District Court improperly credited their statements above other, contradictory evidence. To buttress the Individual Defendants' self-serving statements, the District Court cited

a statement from Dr. Victor Gerbaudo that he saw "'Root reach inside his jacket.'" Addendum 5, 11. There are two problems with this. First, Dr. Gerbaudo did not say that he saw Root reach inside his jacket. The quoted language appears in the City Defendants' 56.1 statement, but is not a quotation from Dr. Gerbaudo's statement to police. R.A. 1524. Plaintiff disputed that assertion because it did not accurately reflect Dr. Gerbaudo's statement as reflected in the police interview report that Root "'took his right hand under his coat and at the time that happened, um, the police officers discharged their firearms on him.'" R.A. 1524. Assuming this is indeed what Dr. Gerbaudo said, it is unclear whether he meant that Root reached his hand from outside his coat to inside his coat—as the City Defendants contend—or that Root's right hand was already under his coat. Taking Dr. Gerbaudo's statement in the light most favorable to Plaintiff, it is reasonable to infer that Root was simply clutching his chest in pain or that he was moving his hand already inside his coat in compliance with commands to show his hands. This precludes summary judgment for Defendants. Second, Dr. Gerbaudo was not deposed, and his statements reflected in a police interview report are inadmissible hearsay that "may not be considered on summary judgment." *Vazquez v. Lopez-Rosario*, 134 F.3d 28, 33 (1st Cir. 1998).

Whether Root "reached" undeniably presents a genuine issue of material fact. Even assuming that he was "reaching," that would not justify the use of deadly force given the other facts of this case. *Woodcock v. City of Bowling Green* and *McKenney*

v. Mangino are instructive. In *Woodcock*, the Sixth Circuit held that the use of deadly force was unreasonable where the decedent "told the police over the phone that he had a gun," "threatened to assault or kill his brother," kept his hand stuffed wrist-deep into the back of his pants," "ignore[d] officers' commands" to show his hands, appeared intoxicated, and did not attack or verbally threaten anyone. 679 F. App'x 419, 424 (6th Cir. 2017). The officer "may have thought that [the decedent] had a gun, but [the decedent] never gave [the officer] reason to think that he would use it imminently." *Id*. at 424-25. The court held that the man having ignored commands did not justify the use of deadly force because "mere noncompliance is not active resistance." *Id*. at 423-25. In a later case, the court elaborated on its holding in *Woodcock*: "even if the person's hands are not visible—and even if he appears to be suspiciously reaching for something in his clothing—these facts would not lead a reasonable officer to believe that the person posed an immediate threat of serious harm." *Palma v. Johns*, 27 F.4th 419, 434 (6th Cir. 2022).

In *McKenney*, officers came to the home of a man holding a gun who would not put it down after officers asked. 873 F.3d at 78. The man did not "utter anything resembling a threat." *Id*. Police retreated and watched him "amble[] nonchalantly" in and out of the house. *Id*. When he came outside "with his gun dangling from his hand," the defendant officer "yelled at him three times to 'drop the gun.'" *Id*. The man "raised the gun over his head." *Id*. He "had a vacant stare," "appeared 'not at

home' mentally," "lowered the gun without firing it," "weave[d] haphazardly into and out of his house," and walked down his driveway toward the defendant's parked cruiser. *Id*. at 78-79. The defendant shot him in the head, killing him. *Id*. at 79. No officer warned the man "that they would use deadly force if he refused to drop his weapon." *Id*. This Court affirmed the denial of the defendant's summary judgment motion because "the threat presented lacked immediacy," "alternatives short of lethal force remained open," and "the feasibility of a more measured approach was apparent." *Id*. at 83. The defendant's argument that he perceived the man "as an imminent danger" was unpersuasive given "the slowness of [the man's] gait, the clear visibility," and "the fact that nobody had warned [the man] that deadly force would be used if he failed to follow police commands." *Id*. at 83-84; *accord Parker v. Town of Swansea*, 310 F. Supp. 2d 356, 364, 368 (D. Mass. 2004) (holding that it was unreasonable to shoot a suspect 28 times even after he "pretended to be armed and acted accordingly" and did not comply with commands "to 'get down,' 'show us your hands,' and 'drop the gun'").

Even if the Individual Defendants believed that Root was armed, that does not justify the use of deadly force. *See McKenney*, 873 F.3d at 78-84. An officer's use of force based on the "mistaken belief that a suspect is armed" is reasonable "so long as the mistake is reasonable **and the circumstances otherwise justify the use of such force**." *Lamont v. New Jersey*, 637 F.3d 177, 183 (3d Cir. 2011) (citation

omitted) (emphasis added). As the record shows, the circumstances did not justify the use of deadly force against Root, and, based on the evidence Plaintiff presented, a reasonable jury could so find.

In sum, there is no evidence that Root posed a threat, immediate or otherwise, to anyone. He was severely injured, non-communicative, in extremis, and on the ground contained in a small area. By the Individual Defendants' own admissions, he was on the ground and not fleeing. Even if the Individual Defendants' self-serving story that Root reached into his jacket were to be accepted as true—which it should not at this stage—prior case law makes clear that reaching, under the totality of the circumstances here, does not justify the use of deadly force.

ii. Alternatives Short of Deadly Force Were Available.

Multiple alternatives short of deadly force were available to the Individual Defendants, but they did not even consider taking them. R.A. 72-73 (¶ 167-72); R.A. 1460 (¶ 62). Plaintiff's use of force expert Scott DeFoe confirmed that the Individual Defendants' failure to take cover did not follow standard police practices. DeFoe testified that the Individual Defendants "shouldn't have all run open in an open air environment that does not afford them any cover and yell and scream commands, many of which are contradictory, simultaneously to an individual at all regardless of the mental health state of that individual. It does not comport with … standard police practices and … training on de-escalation." R.A. 1479 (¶ 130). The

officers who arrived in Brookline had "a six-minute period of time [during the vehicle pursuit]" when they could have run Root's license plate, and any of the officers at the scene in Brookline could have looked in Root's car "and realized that you have a replica firearm inside of it and that you have -- or better said a paintball gun, and that there's significant blood loss, blood inside of that vehicle." R.A. 1479 (¶ 130). That information would have been "critical" to know and was obtainable while Root was contained in the mulch area. R.A. 1479 (¶ 130).

DeFoe also testified that the Individual Defendants should have focused on continuing to contain Root in the mulch area while they "establish[ed] a perimeter" and "create[ed] time and distance." R.A. 1479 (¶ 131). "Creating time and distance" would have "slow[ed] things down," and the officers on the scene could have safely "us[ed] proper cover, designat[ed] a single point of contact … to give whatever commands." R.A. 1480 (¶ 133). DeFoe testified that when an officer gives someone a command, the officer has "got to give a reasonable opportunity to comply." R.A. 1481 (¶ 134). DeFoe opined that the Individual Defendants escalated, rather than de-escalated, the situation by yelling confusing and contradictory commands. R.A. 1480 (¶ 133). The Individual Defendants did not seek to determine the extent of Root's injuries or whether he could comprehend or respond to commands. R.A. 63, 67 (¶¶ 103-107, 126, 132). Nor did they give Root time to comply or any verbal warning that they were going to use deadly force. R.A. 65-66 (¶ 118-119);

R.A. 1481 (¶ 134). In addition, DeFoe testified that the Individual Officers should have requested backup from SWAT or crisis intervention teams. R.A. 1483 (¶¶ 141, 143).

This Court has been clear that one of the most important factors in assessing the reasonableness of officers' conduct is the feasibility of remedial alternatives. *McKenney*, 873 F.3d at 84. The Individual Defendants failed to consider or use options short of deadly force, which a jury could find rendered their use of deadly force unreasonable.

iii. Root Was Neither Resisting Arrest Nor Trying to Flee.

There is no evidence that Root was resisting arrest or attempting to flee. To the contrary, Defendants Fernandes, Figueroa, Godin, Thomas, and Conneely testified that Root:

- remained in the same position on the ground the whole time and was not fleeing;
- never got up;
- "wasn't standing up";
- was neither fleeing nor running away; and
- instead "appeared to fall," "was never able to get up," and did not physically resist any officer.

R.A. 64, 66-67, 69-70 (¶¶ 111, 125, 140, 148-50, 152); R.A. 203 (239:20-22); R.A. 1622 (243:1-3); R.A. 140 (165:20-23). Unlike the other Individual

Defendants, Defendant McMenamy testified that Root "[e]ventually … got to [be on] both feet,"[8] but Defendant McMenamy acknowledged that Root did not flee or run away. R.A. 68 (¶ 134). During the approximately 15 seconds between when McCarthy first approached Root and the Individual Defendants opened fire, Root remained on the ground where McCarthy found him. R.A. 71 (¶ 158); R.A. 473 (00:28-00:43).

Finally, the Individual Defendants contend that Root refused to show his hands despite officers instructing him to do so. Plaintiff disputes that Root failed to comply with any commands. *See* pp. 17, 34-36, 38, 52. In fact, even if Root did move his right hand inside his jacket or attempt to remove it from his jacket, such movement would be wholly consistent with an instruction for him to show his hands. R.A. 1472-74 (¶¶ 100, 109); R.A. 1550, 1553 (¶¶ 38, 43). Further, disobeying police commands is not enough to justify the use of deadly force, particularly where there is no evidence that any officer gave Root any verbal warning that deadly force would be used. *See McKenney*, 873 F.3d at 78-79, 82-84; *Parker*, 310 F. Supp. 2d at 364, 368.

[8] This testimony is contradicted by the other Individual Defendants' testimony that Root never got back on his feet and McCarthy's testimony that Root "[a]bsolutely [could] not" have gotten up onto his feet. R.A. 59, 64, 66-70 (¶¶ 83, 111, 120, 125, 138, 140, 150).

iv. Root's Physical and Mental Condition Are Mitigating Factors.

The supposed crime at issue is Root's presence at BWH with a clear plastic paintball gun that some witnesses mistook for a firearm followed by a vehicle pursuit that began after Root was shot at BWH and later became high-speed *after* Defendant McMenamy "rammed" Root. R.A. 1508-09 (¶¶ 36, 39); R.A. 1542-43 (¶¶ 17, 21); R.A. 50, 52-53, 55 (¶¶ 18, 22-23, 36-42, 52). This series of events ended after Root, who had been shot, was in a massive car accident and suffered significant blood loss. R.A. 56-57 (¶¶ 56-66); R.A. 494-502; R.A. 1924. As the evidence shows, certainly when viewed in the light most favorable to Plaintiff, Root was effectively incapacitated. *See* pp. 6-7, 29 above.

These facts are similar to those in *Estate of Jones by Jones v. City of Martinsburg, W. Va.*, where the Fourth Circuit reversed entry of summary judgment for officers where they shot and killed a man, Jones, whom the jury could "reasonably find … was incapacitated." 961 F.3d 661, 669 (4th Cir. 2020). Before the shooting, Jones "had been tased four times, hit in the brachial plexus, kicked, and placed in a choke hold, at which point gurgling can be heard in the video [footage]. A jury could reasonably infer that Jones was struggling to breathe." *Id*.

> [T]he officers contend[ed] that Jones should have dropped the knife upon their commands … But again, the fact that he did not move or respond corroborates that he was incapacitated, and the reasonable officer would have recognized that fact. Indeed, [one officer] reported that

> Jones "did not make any overt acts with the knife towards the officers," and [another] reported that Jones "wasn't f**king doing nothing." And yet five officers wasted no time, giving Jones mere seconds to comply before firing. The officers shouting "drop the knife" seconds before shooting him was, at best, farcical because it was impossible for an incapacitated person to drop a knife tucked into his sleeve.

Id. at 670. Here too, Root was severely injured, gurgling, struggling to breathe, and not verbally responding to the officers. A jury could reasonably conclude that he was incapacitated, and that the officers acted unreasonably in giving him only seconds to comply with contradictory commands before killing him. Root's physical and mental condition temper the extent to which the crime at issue may support the reasonableness of the Individual Defendants' conduct.

2. The Individual Defendants' Statements Raise Factual Issues.

The Individual Defendants' own, sometimes inconsistent, statements raise factual disputes over the reasonableness of their conduct.

Defendant Fernandes testified that (1) Root reached into his jacket, but he does not recall whether it was Root's left or right hand or where Root's hands were before he reached into his jacket (R.A. 64-65 (¶¶ 113-114)); and (2) he does not recall whether he ever saw Root's hands or what Root's non-reaching hand was doing (R.A. 64-65 (¶¶ 114-115, 117)).

Defendant Figueroa testified that Root's hands were "[u]nderneath his coat" "in his control area, stomach area, chest area" where she could not see them. R.A. 66 (¶¶ 120, 123).

Defendant Godin testified that Root was sitting on the ground and reached into his jacket with his right hand. R.A. 66-67 (¶¶ 124-125, 127).

Defendant McMenamy testified that Root stood, "open[ed] up his jacket," and Defendant McMenamy "saw a floating gun in [Root's] chest" that Root reached toward. R.A. 68 (¶ 135).

Defendant Thomas testified that Root was on the ground, and he was never able to see Root's hands. R.A. 68-69 (¶¶ 138-139, 141, 144-145).

Defendant Conneely testified that Root "appeared to fall" and "never got up," and that Root was trying to support himself with his left hand and while "[h]is right hand went inside his jacket" where Defendant Conneely could not see it. R.A. 70 (¶¶ 149-150, 153).

Based on the case law outlined above, none of these explanations justifies the use of deadly force against Root. And incontrovertible evidence undermines the Individual Defendants' contentions that Root was reaching into his jacket or possibly had the handle of a bb gun in his hand. The autopsy report and photos taken during the autopsy show that Root's right hand was severely injured during the shooting with one bullet perforating the palm, yet the plastic bb gun recovered in Brookline

is not damaged or bloody. *See* pp. 11-12, 42. As Plaintiff's forensic medical expert opined, had Root's hand been as close to the bb gun as the Individual Defendants contend, it is unlikely that it would have emerged unscathed while his hand suffered multiple gunshot wounds. R.A. 1440-41 (¶¶ 5, 7).[9]

3. The Individual Defendants' Statements are Beset with Credibility Issues.

The only witness other than Defendants who would have the most knowledge about the circumstances—Root—cannot testify. *See Lamont*, 637 F.3d at 181-82 ("Because 'the victim of deadly force is unable to testify,' … a court ruling on summary judgment in a deadly-force case 'should be cautious … to ensure that the officer[s are] not taking advantage of the fact that the witness most likely to contradict [their] story—the person shot dead—is unable to testify.'" (citations omitted); *Plakas v. Drinski*, 19 F.3d 1143, 1147 (7th Cir. 1994) ("In any self-defense case, a defendant knows that the only person likely to contradict him or her is beyond reach."); *see also Ingle ex rel. Estate of Ingle v. Yelton*, 439 F.3d 191, 195-96 (4th Cir. 2006); *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994), *cert. denied*, 515 U.S. 1159 (1995). As a result, the Court should critically examine the Individual Defendants' versions of events given McCarthy's testimony and statements to law enforcement about Root's physical and mental condition and the fact that his right

[9] The District Court acknowledged that Dr. Lipman's testimony "creates a dispute of fact as to whether Root was reaching for the bb gun." Addendum 11 n.5.

hand was clutching his chest the entire time she saw him, which was until three or four seconds before the shots were fired (R.A. 58-59 (¶¶ 77-83)); the traffic camera footage of Root stumbling and falling (R.A. 471-72); the cell phone video showing McCarthy running to help Root and the short time that elapsed between when she was with Root and when the shooting began (R.A. 473); Defendant Figueroa's BWC footage reflecting that she drew her firearm upon exiting her vehicle, some of the commands given to Root, and the seconds that elapsed between when she arrived and when the shooting occurred (R.A. 467; R.A. 62 (¶¶ 98-100)); photos of the damage to Root's car and the large clots of blood on the street outside of his car (R.A. 494-502); injuries to Root's right hand as reflected in the autopsy report and photos taken during the autopsy (R.A. 555-56; R.A. 2083-97); photos showing that the plastic bb gun was not damaged or bloody (R.A. 503-12); and DeFoe's testimony about available alternatives and the totality of the circumstances at the scene (R.A. 1479-83 (¶¶ 130-143)).

Further, the fact that the BPD Defendants met together with the union president and their attorney *before* they were interviewed by law enforcement investigators undermines the veracity of their versions of events. R.A. 76-78 (¶¶ 187-195). Defendant Godin's credibility is further tainted by his having fabricated the story that his BWC was in his duty bag on February 7 when in fact he

was wearing his BWC and threw it into his cruiser after the shooting. R.A. 1448-59 (¶¶ 36-59).

As for Conneely, evidence shows that his statements to investigators and deposition testimony that a plastic bb gun was in Root's right hand after the shooting are false, R.A. 1556-57 (¶ 47):

- Root's right hand sustained penetrating and perforating gunshot wounds, including one from a bullet that entered the palm and exited the back of the hand. R.A. 74-76 (¶¶ 180-181); R.A. 543, 555-56; R.A. 1440 (¶ 3); R.A. 2083-2097.
- Plaintiff's forensic expert testified that if Root had the bb gun "in his [right] hand at the time that he was shot in Brookline, it would have had blood on it" and have been damaged. R.A. 1440-41 (¶¶ 5-6).
- Despite the extensive injuries to Root's right hand, the plastic bb gun that Defendant Conneely claims he removed from Root's right hand after the shooting was undamaged, does not appear to have blood on it, and was not tested by law enforcement investigators for blood evidence. R.A. 76 (¶¶ 183-185); R.A. 503-512.
- Further contradicting Defendant Conneely's claim, a Brookline Police detective and officer both saw a gun fall out of Root's chest area when his body was rolled over. R.A. 1441 (¶¶ 8-9).

The fact that Defendant Conneely would falsely testify about the bb gun being in Root's right hand after the shooting raises serious questions about the balance of his testimony.

Statements that Defendant Conneely made immediately after the shooting also raise credibility issues. He asked Defendant McMenamy, "You alright? You shoot too?" Defendant McMenamy responded that he had, and Defendant Conneely shook his hand. Defendant Conneely then asked another BPD officer whether he had shot, and when that officer responded that he had not, Defendant Conneely did not shake that officer's hand. R.A. 73-74 (¶ 174). Defendant Conneely then told Defendant McMenamy, "Just shut your f*ckin' mouth. You got – you got a rep comin'?" Defendant McMenamy responded, "I won't talk." R.A. 774 (¶ 175). The falsity of Defendant Conneely's statements about the bb gun purportedly being in Root's right hand plus Defendant Conneely's attitude after the shooting, including telling Defendant McMenamy to keep his mouth shut, cast doubt on Defendant Conneely's credibility, including his narrative that Root was "reaching."

Despite all of the above, the Individual Defendants asked the District Court to accept their accounts of the events, including their claim that Root was "reaching," because they were the only eyewitnesses to the shooting. Notwithstanding the evidence of Root's incapacity, the infirmities in the Individual Defendant's accounts, and their many credibility issues, the District Court deemed it undisputed that Root

was reaching into his jacket before the officers opened fire. The District Court accepted the Individual Defendants' self-serving statements as true for purposes of their MSJs. The District Court then cited this Court's decision in *Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc*. for the proposition that their "self-serving deposition testimony may be properly considered on summary judgment" because a "deponent's testimony [that] 'sets forth specific facts, within his personal knowledge that, if proven, would affect the outcome of the trial, … must be accepted as true for purposes of summary judgment.'" Addendum 11 (quoting *Velazquez-Garcia*, 473 F.3d 11, 18 (1st Cir. 2007)). Significantly, however, the full quotation from *Velazquez-Garcia* is: "[P]rovided that *the nonmovant's* deposition testimony sets forth specific facts, within his personal knowledge, that, if proven, would affect the outcome of the trial, the testimony must be accepted as true for purposes of summary judgment." 473 F.3d at 18 (emphasis added). The District Court overlooked the critical qualifying language that it is the non-movant's testimony that must be accepted. Here, though, the District Court improperly accepted the *movants'* testimony as true without considering inconsistencies in that testimony and other conflicting evidence. This error flipped the summary judgment standard on its head and requires reversal.

B. The Same Factual Disputes Preclude Summary Judgment on Counts 8 and 9.

Counts 8 and 9 are claims for assault and battery and wrongful death, respectively. Because the District Court concluded that the Individual Defendants' use of force was reasonable as a matter of law, it also deemed them not liable under Counts 8 and 9. Addendum 6. *Raiche v. Pietroski*, 623 F.3d 30, 40 (1st Cir. 2010) (court's "determination of the reasonableness of the force used under § 1983 controls [its] determination of the reasonableness of the force used under [a] common law assault and battery claim[]") (citation omitted); *McGrath v. Tavares*, No. 17-P-326, 2018 WL 3040710, at *2 (Mass. App. Ct. June 20, 2018) (same as to wrongful death). The factual issues precluding summary judgment as to Plaintiff's § 1983 claim preclude summary judgment on Counts 8 and 9.

C. The Individual Defendants Are Not Entitled to Qualified Immunity.

Qualified immunity insulates officials from liability if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). There is a two-prong analysis to determine whether an official is entitled to qualified immunity. *McKenney*, 873 F.3d at 81. First, the court "determine[s] whether the plaintiff's version of the facts makes out a violation of a protected right." *Alfano v. Lynch*, 847 F.3d 71, 75 (1st Cir. 2017). Second, the court "determine[s] whether the

right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id*. (quotation marks and citation omitted).

1. Prong 1: The Individual Defendants Violated the Fourth Amendment.

As addressed above, a jury could find that the Individual Defendants' use of deadly force was objectively unreasonable. *See Woodcock*, 679 F. App'x at 423-24; *McKenney*, 873 F.3d at 83-84; *Palma*, 27 F.4th at 443; *Parker*, 310 F. Supp. 2d at 361-68.

2. Prong 2: The Protected Right Was Clearly Established.

The second prong of the analysis has two sub-parts: first, the plaintiff must identify "controlling authority" or a "consensus of cases of persuasive authority sufficient to send a clear signal to a reasonable official that certain conduct falls short of the constitutional norm"; and second, the court determines "whether an objectively reasonable official in the defendant's position would have known that his conduct violated that rule of law." *Alfano*, 847 F.3d at 75 (quotation marks and citation omitted). As to the first sub-part, "a case need not be identical to clearly establish a sufficiently specific benchmark against which one may conclude that the law also rejects the use of deadly force in circumstances posing less of an immediate threat." *Begin v. Drouin*, 908 F.3d 829, 836 (1st Cir. 2018); *see also Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1171-72 (10th Cir. 2021). Officers need only have had "fair warning … that their

alleged [conduct] was unconstitutional." *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (quotation marks and citation omitted).

The cases previously cited in Argument Sections I.A and I.A.1.ii above were decided years before the BPD Defendants killed Root.[10] *See also Jones*, 961 F.3d at 669-70 ("it was clearly established in 2013 that officers may not use force against an incapacitated suspect," and "it was also clearly established at the time of Jones's death [in 2013] that simply being armed is insufficient to justify deadly force"). They demonstrate that at the time of the shooting, it was clearly established that it is unconstitutional to use deadly force against a civilian who was known to have been in a car accident and appear to be gravely injured, who is on the ground not fleeing, who may be armed, whose hands are obscured, and who—even accepting the Individual Defendants' stories for purposes of this argument—did not respond to police commands. The Individual Defendants cannot avoid the case law that existed as of February 7, which puts their conduct outside the bounds of reasonableness.

In assessing qualified immunity, the District Court relied on two cases that post-date the February 7, 2020, shooting, neither of which is factually similar to this

[10] The only exception is *Palma*, decided in 2022. But *Palma*'s teachings that an officer cannot use "deadly force just because the person's hands are in his pockets and the officer cannot see his hands," "cannot shoot based on a 'mere hunch' that the person might be armed," and cannot "use lethal force merely because someone disobeys the officer's orders" were not novel. 27 F.4th at 443. Indeed, *Palma* cites pre-2020 cases in support of each rule.

case. Addendum 13-16 (citing *City of Tahlequah, Okla. v. Bond*, 142 S. Ct. 9 (2021) (per curiam)[11]; *Estate of Rahim v. Doe*, 51 F.4th 402 (1st Cir. 2022)). In *Tahlequah*, officers shot and killed an intoxicated man who would not leave his ex-wife's garage. The man "convers[ed] with the officers"; refused to consent to a pat-down; walked toward tools hanging in the back of the garage despite officers' commands to stop; "grabbed a hammer"; "turned around to face the officers"; held the hammer "with both hands, as if preparing to swing a baseball bat, and pulled it up to shoulder level"; did not comply with commands to drop the hammer; came out from behind furniture so that he had an unobstructed path to an officer; and then raised the hammer above his head as though he was going to throw it or charge the officers. 142 S. Ct. at 10-11. On these facts, the Court held that the officers did not violate clearly established law but did not decide whether the officers violated the Fourth Amendment. *Id*. at 11-12. The facts of *Tahlequah* are plainly distinguishable from the facts here: the Individual Defendants made no attempt to converse with Root; Root did not verbally communicate at all, and evidence shows that he could not do so; he was in extremis; the Individual Defendants did not see a weapon in his hands; and he was on the ground and approached no one.

[11] *Tahlequah* acknowledges that cases "decided after the shooting at issue" are "of no use in the clearly established inquiry." 142 S. Ct. at 12.

Rahim too is distinguishable. The decedent there, Rahim, was a suspected terrorist under investigation by law enforcement. 51 F.4th at 404. Officers intercepted a call between Rahim and a co-conspirator where Rahim allegedly discussed an imminent attack. *Id*. at 404-05. After Rahim left his apartment building, officers approached him with guns drawn, and there is audio recording of a conversation between Rahim and an officer that culminated in officers shooting Rahim after he said, "Come on! Won't you shoot me?" *Id*. at 405-06. Video footage showed that Rahim continuously advanced toward the retreating officers; according to officers, he also "refused to put his hands up, had refused to drop what was in his hand, had taunted the officers telling them to drop what was in their hands, and had taunted them more with his 'Come on!' statement." *Id*. at 406, 408. These facts are not remotely similar to the facts of this case. There is no evidence that Root was planning any type of attack, said anything to anyone—let alone taunted officers—or advanced toward them. Moreover, unlike here, there was no evidence that Rahim was physically or mentally incapacitated. *Rahim* does not shed any light on whether the Individual Defendants' acted (un)reasonably or the (un)constitutionality of their conduct was clearly established.

In sum, the cases the District Court relied on are not relevant to the clearly established inquiry, and multiple cases—all decided before February 7—put the Individual Defendants on notice that their conduct was unconstitutional.

D. The District Court Erred in Granting Summary Judgment on Plaintiff's MCRA Claim.

Count 2 asserts that the Individual Defendants' conduct surrounding the fatal shooting violated the MCRA, G.L. c. 12, §§ 11H & 11I. The District Court held that Plaintiffs' MCRA claim fails because the Individual Defendants did not use excessive force and, in one sentence, the District Court "note[d] that it cannot discern the presence of threats, intimidation, or coercion in any of the officer's challenged actions." Addendum 18. As described below, the District Court did not consider evidence that would support a jury's conclusion that the Individual Defendants were threatening, intimidating, and coercive, and the court did not consider relevant case law instructing that "[a] reasonable jury could conclude that the officers' surrounding presence, display of weaponry and non-responsiveness amounted to a threat or intimidation under the MCRA." *Sheffield v. Pieroway*, 361 F. Supp. 3d 160, 168 (D. Mass. 2019).

"The MCRA is the state analog to § 1983 and provides a cause of action for an individual whose rights under the constitution or laws of either the United States or the Commonwealth of Massachusetts have been interfered with by 'threats, intimidation or coercion.'" *Raiche*, 623 F.3d at 40 (quoting G.L. c. 12, §§ 11H and 11I). A threat "involves the intentional exertion of pressure to make another fearful or apprehensive of injury or harm"; intimidation "involves putting in fear for the purpose of compelling or deterring conduct"; and coercion involves "the application

to another of such force, either physical or moral, as to constrain him to do against his will something he would not have otherwise done." *Planned Parenthood League of Mass., Inc. v. Blake*, 417 Mass. 467, 474, 631 N.E.2d 985, 990 (1994) (quotation marks and citations omitted). "Evidence of 'threats, intimidation, or coercion' is to be measured by an objective standard, not the state of mind of the person threatened." *Sarvis v. Boston Safe Deposit & Tr. Co.*, 47 Mass. App. Ct. 86, 92, 711 N.E.2d 911, 918 (1999).

Sheffield v. Pieroway is instructive. The court there held that "[a] reasonable jury could conclude that the officers' surrounding presence, display of weaponry and non-responsiveness amounted to a threat or intimidation under the MCRA." 361 F. Supp. 3d at 168. The defendant officers pulled over a man, approached his car from both sides, and did not tell him why they had pulled him over despite his inquiries. *Id*. at 163. Another officer then ordered the driver out of the car, and when the driver again asked what he had done wrong and then reached behind the center console toward the floor in the backseat, one officer reached into the car and the other officer put his hand on his holstered firearm. *Id*. The driver started the car, closed the window, and drove away. *Id*. The driver subsequently got out of the car and fled on foot; an officer chased him, yelled at him to stop running and put his hands where the officer could see them, and threatened to shoot the driver if he failed to do so. *Id*. at 163-64. The driver kept running, and when the officer caught up to him, the

officer shot him in the chest, killing him. *Id*. at 164. The personal representative of the driver's estate brought § 1983, MCRA, and related claims against the officers, who moved for summary judgment. *Id*. at 163. As to the MCRA claim against the officer who ordered the driver out of the car, the court held that a jury could conclude that surrounding the driver's car, the officer placing his hand on his weapon, and the officer's failure to explain why he pulled over the driver could constitute threats or intimidation. *Id*. at 168.

That reasoning applies here. The Individual Defendants surrounded Root with their guns drawn. They screamed a cacophony of commands, some of which were contradictory and some of which did not make sense given Root's position on the ground. *See, e.g.*, R.A. 59-60 (¶ 84 (McCarthy testified that she was "so confused" by commands like "Get down! Show me your hands! Lay down! Stand up!" because Root could not get up)). They failed to assess Root's physical and mental condition or whether he was able to understand and respond to commands. R.A. 63, 67 (¶¶ 103-107, 126, 132). The Individual Defendants displayed their weaponry and screamed commands in a manner that made it impossible to comply. The Individual Defendants' conduct constitutes threats, intimidation, and/or coercion under the MCRA because these tactics intended and caused Root to give up his life.

II. The District Court Erred in Granting Summary Judgment to Defendant McMenamy.

Counts 5 and 6 assert § 1983 and MCRA claims, respectively, against Defendant McMenamy for ramming his car into Root's and for kicking Root. The District Court granted summary judgment to Defendant McMenamy on both counts, concluding that (1) the PIT maneuver was justified because "traffic video footage shows Root driving at a high rate of speed throughout a heavily populated area" (Addendum 17), which is a factual conclusion contradicted by the evidence; and (2) "not every push or shove … violates the Fourth Amendment" (Addendum 17-18 (quotation marks and citations omitted)). The District Court erred as to both.

A. A Jury Could Reasonably Conclude that the PIT Maneuver Violated the Constitution and the MCRA.

Using a police vehicle to intentionally strike a vehicle is a use of force subject to the *Graham* reasonableness analysis. *Scott v. Harris*, 550 U.S. 372, 381 (2007). On an urban road with embedded trolley tracks, Defendant McMenamy passed multiple BPD cruisers and intentionally drove his cruiser into Root's car (violating BPD Rule 301). R.A. 52-55 (¶¶ 33-51). Defendant McMenamy described what he did as having "rammed" Root's car, made a T-bone motion with his hands while telling the story to another officer, and admitted that he was not even thinking about BPD policy and its prohibition of his conduct when he "rammed" Root. R.A. 52-55 (¶¶ 37, 40, 45-47, 49). Defendant McMenamy did this while the pursuit was

traveling at, according to him, approximately 20 to 30 miles per hour, which he described as "noticeably slow" and "as slow as molasses." R.A. 52 (¶ 36); R.A. 468 (03:09-03:13); R.A. 2813. He could have simply continued pursuing Root—which every other officer did—but instead chose to drive directly into Root's car.

Scott v. Harris, relied on by the District Court and Defendant McMenamy, is distinguishable. The *Harris* Court held that using a cruiser to "push" a suspect's vehicle was not excessive where video footage showed the suspect "racing down narrow, two-lane roads in the dead of night" at "shockingly fast" speeds, "swerve around more than a dozen other cars, cross the double-yellow line, … force cars traveling in both directions to their respective shoulders to avoid being hit, run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, [and was] chased by numerous police cars" that "engage[d] in the same hazardous maneuvers just to keep up." 550 U.S. at 375, 379-80.

In contrast, when Defendant McMenamy hit Root, Root was not speeding or putting the public at risk. Despite McMenamy's own descriptions of the slowness of the pursuit, the District Court concluded that the PIT maneuver was reasonable because "Root was driving at a high rate of speed." Addendum 17. There is no evidence supporting this conclusion. *Contra, e.g.*, *Plumhoff v. Rickard*, 572 U.S. 765, 781 (2014) ("Fourth Amendment did not prohibit … using the deadly force that they employed to terminate the dangerous car chase [at over 100 miles per hour]").

The District Court also cited *County of Sacramento v. Lewis* for the proposition that "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressable by an action under § 1983." 523 U.S. 833, 854 (1998). Addendum 17. Plaintiff does not challenge the reasonableness of the pursuit itself, just the PIT maneuver. In any event, *Sacramento* weighs against granting summary judgment for Defendant McMenamy. The Court there specifically addressed pursuits "inten[ded] to harm suspects" and quoted a Fifth Circuit case holding that "'[w]here a citizen suffers physical injury due to a police officer's *negligent use* of his vehicle, no section 1983 claim is stated. It is a different story when a citizen suffers or is seriously threatened with physical injury due to a police officer's *intentional misuse* of his vehicle.'" *Id*. at 854 n.13 (quoting *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986) (emphasis in original)). The *Checki* court continued: "where a police officer uses a police vehicle to terrorize a civilian, and he has done so with malicious abuse of official power shocking to the conscience, a court may conclude that the officers have crossed the 'constitutional line.'" 785 F.2d at 538. While the facts of *Checki* are not similar to this case, its reasoning remains instructive. Defendant McMenamy intentionally misused his cruiser to harm Root. This alone precludes summary judgment in his favor.

A jury could also conclude that Defendant McMenamy's PIT maneuver violated the MCRA. While Root was being pursued at a reasonable speed, Defendant McMenamy unnecessarily, and in violation of BPD rules, passed other cruisers to intentionally hit him. A jury could reasonably find that Defendant McMenamy drove in a way that threatened Root, particularly given that immediately after ramming him, Defendant McMenamy got out of his cruiser and drew his firearm at Root.

B. A Jury Could Reasonably Conclude that the Kick Violated the Constitution and the MCRA.

A police officer kicking a civilian constitutes a seizure. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) ("some physical touching of the person of the citizen" is an "[e]xample[] of circumstances that might indicate a seizure"). "Punching, stomping and kicking a suspect who is on the ground and seriously injured … violates clearly established law." *Alicea v. Thomas*, 815 F.3d 283, 292 (7th Cir. 2016); *see also Boozer v. Sarria*, No. 1:09-CV-2102-TWT, 2010 WL 3937164, at *6 (N.D. Ga. Oct. 4, 2010) ("No reasonable officer would believe that it was proper to kick a suspect while that suspect was lying on the ground, not resisting in any way.").

Here, Defendant McMenamy "put [his] foot up like [at a] 90-degree angle and kicked [Root] down to the ground." R.A. 63-64 (¶ 108). Right before the kick, McCarthy had been at Root's side, trying to help him while he gurgled blood, and

his eyes bounced in his head. Root was on the ground, incapacitated, not fleeing, and not a threat to Defendant McMenamy or anyone else.

Defendant McMenamy did not seek summary judgment as to the kick. Dkt. 92 at 16-17; Dkt. 113 at 1 n.2. He thus waived any argument that he is entitled to summary judgment on Counts 5 and 6 as to the kick. Nevertheless—and without regard to the circumstances surrounding the kick—the District Court found "that McMenamy's use of his foot to push Root to the ground" was reasonable.[12] Addendum 17. The District Court did not consider the specific facts surrounding the kick or the cases where courts have held that it is unreasonable to kick someone in Root's condition. *Alicea*, 815 F.3d at 292; *Boozer*, 2010 WL 3937164 at *6. At the very least, there is a factual dispute over the unreasonableness of this use of force.

Similarly, a jury could conclude that the kick violated the MCRA. Root had already been shot, was in a severe car accident, and was on the ground and barely conscious when McMenamy kicked him. Given these facts, a jury could find that McMenamy's conduct was intimidating, threatening, and coercive.

[12] Despite Defendant McMenamy using the word "kick," the District Court softened that language by saying that he "use[d] his foot to push Root."

III. The District Court Erred in Granting Summary Judgment to the City.

Count 7 asserts a claim under § 1983 against the City for failure to train and supervise[13] its officers. In granting summary judgment for the City on this claim, the District Court relied on its determination that the BPD Defendants did not violate Root's constitutional rights, and it did not engage in further analysis. As discussed above, disputed material facts preclude a determination as a matter of law that the BPD Defendants did not use excessive force. Further, the evidence shows that a reasonable jury could conclude that the City's training was inadequate. Thus, the District Court erred in granting summary judgment for the City.

A. Municipal Liability Premised on the Failure to Train

A municipality is liable under § 1983 "when its agents and employees committed constitutional violations" and "the governmental employees' 'execution of a government's policy or custom … inflicts the injury' and is the 'moving force' behind the constitutional violation that a municipality can be liable." *Young v. City*

[13] The Complaint alleges the City failed to supervise its police officers on February 7, and evidence produced during discovery relates to the City's failure to supervise. Nevertheless, the City sought summary judgment on only the failure to train theory because, in the City's estimation, Count 7 "principally concerns" failure to train. Dkt. 94 at 1 n.1. As a result, the City waived any right to argue that it is seeking summary judgment concerning its failure to supervise. Because Plaintiff did not move for summary judgment against the City, and the City did not seek summary judgment as to its failure to supervise, the summary judgment record does not include the evidence of the City's failure to supervise that was produced during discovery. As a result, the District Court did not fully consider the failure to supervise theory and erred in entering judgment for the City.

of Providence ex rel. Napolitano, 404 F.3d 4, 25 (1st Cir. 2005) (quoting *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 694 (1978)). There are two elements to assessing a municipality's liability: "first, that plaintiff's harm was caused by a constitutional violation, and second, that the City be responsible for that violation, an element which has its own components." *Young*, 404 F.3d 25-26. The two components of the second element are: "1) that the municipal policy or custom actually have caused the plaintiff's injury, and 2) that the municipality possessed the requisite level of fault, which is generally labeled in these sorts of cases as 'deliberate indifference.'" *Id*. at 26 (quoting *Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 404 (1997)). Causation and deliberate indifference are separate requirements but are often intertwined in these cases. *Young*, 404 F.3d at 26.

The failure to train constitutes "a city 'policy or custom' that is actionable under § 1983" where the failure "amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388-89 (1989). The Supreme Court has created a framework for analyzing § 1983 claims based on the failure to train police: first, the court asks "whether [a] training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent 'city policy.'" *Id*. at 390. Considering "the duties assigned to specific officers … the need for more or different training [may be] so obvious, and the inadequacy so likely to result in the violation

of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id*.

Proper use of force training is of utmost importance given the gravity of using deadly force against a civilian. "[C]ity policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task." *Canton*, 489 U.S. at 390 n.10. As a result, "the need to train officers in the constitutional limitations on the use of deadly force, [is] 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." *Id*. (internal citation omitted). "Given the known frequency with which police attempt to arrest fleeing felons and the 'predictability that an officer lacking specific tools to handle that situation will violate citizens' rights,'" a city's failure "to train the officers about constitutional limits on the use of deadly force could reflect the city's deliberate indifference to the 'highly predictable consequence,' namely, violations of constitutional rights." *Connick v. Thompson*, 563 U.S. 51, 63-64 (2011) (citation omitted).

A plaintiff need not establish a pattern of similar violations where, as here, the need to train is "so obvious." *Canton*, 489 U.S. at 390 n.10. A municipality may be liable for its failure to train "where a violation of a federal right is a highly predictable consequence of a failure to equip law enforcement officers with specific

tools to handle recurring situations." *Young*, 404 F.3d at 28 (cleaned up). It is undeniably predictable that police will encounter a suspect who poses no immediate threat and is not attempting to flee. *Connick*, 563 U.S. at 63-64.

B. Factual Disputes about the BPD Defendants' Use of Force Preclude Summary Judgment.

As described above, there are genuine factual disputes about whether the BPD Defendants used excessive force in killing Root. Because the District Court's grant of summary judgment to the City is premised solely on the conclusion that the BPD Defendants did not violate Root's constitutional rights, it too should be reversed.

C. A Jury Could Find that the City Did Not Adequately Train the BPD Defendants.

A jury could reasonably conclude that the City's training was inadequate. The BPD Defendants' conduct during the pursuit up through the moments after the shooting demonstrates that whatever training they received did not stick. As to the use of force, the BPD's training manuals and testimony from the City's own training instructor establish significant gaps in the BPD Defendants' training on establishing a perimeter, focusing on containment to create time and distance, engaging in de-escalation techniques, considering the full totality of the circumstances rather than only select circumstances, teaching when using deadly force is justifiable, and less-lethal force options. Officer Owens' testimony is replete with admissions concerning holes in the BPD's training. R.A. 1468-1475 (¶¶ 96-113). Similarly, the

BPD Defendants testified that they did not recall being trained on a variety of topics, including the use of force, de-escalation, and defensive tactics. R.A. 1461-67 (¶¶ 68, 70, 72, 75-76, 78-79, 81-82, 84-86, 88).

Beyond these gaps in the BPD's training, the BPD Defendants' repeated violations of BPD rules imply that they were not trained to understand that they are required to follow BPD rules. Taken together, the repeated violations of multiple rules by many BPD Defendants underscore that the BPD's training failures amount to a custom or informal policy of a lack of accountability. That BPD officers can violate BPD rules with impunity is worsened by the apparent history of officers being allowed to meet together, including with the union president, before being interviewed by investigators about use of force incidents. R.A. 76-78 (¶¶ 187-195). Moreover, Long's baseless statements to the press described above (*see* pp. 13-15) reflect the BPD's impulse to circle the wagons, protect officers, and paint civilians in a bad light without first gathering the facts to properly assess the officers' conduct.

In addition, Plaintiff's use of force expert identified specific components of standard police protocol on the use of force that are missing from the BPD's training. Further, a BPD use of force/defensive tactics instructor testified that recruits are not specifically trained in how to figure out which officers in a multi-officer scenario will assume the contact and cover roles, how to effectively give commands in a multi-officer scenario, how to avoid giving contradictory commands, or how to

assess a suspect's physical condition in the context of considering the totality of the circumstances. Based upon the "series of interrelated acts … carried out by individual police officers" on February 7, a reasonable jury could infer that their conduct was due to the City's failure to train. *Bordanaro v. McLeod*, 871 F.2d 1151, 1161 (1st Cir. 1989).

D. The City's Inadequate Training Constitutes a Custom or Policy Amounting to Deliberate Indifference to the Rights of Civilians that Caused Root's Death.

When viewed in light of the BPD's history of excessive force complaints against officers and failure to discipline officers, a jury could find that the City's inadequate training constitutes a custom or practice amounting to deliberate indifference. "If there is a reckless disregard for human life and safety prevalent among the city's police officers which threatens the life and security of those whom they encounter, and if that recklessness is attributable to the instruction or example or acceptance of or by the city policymaker, the policy itself is a repudiation of constitutional rights." *Grandstaff v. City of Borger*, 767 F.2d 161, 170 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987). Where, as here, "police officers know at the time they act that their use of deadly force in conscious disregard of the rights and safety of innocent third parties will meet with the approval of city policymakers, the affirmative link/moving force requirement is satisfied." *Id*. When multiple officers act in concert, it is reasonable to infer "that all of the officers involved were

operating under a shared set of rules and customs." *Bordanaro*, 871 F.2d at 1156. That multiple officers acted in the same manner is evidence of a custom or policy because "[a]bsent such a norm, it is highly unlikely such unanimity of action could occur." *Id*.

The City knows that the BPD has a long history of excessive force complaints, very few civilian complaints about excessive force have been sustained by the BPD's Internal Affairs department, and many complaints "have remained open for years without resolution." *Cox v. Murphy*, No. 12-11817-FDS, 2016 WL 4009978, at *3 (D. Mass. Feb. 12, 2016) ("From 2001 to 2011, there were 698 citizen complaints filed against Boston police officers alleging improper use of force. Of those 698 complaints, only 18 were 'sustained.'") (citations omitted). The *Cox* court denied the City's summary judgment motion, concluding that "at some point, as the accusations and claims [of excessive force] begin to pile up, [and] a critical mass may be reached requiring an affirmative response from supervisors." *Id*. at *10. There also is at least one other case pending against BPD officers and the City concerning excessive use of force. *See Coleman v. City of Boston*, No. 1:18-cv-10646-MLW (D. Mass.). Further, the Boston Globe recently reported that, from 2016 through early July 2020,

> [i]n cases where at least one allegation [of police misconduct] was sustained [by the BPD's internal affairs department], BPD data show no record of punishment 40 percent of the time. … The data also show that 37 percent of the time that an allegation was upheld, officers received only an oral reprimand. Another 19 percent resulted in suspensions, the most common duration was a single day.

R.A. 1948-49.

Against this backdrop, the BPD Defendants' conduct—for which they have faced no discipline—shows that the BPD promotes a culture in which officers' conduct is not scrutinized and officers are not held accountable. The reasoning in *Grandstaff v. City of Borger* is instructive. There, police shot and killed a man after a high-speed chase. 767 F.2d at 164-65. In assessing the plaintiff's failure to train claim, the court explained that "[a]n injured plaintiff is not likely to document proof of a policy or disposition … that disregards human life and safety. The disposition must be inferred circumstantially from conduct of the officers and of the policymaker." *Id*. at 170-71. The same is true here. Along with the BPD's well-documented history of failing to investigate and discipline officers, the City ratified the BPD Defendants' use of force by making statements to the public that the BPD knew or should have known were false. *See St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) ("[i]f the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality").

A jury could reasonably conclude that Root's death was a direct result of the BPD's having failed to properly train its officers and the BPD's culture where officers are free to violate BPD rules and civilians' constitutional rights without consequence. This failure resulted in the uncoordinated vehicle pursuit and the chaotic scene in Brookline where none of the BPD Defendants thought to take cover, act as the primary communicator with Root, assess his ability to comprehend and respond to commands, or fire their weapon in response to a legitimate justification. Had the BPD Defendants been properly trained, they would have had the tools to properly create time and distance, take advantage of Root's containment in the mulched area, and rely on the support of a SWAT and/or crisis intervention team. Similarly, had the BPD equipped its patrol officers with less-lethal weapons, the BPD Defendants would have had effective options short of their firearms. But the BPD failed its officers and thus failed Root.

CONCLUSION

As set forth above, this Court should reverse the entry of summary judgment in Defendants' favor and remand the case for trial.

Dated: January 24, 2023

Respectfully submitted,

Plaintiff-Appellant Jennifer Root Bannon,

By her attorneys,

/s/ Mark A. Berthiaume

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2023, the foregoing was filed through the Court's ECF system and served on all registered users. In addition, on January 24, 2023, the foregoing was served upon the following by email, and a copy of the DVD containing the summary judgment exhibits that are videos and audio recordings was served on the following by UPS overnight delivery:

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RULE 32(g)(1) CERTIFICATION

I hereby certify that:

1. This document complies with the word limit set in the Court's order dated January 20, 2023, granting Plaintiff's unopposed motion for leave to file oversize principal brief containing up to 16,000 words because—excluding the parts of the document exempted by Fed. R. App. P. 32(f)—this document contains 15,989 words.

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No. 22-1958

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JENNIFER ROOT BANNON,

Plaintiff-Appellant,

v.

DAVID GODIN, Boston Police Officer;
JOSEPH McMENAMY, Boston Police Officer;
LEROY FERNANDES, Boston Police Officer;
BRENDA FIGUEROA, Boston Police Officer;
COREY THOMAS, Boston Police Officer;
TROOPER PAUL CONNEELY, Massachusetts State Trooper;
and
CITY OF BOSTON,

Defendants-Appellees.

On Appeal From the United States District Court for the District of Massachusetts in Case No. 1:20-cv-11501, Judge Richard G. Stearns

ADDENDUM TO BRIEF OF PLAINTIFF-APPELLANT JENNIFER ROOT BANNON

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[1] District Court docket entries are denoted by "D.I."

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 20-11501-RGS

JENNIFER ROOT BANNON

v.

BOSTON POLICE OFFICERS DAVID GODIN, JOSEPH MCMENAMY, LEROY FERNANDES, COREY THOMAS, and BRENDA FIGUEROA; MASSACHUSETTS STATE TROOPER PAUL CONNEELY; and THE CITY OF BOSTON

MEMORANDUM AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

December 5, 2022

STEARNS, D.J.

On February 7, 2020, Juston Root was shot and killed by law enforcement after pointing and discharging what appeared to be a firearm at a Boston police officer and then leading police on a car chase through Boston and Brookline. Root's sister, Jennifer Root Bannon, acting as the special personal representative for Root's estate, sued the officers involved in Root's death as well as the City of Boston as their employer. At the close of discovery, the parties cross-moved for summary judgment. Although the circumstances of this case are undeniably tragic, the court is constrained by

legal precedent and the undisputed facts to rule in defendants' favor. Accordingly, for the reasons that follow, the court will grant defendants' motions for summary judgment and deny Bannon's motion for partial summary judgment.

BACKGROUND

On the morning of February 7, 2020, the Boston Police Department (BPD) received a call warning that a person with a gun had been seen on the grounds of Brigham & Women's Hospital (BWH), located on Francis Street in Boston. Bannon Statement of Undisputed Material Facts (BSUMF) (Dkt # 88) ¶¶ 1, 5. Boston Police Officer David Godin responded to the call and encountered Root, who falsely identified himself as a law enforcement officer. *Id.* ¶¶ 6, 8. Root then aimed what was later determined to be a paintball gun at Godin and pulled the trigger. *Id.* ¶ 9. Godin returned fire and tripped backwards onto the street. *Id.* ¶¶ 10, 14. Another officer who responded to the call, Michael St. Peter, witnessed the exchange and fired his weapon at Root. *Id.* ¶¶ 11-13.

Injured, Root limped to his nearby vehicle and drove in the direction of Huntington Avenue. *Id.* ¶¶ 17, 22. Godin and St. Peter gave chase, while Godin reported over the BPD radio that shots had been fired and that he believed Root had been hit. *Id.* ¶¶ 24-25. Other BPD officers joined the

pursuit, including Joseph McMenamy, Leroy Fernandes, Brenda Figueroa, and Corey Thomas. *Id.* ¶¶ 29, 31. In an effort to stop Root, McMenamy performed a "PIT maneuver," ramming the side of Root's vehicle with his police cruiser. *Id.* ¶¶ 37-41.[1]

Undeterred by the collision, Root continued westbound onto Route 9 in Brookline, where Massachusetts State Trooper Paul Conneely joined the chase. *Id.* ¶¶ 54-55. Root collided with other vehicles at the intersection of Route 9 and Hammond Street, and his vehicle – which at this point was heavily damaged – came to a stop. *Id.* ¶¶ 56-60. Root exited his vehicle, limped onto the sidewalk, and fell. *Id.* ¶¶ 67-69. He then got back up, walked to a mulched area adjacent to the sidewalk, and collapsed. *Id.* ¶¶ 70-71.

Shelly McCarthy, an EMS-certified passerby who had been sitting in her car when Root's vehicle came to a stop, ran over to assist Root. *Id.* ¶¶ 73-75. Root, in McCarthy's estimation, was gravely injured. *Id.* ¶¶ 78-81. McCarthy stated that during the entire time that Root was in her line of sight, his right hand clutched his chest while his left hand dangled at his side. *Id.* ¶ 82. At that point, officers converged on the scene and began shouting commands over one another. *Id.* ¶¶ 84-88; *see id.* ¶ 89 ("McMenamy,

[1] McMenamy's maneuver was done in violation of written BPD policy. *See id.* ¶ 50 (BPD Rule 301 provides that "[o]fficers shall not use their police vehicle to deliberately make contact with a pursued vehicle").

Thomas, and Conneely stated that the scene . . . was chaotic."). McCarthy heard an officer yell at her to "run," and she did. *Id.* ¶¶ 85-86. Officers continued to give Root overlapping verbal commands to "get on the ground," "stay down," and "show me your hands." *Id.* ¶¶ 90, 94, 98, 100. McMenamy closed in and pushed Root to the ground with the bottom of his left foot. *Id.* ¶¶ 108-110.

Fernandes testified that Root "reached into what appeared to be a jacket" and that he saw Root's "'arm, shoulder, arm motion' like it was 'coming out' of the jacket." *Id.* ¶¶ 112, 115. Figueroa stated that she witnessed Root "'removing his hand out of his jacket,' and 'the handle of a firearm was shown.'" *Id.* ¶ 122. Godin recalled Root "reaching with his right hand into his jacket, and someone yelling gun." *Id.* ¶ 127. McMenamy stated that he saw Root "'open up his jacket,' 'saw a floating gun in [Root's] chest,' and 'saw [Root's] hand reach over and get to there.'" *Id.* ¶ 135. Conneely testified that Root's "right hand went inside his jacket" and he saw Root's "hand around a black handle coming up." *Id.* ¶ 154.

Fernandes, Figueroa, Godin, McMenamy, Conneely, and Thomas opened fire on Root, rapidly unloading a total of thirty-one rounds. *Id.* ¶¶ 160-166. Thomas did not see Root reach into his jacket, but he testified that he "heard . . . one gunshot and . . . presumed [Root] was shooting at the

other officers," which "caused [him] to start shooting as well." *Id.* ¶ 146. A bystander, Dr. Victor Gerbaudo, witnessed "Root reach inside his jacket just before the officers discharged their firearms." City Defs.' Statement of Undisputed Material Facts (CDSUMF) (Dkt # 95) ¶ 58.

Root was transported by ambulance to Beth Israel Deaconess Medical Center where he was pronounced dead. BSUMF ¶ 178. Officers recovered a "bb" gun with a metal rod extending from its barrel in the mulch near Root's body. *Id.* ¶ 182.

DISCUSSION

"Summary judgment is warranted if the record, construed in the light most flattering to the nonmovant, 'presents no genuine issue as to any material fact and reflects the movant's entitlement to judgment as a matter of law.'" *Lawless v. Steward Health Care Sys., LLC*, 894 F.3d 9, 21 (1st Cir. 2018), quoting *McKenney v. Mangino*, 873 F.3d 75, 80 (1st Cir. 2017). The moving party "bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If this is accomplished, the burden then "shifts to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation

and from which a reasonable jury could find for the nonmoving party." *Rogers v. Fair*, 902 F.2d 140, 143 (1st Cir. 1990).

Deadly Force by Individual Defendants (Counts I, VIII-IX)

The crux of Bannon's excessive force, assault and battery, and wrongful death claims against the individual defendants is that their use of deadly force against Root at the Route 9 crash scene was unreasonable and unjustified. The individual defendants contend that their use of deadly force in the chaotic, highly emotive, and ambiguous circumstances surrounding the final confrontation with Root did not violate his Fourth Amendment rights. In any event, the officers maintain that they are protected by the doctrine of qualified immunity.

Qualified immunity attaches to discretionary conduct of government officials that "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The inquiry into whether a constitutional right is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *See Marrero-Mendez v. Calixto-Rodriguez*, 830 F.3d 38, 45 (1st Cir. 2016), quoting *Mullenix v. Luna*, 557 U.S. 7, 12 (2015). "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but

the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam), quoting *Malley v. Briggs*, 475 U.S. 335, 343 (1986).

> Law enforcement officers quite often are required to assess . . . probabilities[] and to weigh the attendant contingencies. And it is precisely such spontaneous judgment calls—borne of necessity in rapidly evolving, life-endangering circumstances—that the qualified immunity doctrine was designed to insulate from judicial second-guessing in civil actions for money damages, unless the challenged conduct was clearly incompetent or undertaken in plain violation of established law.

Hegarty v. Somerset Cnty., 53 F.3d 1367, 1377 (1st Cir. 1995).

When faced with a claim of qualified immunity, a court may choose to "first determine whether the plaintiff has alleged a deprivation of an actual constitutional right at all." *Conn v. Gabbert*, 526 U.S. 286, 290 (1999). The "threshold" question in this mode of analysis can be stated as follows:

> Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? . . . If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.

Saucier v. Katz, 533 U.S. 194, 201 (2001). "Deciding the constitutional question before addressing the qualified immunity question also promotes

clarity in the legal standards for official conduct, to the benefit of both the officers and the general public." *Wilson v. Layne*, 526 U.S. 603, 609 (1999).[2]

Turning to the constitutional issue — and after viewing the undisputed facts in the light most favorable to Bannon — the court concludes that the defendant officers did not violate Root's Fourth Amendment rights. We begin with some basic Fourth Amendment principles. "[*A*]*ll* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest" are to be decided under a Fourth Amendment standard of reasonableness, the proper application of which "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 395-396 (1989) (emphasis in original) (rejecting a Fourteenth Amendment substantive due process analysis of excessive force claims). The standard by

[2] This analytical sequence is not mandated. "There are circumstances in which the first step of the *Saucier* procedure may create a risk of bad decisionmaking," *Pearson v. Callahan*, 555 U.S. 223, 239 (2009), as there are cases "in which a court will rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all." *Id.*

which excessive force is to be gauged is an objective one: "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Id.* at 397. *See also Menuel v. City of Atlanta*, 25 F.3d 990, 996 (11th Cir. 1994) (officers attempting to subdue a violent, mentally ill suspect acted reasonably in resorting to deadly force after being unexpectedly fired upon). *Cf. Roy v. City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994) ("[W]hether substantive liability or qualified immunity is at issue, the Supreme Court intended to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases.").

The officers were aware that Root was reportedly armed and dangerous, having pointed what appeared to be a firearm at Godin and pulled the trigger during the BWH confrontation.[3] Further, Root had just fled the initial crime scene, leading the officers on a dangerous car chase through a densely populated area, culminating in Root's violent collision with vehicles driven by civilian passersby. Despite Root's injuries, the

[3] Although the weapon wielded by Root at the BWH scene ultimately turned out to be nonlethal, a reasonable officer in Godin's and St. Peter's situation would have been warranted in the belief that Root had discharged a deadly firearm at Godin.

officers had reason to believe that Root continued to pose an immediate threat to themselves and to the public.

This threat of danger was escalated when Root reached into his jacket, an action that officers reasonably interpreted as an attempt to retrieve a firearm. Given the circumstances, the officers had reason to believe that Root was armed, and his behavior "would lead almost anyone to believe that he was reaching for a weapon." *Escalera-Salgado v. United States*, 911 F.3d 38, 41 (1st Cir. 2018). Where, as here, "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable [to use] deadly force." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).[4]

Bannon has provided no evidence to rebut the officers' testimony that Root was reaching into his jacket before the officers opened fire. Although McCarthy testified that Root's hands did not change position while he was in

[4] The case that Bannon relies on in support of her argument that deadly force was unreasonable, *Woodcock v. City of Bowling Green*, 679 F. App'x 419 (6th Cir. 2017), is inapposite. There, the Sixth Circuit explained that the use of deadly force where the decedent had a hand in his pocket was objectively unreasonable because the officer "may have thought that [the decedent] had a gun, but [the decedent] never gave [the officer] reason to think he would use it imminently." *Id.* at 424-425. Unlike in *Woodcock*, Root was observed to be reaching into his jacket, an affirmative action that gave the officers "reason to think" that (as earlier at BWH) Root had a firearm *and* that "he would use it imminently." *Id.*

her line of sight, she had turned away to run at the officers' command and did not see what Root's hands were doing at the time the officers started shooting. Moreover, although Bannon takes issue with the self-serving nature of the officers' statements, self-serving deposition testimony may properly be considered on summary judgment. *See Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, 473 F.3d 11, 18 (1st Cir. 2007) (providing that the deponent's testimony "sets forth specific facts, within his personal knowledge that, if proven, would affect the outcome of the trial, the testimony must be accepted as true for purposes of summary judgment"). In any event, the court does not have to simply take the officers at their word. Dr. Gerbaudo, a disinterested bystander who witnessed the events, stated that he saw Root reach into his jacket immediately before the officers opened fire.[5]

[5] Bannon's reliance on Dr. Jennifer Lipman's expert testimony that, "had Mr. Root's hand been as close to the bb gun as the Individual Defendants contend, it is unlikely that the bb gun would have emerged unscathed while Mr. Root's hand suffered multiple gunshot wounds," Bannon Opp'n to Individual Defs.' Mot. (Dkt # 113) at 18, is misplaced. At most, Dr. Lipman's testimony creates a dispute of fact as to whether Root was reaching for the bb gun. However, the actual presence of the bb gun on Root's person is irrelevant where, as here, there is uncontested evidence that the officers had probable cause to believe that Root was armed and that he was reaching into his jacket in a manner that strongly suggested — given the attendant circumstances — that he was grasping for a firearm. *See Garner*, 471 U.S. at 11.

Bannon argues that the officers failed to provide Root with clear verbal commands and that they "did not take cover, use any de-escalation techniques, use less-lethal force options like OC spray or a baton, or warn . . . Root that deadly force may be used." Bannon Mem. (Dkt # 87) at 12-13. That may well be true. But, as the officers point out, the "calculus of reasonableness" in the Fourth Amendment context must make "allowance" for law enforcement "to make split second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-397. Such is essentially the case here.

Finally, the court rejects Bannon's contention that the number of shots fired at Root – by six officers in rapid succession lasting only a few seconds – was constitutionally excessive. "[I]f police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014).

While the forceful outcome of the constitutional analysis is to my mind conclusive, for the sake of completeness, I will turn to the defendant officers' qualified immunity claims. Because of the fact-intensive nature of the inquiry, when it comes to excessive force claims, the qualified immunity

doctrine has special bite. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1152-1153, 1154 (2018) (per curiam) (cautioning courts of appeals against undue generality in their approach and noting that under Supreme Court precedent officers are entitled to qualified immunity unless a prior case "squarely governs" – "a reasonable officer is not required to foresee judicial decisions that do not yet exist in instances where the requirements of the Fourth Amendment are far from obvious").

In *Kisela*, the defendant officer used deadly force to subdue a woman wielding a large knife in the (perhaps mistaken) belief that she posed a threat to another woman at the scene. *Id.* at 1153. The Supreme Court faulted the lower court for its over-reliance on its own less than clear precedent. If anything, the Court concluded, the precedent favored officer Kisela. While they post-date the encounter with Root, two cases – one from the Supreme Court, the other from the First Circuit – are "squarely" on point, *id.*, and based on numerous cases that predate the encounter. In *City of Tahlequah, Oklahoma v. Bond*, 142 S. Ct. 9 (2021) (per curiam), officers were called to the scene of a domestic disturbance. They encountered Rollice, the trespassing and intoxicated ex-husband of the complainant. When Rollice retreated into his ex-wife's garage, the officers followed. Rollice refused the officers' commands to stop walking. He then grabbed a hammer from a

workbench with both hands and turned to face the officers in a fighting stance "as if preparing to swing a baseball bat." *Id.* at 10. The officers opened fire in response, killing Rollice. A Ninth Circuit panel ruled that the district court had committed error in dismissing Rollice's estate's wrongful death claim on qualified immunity ground. The Supreme Court rejected the circuit court's theory that the officers had provoked the confrontation by "cornering" Rollice. Rather, the Court held that the officers were entitled to qualified immunity because neither the lower court nor the respondent had "identified a single precedent finding a Fourth Amendment violation under similar circumstances." *Id.* at 12.

A recent First Circuit decision, *Estate of Rahim v. Doe*, 51 F.4th 402 (1st Cir. 2022), is of similar if not greater import. Rahim, a terrorist suspect, was overheard by authorities expressing in a phone message to one of his confederates his frustration at the slow pace of a planned terrorist attack in New York City and his determination to undertake a vigilante action against the "boys in blue" "right here in Massachusetts." *Id.* at 405. A surveillance team was notified and informed that Rahim was armed with a knife. The team was ordered to stop Rahim from boarding any public transportation. At 7:00 a.m., the team followed Rahm from his apartment to a bus stop in front of a CVS on Washington Street. The officers approached Rahim with

their weapons drawn and ordered him to put his hands up and drop the knife. Rahim refused and began advancing on the officers as they retreated though CVS parking lot, taunting them as he did so.

Given the constellation of events, the majority of the First Circuit panel determined that:

> An objective officer would conclude Rahim had chosen to escalate the situation and that Rahim was an increasing threat. And Rahim's actions were consistent with his words: he kept advancing on the officers, despite their attempts by retreating to not let him close the distance. When he had come close enough to them to be a lethal threat to the officers and others, they had split-second decisions to make about what was needed to stop him. And two officers almost simultaneously reached the same decision. Doe 1 fired twice and Doe 2 fired once. Rahim was hit. The entire encounter unfolded over about thirty seconds.

Id. at 406. The district court denied the officers' claim of qualified immunity, holding that a grant of immunity would be warranted based on the events of the confrontation itself, but not when consideration was given to the information gathered by the officers in the days leading up to the fatal encounter, including their "plans, actions, observations, and means available to respond." *Id.* at 409.

The First Circuit reversed, holding that the district court had erred in importing events that had occurred prior to the fatal shooting into the analysis rather than focusing on the moment of the shooting. *Id.* at 410. When viewed in the proper focus, the court held that a reasonable officer at

the situation of the moment "would have understood Rahim to have a lethal knife in his hands . . . [and] would have understood Rahim's actions to show that he had every intention to use this knife to kill the officers and, if they were unsuccessful in stopping him, to kill other people." *Id.* at 413. The propriety of a grant of qualified immunity, moreover, was justified in light of ample precedent, citing among other cases, *City of Tahlequah*, *supra*, and *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021) (per curiam).

Applying the same analysis as used in *City of Tallequah* and *Rahim* to the facts at hand, the case for qualified immunity is even more compelling, particularly in light of the officers' reasonable belief that Root was armed not with a hammer or a knife but with a gun that he was prepared to use.

Excessive Force by McMenamy (Count V)

Bannon first challenges McMenamy's use of a "PIT maneuver" on Root's vehicle during the car chase as an excessive use of force. Although McMenamy's blocking maneuver was in clear violation of BPD policy, an action under § 1983 may not be based on a violation of a state law or an internal departmental regulation unless the act complained of also violates a secured federal right. *See White v. Olig*, 56 F.3d 817, 821 (7th Cir. 1995); *see also Boveri v. Town of Saugus*, 113 F.3d 4, 7 (1st Cir. 1997) ("A regulatory violation, like a violation of state law, is not inherently sufficient to support

a § 1983 claim."). There is no federally secured right under either the Fourth or the Fourteenth Amendments to be free from police pursuits. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 853, 854 (1998) ("[W]e hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressable by an action under § 1983."); *Scott v. Harris*, 550 U.S. 372, 386 (2007) ("A police officer's attempt to terminate a high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."). Here, as in *Scott*, the traffic video footage shows Root driving at a high rate of speed through a heavily populated area. The danger that Root's vehicle posed to the public was underscored by the violent end of the chase, which saw Root colliding with two vehicles driven by civilian passersby. Thus, the court concludes that McMenamy's pursuit of Root or his resort to a PIT maneuver did not violate the Fourth Amendment.

The court also rejects Bannon's argument that McMenamy's use of his foot to push Root to the ground at the Route 9 crash scene was constitutionally unreasonable. "'Not every push or shove, even if it later may seem unnecessary in the peace of a judge's chambers,' . . . violates the Fourth

Amendment." *Graham*, 490 U.S. at 396, quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973).

Massachusetts Civil Rights Act (Counts II, VI)

The Massachusetts Civil Rights Act (MCRA) "provides a cause of action for any person whose rights under the Constitution, federal law, or state law have been interfered with by threats, intimidation, or coercion of another." *Kelley v. LaForce*, 288 F.3d 1, 10 (1st Cir. 2002), citing Mass. Gen. Laws ch. 12, §§ 11H, 11I. "The Supreme Judicial Court of Massachusetts has interpreted the MCRA to be co-extensive with § 1983 except for two disparities: (1) the MCRA does not require any state action . . . , and (2) a claim under the MCRA requires a violation by threats, intimidation, or coercion." *Id.*

Because, as discussed above, Bannon has failed to demonstrate that the officers violated any constitutional provision or law, her MCRA claims also fail. Moreover, the court notes that it cannot discern the presence of threats, intimidation, or coercion in any of the officer's challenged actions.

Failure to Train or Supervise (Count VII)

The City argues that Bannon has failed to establish a triable issue that it failed to properly train or supervise its officers such that it is liable under § 1983. The court agrees. A foundational element of a municipal liability

claim under § 1983 is the occurrence of a "constitutional deprivation." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989); *see also Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 902 (1st Cir. 1988). Here, Bannon has not demonstrated that any BPD officer committed a constitutional deprivation of Root's rights. It follows then that Bannon's municipal liability claim cannot stand.

ORDER

For the foregoing reasons, the court ALLOWS defendants' motions for summary judgment on the finding that no Fourth Amendment violation occurred, or in the alternative, that qualified immunity attaches to the defendant officers' actions. Bannon's motion for partial summary judgment is DENIED.

SO ORDERED.

/s/ Richard G. Stearns
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Jennifer Root Bannon
as the Special Personal Representative
of the Estate of Juston Root

Plaintiff

v. CIVIL ACTION 1:20-11501-RGS

David Godin, et al.

Defendants

JUDGMENT

STEARNS, D.J.

In accordance with the court's Memorandum and Order [Dkt. # 124] issued on December 5, 2022, granting defendants' motions for summary judgment, it is

ORDERED:

Judgment entered for the defendants.

December 5, 2022
Date

By the court,
/s/ Arnold Pacho
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JENNIFER ROOT BANNON, as the Special Personal Representative of the Estate of Juston Root, Plaintiff,

vs.

BOSTON POLICE OFFICERS DAVID GODIN, JOSEPH McMENAMY, LEROY FERNANDES, BRENDA FIGUEROA, and COREY THOMAS; MASSACHUSETTS STATE TROOPER PAUL CONNEELY; and THE CITY OF BOSTON, MASSACHUSETTS, Defendants.

No. 20-CV-11501-RGS

BEFORE THE HONORABLE RICHARD G. STEARNS
UNITED STATES DISTRICT COURT JUDGE
MOTION HEARING

John Joseph Moakley United States Courthouse
Courtroom No. 21
One Courthouse Way
Boston, Massachusetts 02210

September 28, 2022
11:05 a.m.

Kathleen Mullen Silva, RPR, CRR
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P R O C E E D I N G S

THE CLERK: This is Civil Action 22-11501, Bannon v. Godin, et al.

Would counsel please identify themselves for the record.

MR. BERTHIAUME: Good morning, Your Honor. Mark Berthiaume, Greenberg Traurig, on behalf of the plaintiffs. Together with me at counsel table are Allie Holdway, Courtney Foley and Gary Greenberg.

MR. WHITESELL: Good morning, Your Honor. Edward Whitesell for the City of Boston. I represent the city police officers, as well as the City of Boston itself.

MS. DAVIDSON: Good morning, Your Honor. Bridget Davidson on behalf of the city defendants as well.

MR. MOYNIHAN: Good morning, Your Honor. Daniel Moynihan on behalf of Trooper Paul Conneely.

THE COURT: I thought it might be useful to start with just some general principles, although I understand difficult cases of this kind ultimately are governed more by the facts necessary to the law. But the law does give us I think some guidance.

What is at issue, of course, in this case is the use of force and the question is whether the force was excessive and the test is the same under Supreme Court decision Graham v. Connor being perhaps the leading case applies, as I said, to

both uses of deadly or non-deadly force but the ultimate inquiry is the reasonableness of the officer's action.

The doctrine of qualified immunity is hard to speak of in very general terms. The Supreme Court has said that it applies unless cases squarely hold on a similar factual pattern that the officer's conduct was unlawful under this circumstance, I think that's Kisela v. Hughes, a Supreme Court decision.

I think we can all agree in a general sense that there is a right to be free from the use of excessive force, as I said, but, again, we go back to the issue of reasonableness and as the very term implies, reasonableness means that we look at it from an objective point of view, that is, the subjective motivations of the officers really do not matter for purposes of the Fourth Amendment analysis.

So with that as just a sort of a general legal framework, I think -- I know these are cross motions for summary judgment -- it might be more efficient to start with the defendants and then move to the plaintiffs, who can then both lay their case out for summary judgment and also reply to the arguments made. And I gather we'll hear from two separately on behalf of Trooper Conneely and then -- I'm sorry, Mr. Whitesell --

MR. WHITESELL: Yes, Your Honor.

THE COURT: -- you'll be addressing the liability of

the city as well as the officers for the City of Boston?

MR. WHITESELL: Yes, Your Honor.

THE COURT: All right.

MR. WHITESELL: Your Honor, we would submit that, based on the facts in this case, that this was -- the force used in this case was neither a constitutional violation nor was it sufficient to overcome the qualified immunity of the officers.

The reasonableness factors, as Your Honor is obviously aware of, are the severity of the crime, the degree of the threat that's posed to the officers and others, and whether the suspect is resisting or attempting to evade. Based on the totality of the circumstances in this instance, I think it's fairly clear that the officers can meet all of those factors.

Your Honor may not know and may not need a full recitation of the facts, but this incident began at the Brigham Hospital. It involved a person brandishing what was believed to be a gun by witnesses on the scene, including two police officers and security guards in the area. The gun at one point, as can be seen from the video, is pointed directly at Officer Godin at point-blank range to the extent that he was fearful for his own life.

Mr. Root then got in a vehicle, went on a high-speed chase out to Brookline where he ended up getting in a car accident. In the interim, one of the issues that's at issue in

this case is the PIT maneuver that was attempted by Officer McMenamy where he tried to stop the high-speed chase and was unsuccessful in doing so by hitting the rear end of Mr. Root's car from the side.

Mr. Root proceeded to Brookline where he ended up in an accident with three other vehicles, got out of the car, stumbled to a grassy area where he was approached by five police officers from the City of Boston and a state trooper. And they yelled -- varying of them yelled, "Show your hands. Show your hands. Get down" and certain things of that type. Mr. Root did not comply. The officers testified, two of them testified that they could see a gun handle. Two of them testified they could see him reach for his pocket and they discharged their weapons a total of 31 times.

I would submit to you, Your Honor, that the severity of the crime here, pointing a gun at a police officer in a very crowded hospital area where there were many pedestrians on the street at the time, that meets that standard. The high-speed chase through Brookline meets that standard. I would suggest to Your Honor that he had done nothing but attempt to evade capture from the moment that he first brandished the weapon in the Brigham, getting into the car, trying to leave the scene in a chase and then trying to leave from the car to get away from the officers that were following him to the scene in Brookline.

The question here I think really spins on the issue of

whether there was an imminent threat. I would suggest that given the totality of the circumstances, what is particular in the instance of Officer Godin, who already had the weapon pointed at him down at the Brigham, and had followed out to the scene and was one of the five officers on the scene, but in terms of all the officers, they were receiving radio calls while they were in their cars trying to locate the suspect, that shots had been fired, that police officers were involved in the shooting, and that there was a real threat that this individual who was proceeding towards Brookline may again discharge that weapon in a crowded area. The scene of this accident is right outside the Star Market in Brookline in Chestnut Hill.

So based on those standards, I think that the officers from the City of Boston can prove that this was not a constitutional violation. There's no violation of the Fourth Amendment for using force, i.e., shooting a suspect that they believed was reaching for a gun, a gun that had been brandished and shown, directly pointed at a police officer just moments before at another location.

With respect to -- if the court were to find that that does mean -- that these circumstances, these facts, the totality of these circumstances, does mean the requirements for them to show that there's a constitutional violation, I would submit that the law is not clear that the officers should have

known that this would have been a violation.

I think with respect to the PIT maneuver, the Harris case is pretty clear that officers are allowed to try to attempt to stop a high-speed chase to prevent harm to others, the driver and themselves. And I think the law with respect to --

THE COURT: Which case are you relying on?

MR. WHITESELL: I think it's Smith v. Harris.

MR. MOYNIHAN: Scott v. Harris.

MR. WHITESELL: Scott v. Harris, I'm sorry.

THE COURT: Scott v. Harris. Okay.

MR. WHITESELL: I apologize. I was thinking of something else, Your Honor.

THE COURT: I know the appeals court cautioned us against over-parsing a sequence of events where they're continuous in a case like this. But would you agree that there are three points at which one can talk about force being applied? First at the hospital scene, then in the attempt to stop the fleeing vehicle, and then finally at the scene where the final shooting takes place?

MR. WHITESELL: I would agree with Your Honor, but I do not believe that the first incident is an allegation in this case. It hasn't really been pressed with respect to the motions. There was force used. I believe officers discharged guns at the Brigham, but I'm not sure that that's really an

element in this case as it stands today.

THE COURT: So we're looking at two points?

MR. WHITESELL: Yes. I think the assertion is the PIT maneuver, which the officers would suggest to you didn't cause any injury or damage to the -- it was unsuccessful. He was able to continue driving.

But the second issue would be what happened at that scene when he was on the ground and they approached with their weapons drawn, yelling commands, and his refusal to obey commands, and then the response when they see him reaching into his pocket, the response by discharging their weapons. That is really the issue as it relates to excessive force in this case.

There is some allegation regarding a kick as they approached him initially, that one officer kicked him, but there's really no evidence that that had any impact on damages. And given the proportionality of the force, the fact that they thought he had a gun and was lying on the ground with a gun would suggest that the proportionality of a kick in that context is certainly reasonable objectively.

So Your Honor, I think that the law is at best unclear for the plaintiff as it relates to the use of force in these circumstances. At worst I think it's clearly in favor of the officers that this was objectively reasonable. So I simply think that at the end of the day there's no getting past the qualified immunity defense on the force issue.

If Your Honor doesn't have any other questions about the officers' motion, I would be glad to rest on that.

THE COURT: The theory of liability on the part of the City of Boston is training?

MR. WHITESELL: Oh, yes, Your Honor.

So with respect to the Monell motion, the theory is the failure to train the officers. We would submit to you that the standard for that is deliberate indifference. As Your Honor well knows, usually that is proved by showing some prior constitutional violations that would put the city on notice that their training as it relates to the issues in this case was inadequate.

So the theory here is that there's a failure to train the officers in pursuit techniques. There's a failure to train the officers in force techniques. Both of these things are taught at the academy extensively. There are promulgated BPD rules on the use of force and how to do pursuit driving. There are in place -- there's clearly no deliberate indifference to the issues of pursuit driving or the use of force, including deadly force. It's an issue that's been addressed by the policy makers and the people at BPD.

The plaintiff challenges the way the rules have been adopted and suggests that those are problematic or have faults or have holes, I believe is the word that's used, but that's not the standard for proving a Monell claim. You have to prove

that this is a constitutional violation, that there's a custom and policy in place that is the driving force behind this particular constitutional violation in this case.

I would also say, Your Honor, if you were to find that there was no constitutional violation, then obviously the Monell claim depends on that, it goes hand in hand. You would have to find the officers did commit a constitutional violation in the first instance for the city to be liable for Monell.

But here you don't have the classic -- at least there's no evidence in this case on the summary judgment record of the classic series of constitutional violations that would have put policy makers on notice that something about the way that they are teaching these officers at the academy is not sufficient, that the rules that they've adopted and promulgated and have publicly available on the website are not sufficient. They don't offer any of those prior constitutional violations. They look at the rules themselves. They offer their expert testimony saying there were different things that could have been done in this case. Maybe that's a negligence standard. Maybe that's something that could be argued on negligence, but it's certainly not a constitutional violation under Monell.

So the city's position would be they would have had to either provide us with something to show something to the court that would have allowed BPD to be on notice that the rules and regulations they have in place right now are insufficient to

prevent, assuming you find it is a constitutional violation, the violation of the Fourth Amendment in this case.

THE COURT: Thank you.

Mr. Moynihan, Trooper Conneely comes onto the scene on Route 9, right --

MR. MOYNIHAN: That's correct, Your Honor.

THE COURT: -- during the flight toward Brookline?

MR. MOYNIHAN: That's correct. He's involved only in, I guess we're calling it scene three, which is the shooting.

You know, our position on behalf of Trooper Conneely is that his actions were objectively reasonable and that, first of all, there was no Fourth Amendment violation for a plethora of reasons.

His facts that he's aware of are that he's on Route 9. He hears on the scanner that someone had pulled a gun on a security officer at Brigham & Women's Hospital. He then hears something about a shot on Fenwood Road. He assumes, presumes that there's been shots fired at a security officer.

He then begins to make his way onto Route 9, where he then observes Mr. Root's vehicle go by him at a very high rate of speed, which was clocked -- determined later to be 90 miles per hour. He then sees the Boston cruisers pursuing Mr. Root's vehicle. He then hears a crash on Route 9 in Brookline. He then goes to that scene. He then sees carnage in the form of multiple vehicles which have been crashed into by Mr. Root. He

then sees Mr. Root getting out of the car and there's some difference about whether he stumbled to the mulch area or ran to the mulch area. But in any event, he goes to the mulch area. He is told then that Mr. Root is armed. He's told that Mr. Root has a firearm in his chest within his jacket. So those are the facts that are known by Trooper Conneely as he approaches scene three. As you know, only the facts that are knowable to that particular officer is to be attributed to him.

There is no question here, Your Honor, that there was a seizure of Mr. Root by Trooper Conneely and the others. There's no question here that there was a use of force by Trooper Conneely and the others. The question is did it violate the Fourth Amendment and the question is whether it's objectively reasonable under the circumstances. We've cited in our brief the Plumhoff case. We've cited in our brief the Cole v. Bone case. We've cited in our brief the Smith v. Freland case. All of which make clear the fact that various circumstances are determined by the courts to be objectively reasonable and to not be violations of the Fourth Amendment.

So our basic argument in this case, Your Honor, is that Trooper Conneely's knowledge, Trooper Conneely's actions did not violate the Fourth Amendment. As tragic as this case may have worked out, his actions did not violate Mr. Root's Fourth Amendment rights. The court, as you know, in the McKenney case has fashioned a fairly wide zone of protection

for police in borderline cases. The facts that he knows are just as I just indicated.

In addition, the fact that then becomes apparent at the scene is after multiple commands are given to Mr. Root, Mr. Root fails to comply with those demands and instead Mr. Root begins to reach into his jacket where Trooper Conneely has been told there is a firearm.

And so there are multiple commands given. There's failure to comply. There is not only a failure to comply, but there's a threatening gesture in reaching for a firearm, which Trooper Conneely believes, and has been told, was in his coat and, by the way, turned out to be some sort of a firearm in his coat. At the end of the day we know that that firearm was a replica but it was black. It was seemingly realistic looking.

So our position, initially, Your Honor, is that Mr. Root was not deprived of any constitutional right, as he was resisting a lawful arrest, failed to comply with multiple commands, and Mr. Conneely did not -- Trooper Conneely did not clearly -- did not violate any clearly established law under the Fourth Amendment.

The Justiniano case v. Walker I think has some similarities here in the sense that the lower court initially found that Trooper Walker did not violate the Fourth Amendment. On appeal, the court decided to go to question two. And similarly here, although we take the position that Trooper

Conneely did not violate any Fourth Amendment rights, if we're to look at the light most favorable for the plaintiff and if this court is to assume for the moment in that fashion that Trooper Conneely did violate rights, then similar to the city's argument, we make the same argument, Your Honor, here that was discussed in Justiniano v. Walker, and that is that he would not have known that his actions violated a right. Would a reasonable trooper, would a reasonable law enforcement officer have known that discharging their weapon under these facts violated a constitutional right?

And I think it's clear, Your Honor, that, you know, the Ashcroft case gives reasonable leeway to troopers, law enforcement. Frankly, I don't think that even applies here, Your Honor, given the facts of this case. I think that if this court -- and I would argue that if this court does find a constitutional violation which, again, we state there is not, that qualified immunity then comes into play here and, as in the Justiniano v. Walker case, would a reasonable officer -- a reasonable officer would not have clearly understood that firing their weapon at Mr. Root was unreasonable and unavoidable. It was not.

So our position squarely is there was no Fourth Amendment violation by Trooper Conneely, who comes in in scene number three. And if the court's to look at it in that fashion and grant in the light most favorable, qualified immunity

absolutely applies here, Your Honor.

THE COURT: Thank you, Mr. Moynihan. All right.

For the plaintiff, I recognize there are two issues you may want to address. First, let's start with the motion for partial summary judgment, which is the affirmative of that case, and then you may want to say something about whether there are disputes of facts with respect to the city's and the trooper's position requiring a trial.

MR. BERTHIAUME: Thank you, Your Honor. And thank you for your prompt consideration of these motions.

With respect to the plaintiff's motion for summary judgment, as you know, we've alleged 1983 claims and MCRA claims, as well as assault and battery, wrongful death. It is our position that, when viewed even in a light most favorable to the defendants, the city defendants and Officer Conneely, that no rational jury could conclude that this shooting, 31 shots into Mr. Root in Brookline, was objectively reasonable.

Now, we have submitted to the court a host of material to support the complaint, the allegations that we have set forth in the complaint, a very comprehensive complaint laying out what transpired from the Brigham & Women's Hospital all the way into Brookline and beyond.

I submit to the court that what is contained in that complaint, those allegations, are -- have been undisputed. They haven't attempted to offer any evidence contradicting what

we have alleged in the complaint. And I will go through it in a moment.

The one fact that is in dispute -- and it is in dispute -- is whether Juston Root was reaching for anything in Brookline. And we'll get to that. But even assuming, for the purposes of our motion, that these six officers were telling the truth and weren't creating a narrative, even assuming that that's true, the law is clear that, given all these other undisputed facts, reaching in and of itself is insufficient, again, as a matter of law.

Before proceeding to the legal argument with respect to whether the adequacy of that conduct is sufficient, I think it is critical to review the facts that led up to the 31 shots being fired into Mr. Root as he lay on the ground severely injured.

There is no question, and we don't argue -- I mean, as we set out in the complaint, Mr. Root, this 41-year-old man, did have a history of mental illness, a paranoid schizoaffective disorder diagnosed ten years before. A product of that was the fact that he had delusions of being a law enforcement officer, and as a result at times did carry toy guns. I mean, not loaded, not charged, but he carried toy guns. He had a CIA tag lanyard at times, you know. And that was a product of his mental disorder.

On the morning of February 7, 2020, we know, because

we have video of all this -- it can't be challenged -- he went to the Brigham & Women's, a place near the Mass. Mental Health Center where he had been treated for many years. He parked his car in the road, double parked his car, was seen on video getting out of his car, going up and down the street. It was reported to the police that they had observed a gun, somebody with a gun in the Brigham & Women's. No dispute. Again, no dispute that Officer Godin, one of the defendant officers, and another officer, St. Peter, responded to the scene.

Ultimately, Officer Godin confronted Mr. Root. Officer Godin pulled his gun. Mr. Root had this plastic paintball gun in his waistband. He pulled it out, shots were fired by Officer Godin and Officer St. Peter. It's clear from the video that Mr. Root appears to be injured. He limps to his vehicle. Officer Godin fell backwards, stumbling after he had fired his weapon, and Mr. Root drove toward Route 9.

Significantly, both Officer Godin and Officer St. Peter believe that they have shot Mr. Root. In fact, Officer St. Peter says, you know, I think -- I think he's effectively going to die. I mean, I don't remember the exact words, but something to that effect. It's in our brief.

Officer Godin, in his vehicle, radios dispatch, informs dispatch that he believes he has shot Mr. Root. So at this point Officer Godin, Officer St. Peter and among the defendants at least Officer Fernandes admits hearing that over

the radio, that Mr. Root has been shot.

So during the course of this six-minute pursuit, these officers are aware that Mr. Root is injured and likely has been shot. They do proceed down Route 9. Contrary to what was suggested a few moments ago, there was no high-speed chase prior to this PIT maneuver performed by Officer McMenamy. There's no dispute.

Officer McMenamy testified that the reason he was able to go and collide with Mr. Root's car was because he was only going 20 or 30 miles an hour and he was able to collide with his car in an effort to bring it to a stop, clearly something that violates BPD rules, and then he got out. Mr. Root was able to extricate his car from the collision, and then continued. And yes, at some point thereafter, after that use of force, there was -- he gained speed. And there was a violent collision at the intersection of Hammond and Route 9 in front of the Star Market there in Chestnut Hill.

Significantly, during the course of this six-minute pursuit, no BPD supervisor was involved, took charge of the pursuit, as is required by BPD rules. No plan was put into effect as to how to deal with this situation at the conclusion of the chase in violation of BPD rules. There was no attempt to communicate with each other in terms of how things should be done at the conclusion of this scene to ensure that people understood Mr. Root's condition.

The collision that occurred at Hammond and Brookline by defendants' admission was massive. There were three cars ultimately involved. Mr. Root's car spun around. Three tires went off the car, finally came to rest at the side of Route 9. And there's video. We have attached the video from the traffic camera showing what transpired there and the collision.

We also know from video Mr. Root's condition as he exited the vehicle. You see from the video as he opens the door, he appears to go to the ground, gets up limping, stumbles around the front of the vehicle to the sidewalk where he collapses. You see him collapsed on the sidewalk for some matter of seconds. You see him pull himself up on to his feet and then again limp, stumble into this mulch area in front of the Star Market between Route 9 and the Star Market parking lot, roughly 20 feet of mulch area. There's a Bank of America or Capital Bank, Chase Bank, you know, ATM there, bushes and mulch. Again, this is 9:30 in the morning, daylight.

As Mr. Root gets up from the sidewalk -- again, all undisputed. This is not -- you can see it on the video. Mr. Root stumbles into the mulch area. There's a witness, a trained emergency medical technician, trained EMT, who was sitting in her car watching this. She's watching. She hears this crash. She sees this man who appears to be severely injured stumbling into the mulch area. She gets out of her car and runs to his side in an effort to help him. Again, we have

video showing exactly that. A bystander across the street took his cell phone and you actually see Mr. Root running -- well, stumbling, limping into the mulch area, Shelly McCarthy, this witness, running to his side, and him collapsing at her feet as she arrives at his side.

Ms. McCarthy, who's been deposed and who has -- was interviewed by the officers, describes what she saw as a man covered in blood. I would note that the vehicle -- the vehicle that crashed, his Chevy Bolt, is covered in blood. I mean, there's blood throughout the inside of his car. Blood is pooled on the driver's seat. And the plastic paintball gun that he had at the Brigham is on the floorboard. But it's covered in blood. She says he is covered in blood.

From the time she sees him -- she doesn't take her eyes off of him -- he has his hands -- he's clutching his chest. He's struggling to breathe. She thinks he's probably having a heart attack or a stroke. She doesn't know what. But she knows he's desperately struggling to breathe and has his right hand grasping his chest, clutching his chest the entire time that she's there with him. She describes the fact that he cannot communicate. He doesn't say a word. His eyes are ping-ponging in his head. She can hear gurgling coming from his throat. Her description, the lights were on but nobody was home.

She's desperately trying to help this man. She hears

sirens. She hears the balance of this pursuit coming and, as she expressed, you know, she's thankful that somebody is coming to help her help him. She assumes an ambulance is coming. That's her approach.

She's cradling his head. Again, he hasn't said a word. There's no way this man can stand up or do anything. I mean, he's going to stop breathing here relatively soon. She hears yelling, commands, various commands. You know, "Get down. Hands up," just screaming, chaos as she describes it. She's scared to death. The six officer defendants are charging into this mulch area as she is cradling Mr. Root's head.

She hears them yell, "Run, run," and she says she doesn't want to run. She's there to help him but she has no idea what is going on here. We have submitted the body-worn camera of Officer Figueroa, one of the defendants, and if there's any question in your mind about the chaos that existed at the scene, watching that body-worn camera -- now, she had her arm in front of her camera pointing her gun so you can't see what is on the camera, but you have audio. And in the roughly ten seconds, roughly ten seconds from the time she left her cruiser until you hear shots fired, all you can hear is shouting, incomprehensible shouting. You can hear her saying, "Get down. Show me your hands," and just loud, loud shouting, nothing about a gun, nothing about drop a gun, but it is -- I'd urge the court, if they have any questions about the chaotic

situation that existed, that's Officer Figueroa's body-worn camera.

So Ms. McCarthy, on hearing this, says she doesn't want to run. She says, "I'm sorry," and she starts running away. Within three or four seconds, three or four seconds from the time Ms. McCarthy leaves Mr. Root's side, shots are fired. Thirty-one shots are fired into Mr. Root by the six law enforcement defendants.

There's no dispute that at no time -- so taking the officers' own statements, the defendants acknowledge that Juston Root was on the ground from the time they got there until the shots were fired, with the exception of Officer McMenamy. He has a slightly different take on it. Officer McMenamy would have you believe that after he walked up to him and kicked him to the ground, Juston Root stood up and opened up his jacket with his left hand and reached with his right hand. Nobody describes that. Nobody says that, none, not any of the other defendants. He was on the ground either crouched, sitting on his side, various descriptions.

They admit there was no verbal threatening. There was no resistance that was provided. He didn't physically resist. He didn't verbally threaten them in any way. He wasn't moving. He wasn't standing, with the exception of Officer McMenamy. He did not say anything. Clearly not fleeing, not resisting arrest. But no steps were taken in that ten seconds to assess

his condition.

Now, the reaching, for purposes of our motion, we will accept that they say that his hand in his chest, which Ms. McCarthy says he was clutching his chest the whole time, but his right hand in his chest they thought was him reaching for what they believed to be a gun. None say they saw a gun. None say he brandished a gun. And in Brookline -- we talked about brandishing in the Brigham & Women's. We're talking about what happened in Brookline here. Yes, we accept that they had reason to believe he might be armed in Brookline, don't dispute that. But before they used excessive force in Brookline, he had not pointed a gun. He had not brandished a gun. No defendant admits seeing a gun. They used this reaching. He was reaching for something and we thought he had a gun. So it's reasonable for us to shoot, and I guess ask questions later.

Well, let's talk about the law for a minute. So defendants' counsel says, you know, it's clearly, you know, objectively reasonable under the totality of circumstances. Yes, the standard is there has to be an immediate threat, no feasible alternatives. That's the touchstone. We don't dispute that. And whether the officers' conduct is objectively reasonable. There are a number of factors, a number of factors that are considered in addition to the immediacy of the threat. Whether he's fleeing, we know he wasn't fleeing. Whether he

was resisting, physically or verbally resisting, we know that wasn't happening.

So from our perspective, the fact -- accepting that they thought that he was reaching is insufficient. I would point to the Sixth Circuit's decision in Woodcock v. Bowling Green. It's a Sixth Circuit decision 2017 cited in our brief. In that case the Sixth Circuit affirmed a district court's decision granting summary judgment for the plaintiff. In that case -- in the Woodcock case, the victim had placed a call to the police department claiming that he was going to kill his brother, told the police that he had a gun and he was going to kill his brother. Police responded believing this guy had a gun, believing he had threatened to kill his brother.

They ordered him to show his hands. The victim had his hand tucked in the waist of his pants with a bulge there. Officers ultimately shot, claiming We thought he was reaching for a gun that was in his pants. We believed he had a gun. He had said that on the radio. He refused commands. He refused our commands to show his hands.

And just if I can touch on that for a moment, because they would say he was ignoring commands -- he, Juston Root, was ignoring commands, putting aside whether they were able to determine whether he was able to comprehend anything anybody was saying, think for a second about the two commands that they say he was refusing to obey: Get on the ground; get down. He

was. He was on the ground. Show me your hands. Let's assume -- let's assume that he was reaching or moving his right hand out from his jacket. Would that not be a reasonable response to "Show me your hands"? I'm not saying that's what Juston was thinking or doing. He was clearly out of it. But what commands that they were giving did he fail to comply with, even assuming he was able to comprehend them? None.

Here in this case, Woodcock, we're not dealing with somebody who is severely injured and on the ground. He's up, he's standing, reaching, thought he had a gun. The court said --

THE COURT: In Woodcock, as I recall it, the Sixth Circuit made a point that there was never any indication, whether the defendant had a gun or not, he gave no indication he ever was going to use it. It's something a little bit different here where the gun had been -- granted, it turned out not to be a lethal gun -- had been used nine minutes earlier. You had the reaching at the scene. Don't we have something different than the Woodcock case?

MR. BERTHIAUME: I mean, here given the totality of these circumstances, here Mr. Root was on the ground -- right? -- on the ground severely injured. I mean, the facts of this case, I mean, are stronger, in my opinion, than the facts in Woodcock. Clearly those officers in Woodcock had reason to believe he had a gun. He was reaching for it. I mean, that's

what they say is going on here.

And I think in Palma, the Sixth Circuit again reached the same conclusion on very similar facts, and -- I mean, I just -- I think it's helpful to hear what that court said. I'm sure you're familiar with it. I'm not trying to repeat what the court has already seen, but if I may, I think the facts as described by the Sixth Circuit in Palma, when it's discussing Woodcock and Palma, is clearly what we have here, and demonstrates that, as a matter of law, this reaching is insufficient.

And this is what the Sixth Circuit said, "Once on the scene, Johns admits that he never saw Palma holding any object, let alone a firearm or other weapon. As it turned out, Palma was unarmed. But Johns may not have known this and at the time Johns was concerned that he could not see Palma's hands." He then -- the Palma court then says, "Our decision in Woodcock is instructive. In that case, the officers responded to the scene after a man, Harrison, called 911, said that he wanted to kill his brother. The officers found Harrison standing on a railroad track with his left hand reaching into the rear waistband of his pants. Officers repeatedly told him to show his hands but he did not acknowledge or comply with the order. After warning that they would shoot" -- again, something that did not occur here in the Root case -- "Harrison still refused to comply and officers shot him. We found that this

disobedience and suspicious hand placement did not give the officers probable cause to believe that Harrison posed an imminent threat because, while the officers may have thought Harrison had a gun, Harrison never gave the officers reason to think he would use it imminently."

Again, how did Mr. Root give those officers reason to believe that he was going to use this gun imminently? The fact that Johns could not see Palma's hands would not lead a reasonable officer to believe he was in imminent danger. As we explained in Woodcock, even if the person's hands are not visible and even if he appears to be suspiciously reaching for something in his clothing, these facts would not lead a reasonable officer to believe that the person posed an immediate threat of serious harm.

I mean, those are these facts. Mr. Root, considering all of the other facts besides the reaching, clearly no rational jury, based on Woodcock and Palma, could conclude that this conduct was objectively reasonable.

None of the cases -- I mean, we've distinguished their cases in our brief. I'm not going to repeat it here -- none of the cases involve facts like this. Again, critical being -- they knew -- they had to know that he was injured had they looked at him and he's on the ground. No affirmative movements, no communication. He doesn't say a word.

On that point, as I said, I believe, based on the

undisputed facts and accepting that disputed fact with respect to reaching, we believe we're entitled to summary judgment on our 1983 and MCRA claims and the assault and battery and wrongful death claims as they applied based upon our brief.

In what I hope is the unlikely event that the court disagrees, there can be no question, there can be no question that at a minimum there's a question of fact with respect to whether he was reaching. In responding to our motion they argue -- listen, we have six officers. They all say he was reaching. Ms. McCarthy, poor Ms. McCarthy was running. She acknowledges that she didn't see exactly what happened in that three seconds after she fled the scene. So we have six officers. They say he was reaching, or at least four of the six say he was reaching.

And I would note on that point that we have two officers, Officers Fernandes and Thomas, who had a slightly different -- Officer Thomas doesn't rely on reaching. Officer Thomas -- and each defendant has to be evaluated separately. But Officer Thomas testifies that he fired his gun because he heard another gunshot. So he doesn't rely on this reaching. Officer Thomas says, you know, I couldn't see his hands. He's on the ground. I couldn't see where his hands were. They looked to be near his chest, and I heard a gunshot. So I shot. I thought the shot must have come from Mr. Root.

That, I mean, as a matter of law, has to be

objectively unreasonable. You shoot because you heard another gunshot? There's no case that supports that. Officer Fernandes is much the same. He says partially as a result of a gunshot but his hands were moving near his chest. That's Officer Fernandes.

With respect to the other officers who used this reaching, I submit that their statements are not credible. They have significant credibility issues, and I will point to some of those. But clearly when the credibility of witnesses are at issue, the case has to go to a jury. Here, that clearly would need to be the case, again, assuming our motion for summary judgment is unsuccessful.

We know -- I mean, talk about credibility issues. We have Officer Godin. Officer Godin, who did not activate his body camera. Again, another significant -- I mean, think about this. Their argument is that we have to believe -- we have to believe these six officers because nobody else saw the shooting, yet they violate policy by not activating their body cameras, even though they have to. Officers Godin and McMenamy have their body cameras on. Neither of them had them activated. There would be no question here for this jury had we had the body camera and we could see exactly Juston clutching his chest on the ground as he's desperately trying to breathe. But they did not wear their body cameras -- I mean, they did not activate their body cameras, in violation of BPD

policy, denying us that evidence. So they say we just have to believe them even though they violated.

Officer Godin testified, I wasn't even wearing it. He told -- he testified under oath, answered interrogatories in this case under oath that, "I wasn't wearing my body camera. That's why I didn't have it on. It was in my duty bag. I wasn't wearing it."

Well, we learned, after viewing other body camera footage, that he clearly had it on. And he's observed, following the shooting, walking to his cruiser, taking it -- the first thing he does after the shooting, he takes his body camera off and throws it into the cruiser. He provided interrogatories in this case under oath that he was never wearing it. Credibility issues, this is the man we're going to believe. Body camera footage showing him minutes after this shooting telling a fellow officer when asked how he was doing, "Yeah, I killed the mother. I emptied my magazine into him." This is -- without everything else, we have to accept -- now we have to accept Officer Godin's statement that he was reaching. A jury needs to decide that.

Trooper Conneely. Trooper Conneely, credibility. He's the one who immediately after this shooting walks out of this mulch area, goes to Officer McMenamy and says, you know, "Did you shoot?" "Yeah, I shot." Shakes his head. "Keep your F'ing mouth shut. Keep your F'ing mouth shut. Is your union

rep coming down?" I mean, if there's nothing to hide, if this is -- you know, "Man, we did a great job, we did a great job. We did a good thing here. We saved everybody at the Star Market. Keep your F'ing mouth shut," that's Trooper Conneely.

Trooper Conneely, who has embellished this story to the point where he testified under oath -- has testified under oath that when he rolled Mr. Root -- after 31 shots had poured into this man's body, when he rolled him, he says that that black plastic BB gun was in his right hand. "I took it out of his right hand. It was sitting there in his right hand" in an effort to embellish. I mean, we had justification. Look, I mean, look, we clearly saw him reaching for something that we thought was a gun and, sure enough, he had that gun in his hand. Total fabrication.

We know that's total fabrication because the autopsy report, as analyzed by Dr. Lipman, whose expert report you have, shows that his right hand was mangled. His right hand was shot four times, including one bullet that went through the palm of his hand. Think about it, went through the palm of his hand beneath the right ring finger, exited the back of his hand. That was his right hand. This BB gun, this black plastic BB gun, you've seen photographs of it, undamaged, nothing -- no scratch, no blood on it, no nothing.

Other officers have testified subsequently that they saw the gun. I mean, it fell out of his chest area afterwards,

unlike Trooper Conneely, who they asked us to credit his testimony and accept it at face value. The same Trooper Conneely who told Officer McMenamy to keep his F'ing mouth shut.

Credibility, I mean, if there's -- if there's anything stronger on credibility -- we have provided you with information that the investigation conducted here by the Boston Police Department was a sham. It was a sham. But evidence of that includes -- you know, you have a shooting. Everybody -- witnesses are separated, everybody is separated. And you interview these witnesses. Ms. McCarthy, she's interviewed on the afternoon of February 7. Everybody who is anywhere near this is interviewed on February 7 to make sure they get the story straight.

BPD Rule 303 on use of lethal force, investigating use of lethal force, keep the witnesses separated, everybody should be separated so that -- for the obvious purpose of ensuring that you get one person's version, not after they've had an opportunity to speak to others and come up with whatever they were going to say.

In this case the six officer defendants were not interviewed until five days later, five days later. That's when investigators met with each of them to hear their versions of what transpired.

In the meantime, the five BPD officer defendants are

represented by the same attorney, Attorney Kenneth Anderson. The officer defendants, with the exception of Officer Thomas, perhaps, met together as a group prior to their interviews, prior to their interviews. Clearly in violation of another BPD rule, you know, a violation of the -- I don't know why they have BPD rules when they're violated more than they're observed, whether it's body cameras, whether it's PIT maneuver, whether it's separating witnesses, whatever.

In any event, think about it, notwithstanding that, they meet together as a group prior to their interview five days later and, lo and behold, the narrative that comes out of it is he was reaching. He was reaching. Clearly -- again, assuming you don't agree that we're entitled to summary judgment, a jury should be deciding whether that narrative is credible at an absolute minimum. That's their response to our motion for summary judgment and in support of their motion for summary judgment. So with respect to, you know, Officers -- Trooper Conneely and the officers' motion, clearly there are issues for the jury.

In terms of qualified immunity, as I've said, the evidence, candidly, when viewed in the light most favorable to the plaintiff, plainly demonstrates a constitutional violation of the use of excessive force. We believe that the law is clearly established given Woodcock and Palma and the First Circuit's decision in McKenney. I mean, in the First Circuit's

decision in McKenney -- and, again, it doesn't -- it doesn't go as far as Woodcock. I mean, the facts in McKenney, they're stronger. In McKenney, the suspect had the gun in his hand. He has the gun in his hand. He's walking toward the officers. He doesn't point it at them but has the gun out. They clearly see a gun. They see it in his hand. And that's insufficient under McKenney.

I mean, so to say that the law is not clearly established that the conduct that our evidence describes, I mean, it's just -- this case should end on liability today. But if not, we look forward to presenting this case to a jury for their decision as to whether this conduct is objectively reasonable.

THE COURT: If I can summarize what I think you're getting at is the Sixth Circuit cases may be instructive.

MR. BERTHIAUME: I didn't hear.

THE COURT: I said the Sixth Circuit cases may be instructive but the Supreme Court doubts whether Circuit precedent -- certainly how the Circuit precedent can be looked at for issues of settled law, in fact, if some court is increasingly edging to the view that only Supreme Court decisions really matter. But I don't think it's worth debating the principle of excessive force if unreasonable is a clearly established rule. I don't think there's any cases that demonstrate that to me.

But if I understand the thrust of the case, is this: There's no allegation that any of the officers had any prior experience or familiarity with Mr. Root, other than what they saw in the nine miles before the shooting occurred at the hospital. But that your argument is that they should have known by the time he's run to ground, so to speak, that he is wounded, if not mortally, but wounded to the point of being somewhat unconscious is what he is doing, and that they should reasonably have known that he was no longer a threat to them. I think that's what you're really getting at.

I agree that not following department rules goes to the credibility issues of what a witness might have to say, a police witness. Although I don't think you can build a constitutional violation around it, violation of an internal police policy or rule, although I see it has other possible applications on a different issue but that seems to me where your focus really is, if I can distill your argument to a --

MR. BERTHIAUME: Absolutely right. Under these facts, no rational jury could conclude that these officers acted objectively, reasonably in determining whether there was an imminent threat. That's the point, and, as I said, given the case law that exists, I mean, there is -- there should be no question in that regard. And at a minimum, you know, there's a factual question on the issue with respect to reaching.

If the court has no other questions on that, I'll turn

to the Monell claim.

THE COURT: Yes. Be reasonably quick. I do have --

MR. BERTHIAUME: I'm sorry. I apologize for taking so much time.

THE COURT: Oh, I'm paid to listen. It's not that I'm trying to cut you off. It's just that I do have something else coming up.

MR. BERTHIAUME: I understand. On the Monell claim, as I'm sure the court is familiar, you know, there needs to be a constitutional violation, you know, in connection with the execution of a custom or policy of the department and the city needs to be deemed responsible by virtue of their deliberate indifference to that constitutional violation.

We have submitted, again, a host of evidence to support the fact that there is a lack of training. There is -- the court -- Canton v. Harris, Supreme Court case, failure to train is properly considered a policy or custom. So there's no question that that would be actionable under Section 1983 should the other elements be satisfied.

We argue that the failure to train -- I would ask the court to review the Young v. City of Providence case, again it's cited. It's a First Circuit. The First Circuit dealt with a failure to train as a custom or a policy. And in that case, it involved a killing or a shooting of an off-duty police officer and dealt with the failure to properly train with

respect to that.

We have submitted evidence to support the fact that there has indeed been a significant failure to train. Our expert witness, Mr. DeFoe, outlines a series of procedures, training that was deficient. He reviewed the training that was provided. He reviewed the deposition transcripts. He noted that what transpired here with respect to the lack of training caused, at least in part, the officers to act prematurely in using lethal force on Mr. Root. That is, that there were a number of things that could be -- obviously in terms of the immediacy of the threat, part of that standard is that there are no feasible alternatives. In this case, there were innumerable things that these officers could -- should have done had they been properly trained to avoid needing to use lethal force. Among them: Taking cover, not charging this scene when the suspect was already on the ground in a contained area, forming a perimeter, take cover, attempt to communicate, attempt to deescalate, attempt to defuse the situation before -- instead of putting yourself in harm's way, instead of charging -- right? -- instead of charging and opening yourself up to this fear that he might pull a weapon on you, there are things that could have been done had they been trained properly.

In addition to Mr. DeFoe's report and statements concerning working as a team, verbal strategies, active

listening skills, deescalation techniques, use of primary contact officers. Think about what transpired here. I mean, these guys are all screaming. They charge and they're all screaming. They should be trained -- most departments train their officers when you're in that type of situation, you have a primary -- you have one person communicating, attempting to communicate. Others, covering. You don't all -- you're not all yelling incomprehensible commands. Again, not trained, not trained for that. This was the result.

Had they taken cover, create time and distance, that's what officers are trained to do -- unless -- this was a perfect situation to use their cruisers. Their cruisers were 15 feet away. Stand behind your cruiser, at least attempt to assess Mr. Root's condition. Had they stood there for any matter of time and attempted to communicate with him, they would have seen that he can't communicate. They would have seen he's on the ground and the extent of his injuries. But instead they put themselves in front of him and create a situation where they were all scared to death. And the slightest movement caused them to shoot -- caused one of them to shoot just because shots were fired.

THE COURT: In hindsight, you can always think of better things that could have been done. But a failure to train argument is a very difficult one because you have to show that a specific deficiency in training was the moving force --

MR. BERTHIAUME: Yeah.

THE COURT: -- in the result that occurred.

What you're outlining to me are a series of discretionary things that an officer could do, but one of the discretionary things he or she could do is to charge the person and try to disarm them if they had a legitimate belief the person was armed and represented a threat to themselves or to others.

So I don't see how any training program, you know, addresses this particular issue, other than saying, here's things you could do. You know, I think then the officer has the discretion which of this array of options he or she is going to select.

MR. BERTHIAUME: Your Honor, I disagree. I disagree. I mean, officers are trained on how to -- should be trained on how to deal with use of force cases, how to deal with arresting somebody who they believe has a gun. There are training -- officers have a gun -- they're given a gun to enforce the law. And with that comes responsibility and training that's necessary to ensure that they're doing it the right way and considering taking cover.

I mean, if they're not taught, if they're not trained on these things to consider, which could have necessarily avoided what transpired to Mr. Root, a jury could determine, very well determine that that is the case, that a lack of

training, a lack of training, at least in part, caused what happened here. Had these officers had in their mind, you know, let's make sure -- let's make sure we know what's going on here before we charge. Let's make sure that if we can take cover, we take cover. Let's make sure that we can't simply form a perimeter and make sure everybody is protected. He's not running. He is on the ground in this mulch area. But they -- we allege they weren't properly trained. And as a result, they put themselves in harm's way and, at least in part, caused this precipitous action.

I think that also relevant -- I mean -- and they acknowledge -- I mean, we have defendants' own statements that, you know, never thought about cover, didn't really have training with respect to that. So there's no question that these tactical errors are something that should be trained, that they weren't trained and a jury could certainly conclude that that lack of training, that lack of training -- ultimately they need to make decisions, I agree. They do make discretionary decisions. But if your training doesn't teach you on what to consider in making that decision, it is something that is actionable if we can show that the city showed deliberate indifference. And I think that's the test.

So here with respect to the inadequacies of training, you have Scott DeFoe. You have their own statements. And I think the inadequacy of the training is also evidenced by just

what happened on the morning of February 7, all of them doing this same thing, this same wrong thing, all shouting, all charging.

Also relevant on a lack of training, as the First Circuit has ruled in Kibbe, whether a lack of discipline, a lack of accountability, what we have in this case is precisely that. We have evidence demonstrating how the Boston Police Department created an atmosphere where officers could do what they wanted to do. That is demonstrated a number of ways. We know the McMenamy PIT maneuver, just as an example. Again, there's been no discipline, no action taken. He hasn't even been spoken to about the violating of that rule, the body-worn camera policy rules. I mean, these officers don't care about the rules.

That's part of training. That is an integral part of training, accountability and discipline for violating the rules. If you let -- as Officer Godin testified, my body camera -- I know we have that policy, but some days I just don't feel like it. That's -- and no repercussions, no discipline, no retraining. Godin lied about the body camera, lied under oath and here in this case. There's been no discipline. He hasn't been even spoken to about it by internal affairs. Amazing.

THE COURT: I think we're running away from the law, though, and making our jury speech.

MR. BERTHIAUME: No, Your Honor, I beg to differ. I think the lack of accountability and the lack of discipline is relevant. As Kibbe -- in Kibbe, the court -- the First Circuit said the following --

THE COURT: Well, I know the Kibbe case well.

MR. BERTHIAUME: Okay.

THE COURT: The issue there was that you had three officers in totally separate incidents shot at the same plaintiff during an attempt to escape and they thought that was enough to show the city should have had notice that something was wrong with the training of the officers.

But here we have a single incident. We don't have three separate incidents that created a pattern that would have put the city on notice. You have other evidence, but, again, I don't think Kibbe is all that relevant.

MR. BERTHIAUME: Kibbe, on the issue of the relevance of lack of discipline and accountability in terms of constituting a failure to train.

In terms of a pattern, I point to the Young case, Your Honor, with respect to that, and the Canton case in terms of -- I know the court is aware of the standard, but the Supreme Court has certainly -- put aside, you know -- you noted the pattern issue. Clearly there have been a number of excessive use of force cases. Right? And for the police department not to understand the need to train officers properly with respect

to the use of lethal force, I mean is obvious. There can be no question that a failure to train officers properly about how to use their guns is an obvious requirement.

And that's -- reading from the First Circuit's decision in Young, "We have stated that the Supreme Court has left open the possibility that a failure-to-train claim can succeed without showing a pattern of previous constitutional violations. In fact, the court has suggested that liability without such a pattern will be appropriate in a narrow range of circumstances, where a violation of a federal right is a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations."

And then it notes in the Brown Supreme Court case, "City policy" -- and I'm quoting from the Supreme Court -- "City policy makers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, thus the need to train officers in the constitutional limitations on the use of deadly force can be said to be so obvious that failure to do so could properly be characterized as deliberate indifference to constitutional rights. We think a jury could find deliberate indifference by virtue of this route." I mean, that is this case. That is this case.

I respectfully request that under that standard, the lack of training here, the lack of equipping these officers

with the training necessary to avoid what happened on February 7 is so obvious, we should have the opportunity to present that to a jury, for a jury to determine whether the City of Boston, in connection with its failure to train, its allowing its officers to effectively go rogue because they're not disciplined.

I mean, let me conclude with one other piece of evidence that goes to this issue, and I'll just conclude with that. After this shooting on February 7, on the afternoon of February 7 there was a press conference at which Mayor Walsh and Deputy Superintendent Greg Long made statements. In that press conference, they began to rally the wagons around the police officers. They applauded the work of the officers, applauded the work of the officers on that day.

Deputy Superintendent Long said, in fact, when they got to Brookline, Juston Root produced a gun. He produced a gun and failed to comply with commands to drop the gun, repeated, multiple commands to drop the gun. Again, both of those things are not true. There was no gun that was produced by Juston in Brookline and everybody knew that on the afternoon of February 7. And there were no commands to drop the gun.

He was asked at that news conference whether, you know, the bullet that shot the valet -- I hadn't mentioned this, but I know the court is aware of it. There's a valet that was shot from the ricochet of one of the police officer's

bullets at the Brigham & Women's. One of the reporters asked, do we know? Was it an officer? Was it Mr. Root? Under investigation. We don't -- effectively suggesting it could be Mr. Root.

They knew. They knew that he did not have a gun. They knew he did not have a firearm at that time, yet they let the world know on February 7, and everybody to this day believes, that Juston Root shot that valet and Juston Root pulled a gun on the cops in Brookline to justify this shooting. That's the narrative that everybody in this area currently believes, a false narrative, all part of this demonstration of circling the wagons, protect the officers at every cost.

Listen, I respect police officers. I respect law enforcement. I'm a former federal prosecutor. But this does not give them license to do whatever they want. And I respectfully, respectfully request that certainly, certainly the defendants' motions be denied and that the Monell motion on lack of training and the custom and policy that existed within the Boston Police Department be allowed to go to the jury.

Thank you. Thank you for your time. I'm sorry for taking as much as time as I did.

THE COURT: No, thank you. Difficult facts make very difficult cases. I'm going to take the matter under advisement and obviously give it a lot of thought before I render a decision.

THE CLERK: All rise.

(Proceedings adjourned at 12:30 p.m.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS)

I certify that the foregoing is a correct transcript from the record of proceedings taken September 28, 2022 in the above-entitled matter to the best of my skill and ability.

/s/ Kathleen Mullen Silva 12/11/22

Kathleen Mullen Silva, RPR, CRR Date
Official Court Reporter

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights (Refs & Annos)
Subchapter I. Generally

42 U.S.C.A. § 1983

§ 1983. Civil action for deprivation of rights [Statutory Text & Notes of Decisions subdivisions I to IX]

Effective: October 19, 1996
Currentness

<Notes of Decisions for 42 USCA § 1983 are displayed in multiple documents.>

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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CREDIT(S)

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub.L. 104-317, Title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

Notes of Decisions (6414)

42 U.S.C.A. § 1983, 42 USCA § 1983
Current through P.L. 117-262. Some statute sections may be more current, see credits for details.

End of Document