UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mohamed Guled Abdi, trustee for the heirs and next of kin of Ahmed Mohamed Guled,	**Court File No. 12-CV-0306 JNE/JJG)**
Plaintiff,	**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE TO DISMISS FOR LACK OF PROSECUTION**
vs.	
Officer Christopher Garbisch, Officer Jeffrey Newman, Officer Shawn Powell, Officer Chad Conner, Officer Brandon Bartholomew. Officer Chris Tucker and the City of Minneapolis,	
Defendants.	

INTRODUCTION

This case stems from Decedent Ahmed Mohamed Guled's ("Guled") decision to use a stolen vehicle as a deadly weapon to facilitate his escape from arrest. Plaintiff, Mohamed Guled Abdi, as trustee for the Heirs and Next of Kin of Guled, brings this matter *pro se*, presenting a six count Complaint alleging: assault; battery; intentional infliction of emotional distress; negligence; violations of 42 U.S.C. §1983 and civil or constitutional rights violations; a *Monell* claim; failure to train; negligent hiring; and vicarious theories of liability. Plaintiff also alleges a claim of wrongful death under Minn. Stat. §573.02.

Defendants move for summary judgment on all counts and claims in the Complaint, or in the alternative, move for dismissal for lack of prosecution.

FACTS RELATING TO PLAINTIFF'S FAILURE TO PROSECUTE[1]

Plaintiff filed his Complaint with the United States District Court on February 6, 2012. The Marshall Service subsequently served the City of Minneapolis and the individually named defendants between February 23, 2012, and March 2, 2012. (ECF 1, 3). Defendants filed a Joint Answer on March 12, 2012. The Court filed a notice setting a pretrial conference hearing for April 2, 2012. (ECF 4, 5). Prior to the hearing, Plaintiff requested the assistance of a court appointed translator. The pretrial conference was cancelled and Plaintiff was referred to the FBA Pro Se Project. (ECF 7-9). On June 7, 2012, the Court rescheduled a pretrial conference for June 28, 2012. (ECF 10). Defendants filed an amended Rule 26(f) Report on June 18, 2012. On the eve of the scheduled conference, Plaintiff contacted the Court and stated he was out of the country. The pretrial conference was cancelled again and rescheduled to August 24, 2012. (ECF 13).

On August 24, 2012, counsel for Defendants appeared for the Court-ordered pretrial conference, but Plaintiff failed to appear. (EFC 14). Magistrate Judge Graham subsequently issued a Pretrial Scheduling Order, which stated in part, that "[a]ll pre-discovery disclosures required by Rule 26(a)(1) shall be completed on or before **September 14, 2012**." (ECF 15, p. 1) (emphasis in original). Magistrate Judge Graham further stated that "Plaintiff's failure to provide his pre-discovery disclosures on or before **September 14, 2012 shall** result in this Court recommending that this matter be

[1] Unless otherwise noted, all exhibits cited herein are identified in the Affidavit of Darla J. Boggs.

dismissed for failure to prosecute." (*Id.*) (emphasis in original). Defendants served Plaintiff with their Rule 26(a)(1) disclosures on or about September 13, 2012. (Boggs Aff., Ex.B). To date, Plaintiff has not provided his disclosures as directed by the Court. (Boggs Aff., ¶6). Defendants served Plaintiff with standard discovery requests on or about October 18, 2012, and followed up with a reminder directing Plaintiff to respond on or about January 30, 2013. (Exs.C,D,E). According to the Court's Scheduling Order, discovery in this matter closed on March 15, 2013. (*See* ECF 15). To date, Plaintiff has made no effort to prosecute this case, has not responded or provided any written responses to Defendants' discovery requests or submitted any Rule 26(a) Disclosures or requested any extension.

STATEMENT OF FACTS PERTAINING TO THE INCIDENT

In brief summary, the incident at issue involves primarily three separate squads, six officers, and two separate events that all came together in the early morning hours of February 5, 2009, and tragically resulted in the death of Ahmed Mohamed Guled ("Guled").[2] First, Defendant Officers Powell and Newman were involved in a suspicious person stop, and were being assisted by Defendant Officers Conner and Garbisch. Close by, at or about the same time, a stolen vehicle driven by Guled was fleeing from Defendant Officers Tucker and Bartholomew. Guled was driving erratically and at a high

[2] Because Mr. Guled did not survive the incident, and Plaintiff was not present, the only facts presently existing within the record pertaining to this incident are those contained within the involved officers' statements and individual affidavits. The facts presented by Defendant Officers are presented here and will be specifically referenced by each officer's affidavit.

rate of speed when he came upon the suspicious person stop involving Powell, Newman, Conner, and Garbisch. Their squads were partially blocking the street, such that it was nearly impossible for another vehicle to drive through the area without striking the officers standing in the street, their vehicles, or both. Guled did not stop and drove directly at one of the officers. Out of fear for their personal safety and the safety of others at the scene, Powell, Newman and Garbisch shot at Guled's vehicle and Guled did not survive. Conner used no force against Guled. Tucker and Bartholomew used no force against Guled, and only actively pursued him after he was seen driving a stolen vehicle and fled. The specifics of the incident are as follows:

1. Suspicious person stop.

At approximately 12:30 a.m. on February 5, 2009, Powell and Newman, while working patrol, became involved in suspicious person stop at Golden Valley Road and Morgan Avenue North in Minneapolis. (Powell Aff., ¶5). The stop involved a passenger car, a Suburban, and six people. (*Id.* ¶6). As Newman and Powell pulled up, they activated both spotlights on their squad. (*Id.*).

Garbisch and Conner responded to assist and provided backup for Powell and Newman. (Powell Aff., ¶7). Conner and Garbisch parked their squad behind the Suburban, facing north on Morgan. (*Id.*). Their squad was directly across the street from Powell and Newman's squad; the two squads were parallel to one another, with a space of approximately 12 to 15 feet between them. (Garbisch Aff., ¶6). Several people were detained and placed in Powell and Newman's squad, and two people were placed in

Garbisch and Conner's squad. (Conner Aff.,¶10). Identifications and a check for warrants were run on of each person. (*Id.*).

2. Pursuit of a stolen 1998 Nissan.

At or about the same time, Bartholomew and Tucker were on patrol in full uniform in a marked squad car when they noticed a suspicious vehicle going in the opposite direction at approximately Golden Valley Road and Penn Avenue. (Bartholomew Aff., ¶¶4-6). The vehicle (a 1998 Nissan) appeared stolen because its wing window was broken. (*Id.* ¶6). Tucker turned the squad around and started following the vehicle. (*Id.* ¶7). The officers ran the Nissan's license plate number, confirmed that it was stolen, notified dispatch, continued to follow the Nissan, and waited for backup. (*Id.* ¶¶9-10).

After the driver of the Nissan began to swerve erratically, nearly struck an SUV and began to accelerate, Bartholomew and Tucker activated the squad's lights and sirens and pursued the Nissan. (Bartholomew Aff., ¶12). Bartholomew and Tucker aired that they were in pursuit and that the Nissan was heading south on Morgan and was not stopping. (*Id.* ¶13).

3. Defendant Officers' Account.

a. Bartholomew and Tucker.

As Bartholomew and Tucker pursued the Nissan and turned onto Morgan, they saw two marked police cars facing northbound on Morgan just ahead in the roadway. (*Id.* ¶14). One squad was parked more toward the middle of the street, and the second

squad was parked more toward the curb. (*Id.*). A third squad was located behind the first two, and was parked off toward the east side of the street. (*Id.* ¶15).

They saw two officers standing between the two marked squads, directly in the path of the oncoming Nissan. (Bartholomew Aff., ¶16; Tucker Aff., ¶12). Bartholomew saw one officer jump onto his squad and stand on the running board in the driver's door area to get out of the way of the Nissan as it struck his squad. (Bartholomew Aff., ¶17). Tucker recognized the trapped officer as Garbisch. (Tucker Aff., ¶¶14-15).

As the Nissan headed directly at Garbisch, Tucker saw Garbisch frantically trying to get out of the way of the Nissan, but he could not escape. (*Id.* ¶¶15-18). Tucker and Bartholomew heard a volley of gunfire. (*Id.* ¶19; Bartholomew Aff., ¶18). The gunfire appeared to come from the right, where Newman and Powell were located. (Tucker Aff., ¶21). Tucker and Bartholomew's squad was about 15 feet behind the Nissan. (*Id.* ¶22). After the first volley of shots was fired, a piece of glass rebounded and came through the partially open squad window and hit Tucker on the side of his eye. (*Id.* ¶21). Bartholomew exited the passenger side of the squad and took cover behind it. (*Id.* ¶26). Tucker did not feel safe getting out the driver's side door, slumped down for cover, and stayed inside the squad. (*Id.*).

The Nissan appeared to slow down, then accelerated and kept heading toward Garbisch's squad; a second volley of shots was fired. (Tucker Aff., ¶24). The driver of the Nissan then came out of the driver's door and slumped to the ground while the car continued south on Morgan. (*Id.*). Tucker aired "shots fired" and requested rescue and an ambulance. (*Id.* ¶25).

After the last volley of shots, Tucker exited the squad and went toward the scene, as did Bartholomew. (*Id.* ¶27; Bartholomew Aff., ¶19). Bartholomew checked on Garbisch, while other officers checked on the driver (Guled), and called for an ambulance, medical and rescue. (Bartholomew Aff., ¶19). A few minutes after the driver was on the ground and handcuffed, Tucker put a blanket on the driver because it was cold, the driver was still breathing, and Tucker wanted to ensure that he stayed warm until medical assistance arrived. (Tucker Aff., ¶28).

b. Newman.

While in the midst of a suspicious person stop, Newman and Powell heard Bartholomew and Tucker call out that they were behind and pursuing a stolen vehicle (Nissan). (Newman Aff., ¶9; Powell Aff., ¶8). Newman went back to Garbisch and Conner's squad to let the occupants in their squad go so that Conner and Garbisch could leave and assist Bartholomew and Tucker. (Newman Aff., ¶10). During that process, Newman heard police sirens, looked north toward Broadway, and saw a set of car headlights (Nissan) coming in his direction on Morgan; he also saw the police car emergency lights following the car. (*Id.*).

Newman saw the Nissan slow down as it came toward the police cars involved in the stop. The Nissan continued to drive south on Morgan and headed directly toward Newman, Powell, and the people in Garbisch and Conner's squad. (*Id.* ¶11). Newman saw Garbisch standing in the door of his squad as the Nissan approached. Newman ran around to the front of his squad and yelled "Stop!" multiple times at the Nissan as it headed straight for Garbisch. (Newman Aff., ¶¶12-13). The Nissan was aimed at

Garbisch's squad door and Newman feared for Garbisch's safety. He heard the vehicle accelerate and then heard a gunshot. (*Id.* ¶14). The vehicle accelerated and Newman fired his handgun at the vehicle to protect Garbisch from being injured. (*Id.* ¶15).

The driver still did not stop; Garbisch remained pinned between his squad's frame and the open driver's door; and the Nissan continued to drive toward Garbisch and struck the squad's driver's door. (*Id.* ¶¶16-17). The driver rolled out onto the street directly under the driver's door of Garbisch's squad and the Nissan continued to south on Morgan. (*Id.* ¶¶18-19). Newman believed the driver was still a threat and covered Garbisch and Powell while they handcuffed him. (*Id.* ¶19). Newman tried to call Emergency Medical Services but could not get through. (*Id.*).

c. Powell.

At the time Powell heard dispatch air that another squad was pursuing a stolen vehicle (Nissan), he was heading back to his squad after checking for some evidence pertaining to the suspicious person stop. (Powell Aff., ¶¶8-9). Powell heard sirens and ran back to his squad to assist in the pursuit. (*Id.* ¶10). After getting to his squad, Powell looked up and saw the headlights from the Nissan, heard the siren, and saw the emergency lights of the squad following behind. (*Id.* ¶11). There was no other course of escape for the Nissan. It had to either stop, or proceed in Powell's direction and go directly through him and the squads parked at the scene. (Powell Aff., ¶12).

The driver did not appear to hesitate or slow down, but continued in Powell's direction and angled the Nissan toward Garbisch. Powell saw Garbisch standing between the frame of his squad and the squad's door on the driver's side. (*Id.* ¶13). The driver

appeared to be driving into the space between Garbisch's squad and Powell's squad. (*Id.* ¶14). Garbisch had nowhere to go, and could not get out of the path of the oncoming Nissan to escape. (*Id.*). Fearing Garbisch might be severely injured or killed, Powell fired his gun at the driver of the Nissan. Powell believed if he did not take any action Garbish could be crushed and killed. (*Id.* ¶¶15-16).

After Powell first fired his handgun, he saw the driver hesitate slightly and then he heard the Nissan accelerate again, still heading toward Garbisch. (Powell Aff., ¶17). The driver continued to drive through the officers and squads and hit the driver's door of Garbisch's squad, so Powell fired his gun again. (*Id.* ¶18). Powell saw the driver exit the Nissan; the vehicle continued south on Morgan and struck a parked car. (*Id.* ¶19). Powell tried to report "shots fired" and request medical support but was unable to get through. (*Id.* ¶20). Still believing the driver was a threat, Powell approached the driver with his gun drawn while Garbisch handcuffed the driver. (*Id.* ¶21).

d. Conner

While working with Garbisch and assisting Powell and Newman with a suspicious person stop, Conner heard dispatch air that there was a pursuit on Broadway and the officers requested backup. (Conner Aff., ¶10). Powell and Newman came over to Conner and Garbisch's squad and told them they could let the two people detained in their squad go and that they could leave and assist in the pursuit. (Conner Aff., ¶11). Conner got out of his squad, went to the rear passenger side door and let the man in the back of the squad out. He heard sirens and hurried the guy out as the sirens got closer. (*Id.* ¶12). Although the emergency lights on Conner's squad were not activated, the

emergency lights were activated on the other two squads present. (Conner Aff., ¶13). Conner saw the Nissan approach, and did not think it could get through the space between the squads. He quickly moved to the sidewalk in anticipation of chasing the driver as he bailed out of the oncoming car. (*Id.* ¶14).

Conner heard officers yelling "Stop, stop, stop, stop, police, stop!" He then heard gunshots. (Conner Aff., ¶15). He did not know where Garbisch was. He looked toward the shots, saw two officers, and saw the Nissan heading right toward them. At that moment, Conner thought the Nissan was going to run over the officers. (*Id.*). He thought the situation called for the use of deadly force, drew his gun, pointed it at the driver of the Nissan, but other officers were in his line of fire and he could not shoot for fear of hitting a fellow officer. (*Id.* ¶16). Conner saw the driver of the Nissan get shot, saw him on the ground outside of the Nissan, and saw the Nissan proceed down Morgan and strike a parked car. (*Id.* ¶17). Conner witnessed other officers handcuff the driver; he did not know if there was anyone else in the Nissan so he went over to where it stopped and cleared the scene. (*Id.* ¶18). He made sure Garbisch and the other officers were alright and assisted in securing other witnesses present at the scene. (*Id.* ¶¶18-19).

e. Garbisch.

While assisting with the suspicious person stop, Garbisch heard another squad air that they were behind and pursuing a stolen vehicle (Nissan). (Garbisch Aff., ¶8). At that time, Garbisch was getting out of his squad to give the two people detained in his squad back their identification. (*Id.* ¶9). Conner, his partner, was in the process of going around the rear of their squad to assist when Garbisch heard sirens close by. (*Id.* ¶¶9-10).

Garbisch saw the headlights from a vehicle (Nissan) that was being followed by a squad with its overhead lights and sirens activated. (*Id.* ¶10).

The Nissan approached quickly, appeared to slow down a bit and then accelerated. (Garbisch Aff., ¶12). The vehicle was heading straight at Garbisch; he was unable to get out of its path and was halfway in and halfway out of the driver's side door of his squad. (*Id.*). Garbisch remained trapped as the Nissan accelerated toward his position; he drew his handgun. (*Id.* ¶13). The Nissan continued toward him and started pushing against the door of Garbisch's squad, closing the door on him and causing the door to push on or crush his mid-section. (*Id.*). Garbisch believed he was going to be killed and started firing at the Nissan. (*Id.*).

Garbisch saw the driver get out of the Nissan, but, from where he was pinned, he could not tell if the driver was hit or trying to bail out of the car. (Garbisch Aff., ¶14). The driver was on the ground right next to where Garbisch remained trapped; he could not see his hands, but could see that he was still moving. (*Id.*). Garbisch felt he remained vulnerable, was concerned for his safety, and feared the driver was still a threat to him so he fired at the driver again. (*Id.*).

Garbisch then forced the driver's door of his squad open, exited the squad, stepped back, and saw that other officers had the driver held at gunpoint. (Garbisch Aff., ¶15). He immediately holstered his gun, handcuffed the driver, and tried to call Emergency Medical Services but could not get through on the line. (*Id.*). Medical assistance came and tended to Guled. However, he did not survive.

Each of the officers involved were interviewed and provided statements of their involvement in the incident. (Garbisch Aff., ¶18; Conner Aff., ¶20; Powell Aff., ¶24; Newman Aff., ¶23; Tucker Aff., ¶30; Bartholomew Aff., ¶20). A Grand Jury was convened concerning the use of force by Garbisch, Powell and Newman, and returned a verdict of "No Bill." (Glampe Ex. B, p.6).

SUMMARY JUDGMENT STANDARD

Defendants should be granted summary judgment on all counts and claims in the Complaint. Summary judgment is proper if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). On a motion for summary judgment, the court may not allow a case to go forward to trial on the mere chance that a jury will disregard all evidence and accept the unsupported speculation of a party. *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992). A party's mere speculation, conjecture or fantasy is not sufficient probative evidence that would permit a finding in his or her favor. *Id.*

In the alternative, this matter should be dismissed for failure to prosecute. Plaintiff failed to appear as directed and failed to comply with Magistrate Judge Graham's Order. The only thing Plaintiff has done in prosecuting this matter is file a Complaint, and ask the Court for representation and a translator. Although Plaintiff is proceeding *pro se,* the Court has given him ample opportunity to obtain counsel and

afforded him multiple opportunities to comply with the Court's Orders. Plaintiff has failed to comply and this matter is ripe for dismissal with prejudice.

ARGUMENT

I. EXCESSIVE FORCE.

A Fourth Amendment excessive force claim requires proof that the amount of force used was objectively unreasonable under the particular circumstances. *Henderson v. Munn*, 439 F.3d 497, 501 (8th Cir. 2006). Courts have routinely held that "[i]n determining the reasonableness of the force applied, we look at the fact pattern from the perspective of a reasonable officer on the scene with knowledge of the attendant circumstances and facts, and balance the risk of bodily harm to the suspect against the gravity of the threat the officer sought to eliminate." *McCullough v. Antolini*, 559 F.3d 1201, 1206 (11th Cir. 2009) (citing *Scott v. Harris*, 550 U.S. 372, 383-85 (2007)).

Three factors considered in determining whether an officer used reasonable force are: 1) the severity of the crime at issue; 2) whether the suspect poses an immediate threat to the safety of the officers or others; and, 3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *Graham v. Connor*, 490 U.S. 386, 396 (1989). The reasonableness of an officer's actions must be assessed considering the totality of the facts and circumstances confronting the individual officers. *Id*.

Whether a seizure is objectively reasonable is determined "in light of the facts and circumstances confronting [the officer], without regard to [his or her] underlying intent or motivation." *Graham*, 490 U.S. at 397. A court reviewing a police officer's decision must make "allowance for the fact that police officers are often forced to make split-

second judgments in circumstances that are tense, uncertain and rapidly evolving." *Id.* When considering these factors, courts should do so according to the "perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight." *Id.* 396. The totality of the circumstances shows that the force used was reasonable.

A. Guled committed severe crimes.

This incident arose after Guled was pursued after being seen driving a stolen vehicle. Instead of stopping as ordered after Tucker and Bartholomew activated their squad's lights and sirens, Guled continued to flee, thereby endangering the officers and civilians in the area. Tucker and Bartholomew reasonably believed, at the time they spotted Guled and began to follow him, that Guled had already committed crimes of substantial severity. Even though auto theft by itself has been deemed to be a less severe crime, when coupled with fleeing at a high rate of speed through a residential neighborhood, it was reasonable for each of the Defendants to assume that the crimes Guled committed were severe. *See Yang v. Murphy*, 796 F.Supp. 1245, 1250-51 (D. Minn. 1992). Given the facts known to Defendants prior to apprehending Guled, they reasonably believed him to be violent because he was suspected of felony auto theft and because he aggressively fled from officers who signaled him to stop.

B. Plaintiff posed an immediate threat.

"Where the officer has probable cause to believe that the suspect posed a threat of serious physical harm, either to an officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Sanders v. City of Minneapolis,*

474 F.3d 523, 526 (D. Minn. 2007) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 197-98 (2004)(internal quotation marks omitted)). If an officer believes a suspect intends to run him down with a car, the use of deadly force has been held to be objectively reasonable. *Id.* 526-27 (citing *Hernandez v. Jarman*, 340 F.3d 617, 623 (8th Cir. 2003)(finding no constitutional violation where officer shot victim after victim rammed a fellow officer's vehicle and appeared to be driving toward the shooting officer, despite discrepancies in the testimony about when exactly the shots were fired)); *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) (holding deadly force justified if the suspect is using a vehicle as the means to pose a significant threat of death or serious physical harm to an officer or others; officer had probable cause to believe that the truck posed an imminent threat of serious physical harm to innocent motorists as well as to the officers themselves).

Although Tucker and Bartholomew pursued Guled, they used no force against him. Conner was in the vicinity of Guled's vehicle as it struck Garbisch's squad car, but he used no force against Guled, and was not involved in the initial pursuit. Garbisch, Powell, and Newman were standing in the direct path of Guled as he accelerated the Nissan directly at them. Consequently, they had every reason to believe that, at the time they were using force against Guled, he posed an immediate threat to their safety and the safety of the others, because: (1) each of officer believed Guled had already stolen the Nissan and was actively trying to avoid capture; (2) as Guled accelerated down Morgan Avenue in the direction of Garbisch, Powell, and Newman, they verbally ordered multiple times for Guled to stop and pointed their guns at him, but he refused and continued to drive the Nissan directly at them; (3) from each of the Defendant's

perspectives, they believed Garbisch was directly in the path of the Nissan, pinned in the doorway of his squad, and could not escape. Guled ignored the sirens and flashing lights of Tucker and Bartholomew's squad, continued to flee, and ignored Garbisch, Powell, and Newman's orders to stop. Guled did not comply with the officers' commands, did not surrender, and continued to try to escape apprehension. It is undisputed that Garbisch, Powell, and Newman fired their weapons at Guled because they believed he was going to hit Garbisch and cause Garbisch serious bodily harm or death as Guled tried to escape. After the first round of shots was fired, Guled's car slowed, but then accelerated again, which resulted in a second volley of shots. Eventually, Guled exited the Nissan, and the car continued down the road and crashed into a parked car.

In *Tennessee v. Garner*, the United States Supreme Court held that even *deadly* force is reasonable to prevent the escape of a suspect who poses a threat of serious physical harm to the officer or to others:

> Where 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 prevent escape by using deadly force. Thus, if …there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

471 U.S. 1, 11-12 (1985). Deadly force is justified if the suspect is using a vehicle as the means to pose a significant threat of death or serious bodily harm to the officer or others. *Sanders*, 474 F.3d at 526-27; *Hernandez*, 340 F.3d at 624; *Cole*, 993 F.2d at 1333; *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) ("a car can be a deadly weapon"). Once

Guled refused to comply with Garbisch, Powell and Newman's orders to stop, and continued to drive the Nissan at them, these Defendants had the right to use force to stop him. From each Defendant's vantage points, it is undisputed that Guled accelerated the Nissan and headed directly toward Garbisch and other officers standing in the street in an effort to squeeze through the small gap between the parked squad cars so as to escape apprehension. "It is well known that when offenders use motor vehicles as their means of escape they create serious potential risks of physical injury to others." *Sykes v. United States*, -- U.S. – 131 S.Ct. 2267, 2274 (2011). Plaintiff can provide no evidence to the contrary.

C. Guled resisted arrest and attempted to flee.

Whether the suspect is actively resisting arrest or attempting to evade arrest by flight weighs in favor of the officers. As delineated above, Guled actively resisted the officers' attempts to arrest him and actively continued to flee. Newman, Powell and Garbisch drew their guns and ordered Guled to stop, but Guled did not comply. He slowed a little, and then accelerated straight toward Garbisch. An officer reasonably perceives a heightened risk of serious physical harm when a suspect disobeys the officer's orders. *See, e.g., Billingsley v. City of Omaha*, 277 F.3d 990, 993-94 (8th Cir. 2002) (failing to halt after being ordered to stop multiple times). The Defendant Officers' beliefs that Guled posed an immediate threat to their safety and the safety of others was eminently reasonable.

D. Individual officer's liability.

Liability for damages for a federal constitutional tort is personal, so each defendant's conduct must be independently assessed. *Heartland Academy Community Church v. Waddle*, 595 F.3d 798, 805-06 (8th Cir. 2010). Defendants each had probable cause to believe that Plaintiff posed an eminent threat of deadly harm to Garbisch and/or others. Under *Garner*, and *Brosseau*, the deadly force used was reasonable in this situation to prevent injury to fellow officers, to apprehend Guled and prevent his escape, and did not breach Guled's constitutional rights.

Bartholomew and Tucker's initial attempts to arrest Guled failed; Garbisch, Powell and Newton's attempts to stop Guled before he struck Garbisch similarly failed, including shouting orders to him at gunpoint. Consequently, the decision by Garbisch, Powell and Newton to use deadly force beyond mere verbal commands was manifestly reasonable, supported by probable cause, and, in fact, mandated by their duty to protect potential victims.

Plaintiff alleges Defendants used unreasonable deadly force against Guled. He alleges their actions of "stopping, seizing, detaining, arresting and searching [Guled] constituted greater force . . ." than was reasonable. (Ex.A, ¶19).

1. Tucker and Bartholomew.

Before coming upon the suspicious person stop on Morgan Avenue, Tucker and Bartholomew observed Guled driving a stolen vehicle (Nissan), followed him, and signaled him to stop by activating their lights and sirens. (Bartholomew Aff., ¶12; Tucker Aff., ¶10). Guled did not acknowledge their presence and continued to flee.

(Bartholomew Aff., ¶13; Tucker Aff., ¶10-11). Based on Guled's failure to obey their orders, Tucker and Bartholomew knew Guled was suspected of auto theft and was endangering the public by his reckless driving and failure to obey their orders to stop. Once Guled fled down Morgan Avenue, both Bartholomew and Tucker feared for the safety of Garbisch and other officers standing in the path of Guled's vehicle, but, from their vantage point, they could not assist in protecting Garbisch and others in Guled's path. (Bartholomew Aff., ¶¶14-18; Tucker Aff., ¶¶12-21, 26).

At the time Tucker and Bartholomew were pursuing Guled, they had probable cause to believe Guled posed a threat of serious danger if allowed to continue to drive erratically through a residential area. "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 116 S.Ct. 1769, 1772 (1996). "Subjective intent plays no role in ordinary, probable-cause Fourth Amendment analysis." *Id*. at 1774. Tucker and Bartholomew made a split second decision to formally pursue Guled and order him to stop after he began driving in a reckless manner. If, pursuing someone in a stolen vehicle is perceived as "force," Tucker and Bartholmew's use of force was "objectively reasonable" under the circumstances as they perceived them. *Graham v. Conner*, 490 U.S. 386, 396 (1989).

2. Conner.

After Conner saw the Nissan driven by Guled heading in the direction of his squad, he ran to the sidewalk area in an effort to apprehend the driver if he bailed out of the car. (Conncer Aff., ¶14). Although Conner was not in a position to fire his weapon,

from his vantage point, he believed that Garbisch, who was pinned partially inside his squad, was in a life threatening situation. (*Id.* ¶¶15-16). Conner knew Guled was fleeing from other officers, and knew that he was driving the stolen vehicle directly at his partner, Garbisch. Conner believed that Garbisch was in grave danger, and that the situation merited the use of deadly force in order to protect Garbisch and others in the immediate path of the Nissan. (*Id.*). Conner was unable to take any direct action to defend and protect Garbisch, but if he had, such use of force would have been "objectively reasonable under the circumstances as [he] perceived them." *Molina-Gomes*, 676 F.3d at 1152-53.

3. Garbisch.

While assisting with the suspicious person stop, both Garbisch and Conner knew a stolen vehicle (Nissan), was being pursued in the area, and they intended to wrap up what they were doing and assist. (Garbisch Aff., ¶9). Before Guled turned onto Morgan, Garbisch knew Guled was trying to evade capture, heard sirens, and then saw headlights approaching. (*Id.* ¶¶8-10). Garbisch saw the Nissan approaching quickly, heading directly for him. (*Id.* ¶12). Garbisch tried to get into his squad, but could not. He remained half in and half out of his squad's driver-side door as Guled accelerated directly toward him. (*Id.* ¶13). Garbisch drew his gun, the Nissan continued toward him, and started pushing against the door his Garbisch's squad. He could feel the squad's door closing on him and pushing shut on his mid-section. (*Id.*). Garbisch thought he was going to be killed and started firing his gun at the Nissan. (*Id.*).

Next, Garbisch saw the driver (Guled) on the ground next to the driver's door of Garbisch's squad. Still fearing for his safety and feeling that he was still in a vulnerable situation pinned part way into his squad, Garbisch again fired his gun at the driver. (*Id.* ¶14).

At the time Garbisch fired his weapon, he had probable cause to believe that Guled posed a threat of serious danger to himself and others who were in the path of the Nissan. *See* Sykes, 131 S.Ct. at 2274. Garbisch made a split second decision to try to prevent Guled from harming him or others in the area. According to investigative records, Garbisch fired 6 rounds and stopped shooting once he was able to exit his squad where he was pinned. (Glampe Ex.B, p. 3; Garbisch Aff., ¶¶13-15). Garbisch's use of force was "objectively reasonable under the circumstances as [he] perceived them." *Molina-Gomes v. Welinski*, 676 F.3d 1149, 1152-53 (8th Cir. 2012) (quoting *Hernandez*, 340 F.3d at 623-24).

4. Newman.

Newman and Powell were working patrol when they became involved in a suspicious person stop at Morgan Avenue. (Newman Aff., ¶¶4-5). Garbisch and Conner stopped to assist. (*Id.* ¶7). During the stop, Newman heard dispatch air that a stolen vehicle (Nissan) was being pursued. (*Id.* ¶9). At which time, Newman intended to let Garbisch and Conner leave the scene and go assist in the pursuit. (*Id.* ¶10). Before Garbisch and Conner could leave, Newman heard sirens and saw headlights heading in their direction. (*Id.*). At that time, Newman knew the driver of the stolen vehicle

(Nissan) was actively fleeing police pursuit and trying to evade capture. He heard sirens, and saw the Nissan driving in his direction. (*Id.* ¶¶10-11).

Newman saw the Nissan appear to slow down, but then continue to drive toward him, Powell, Garbisch and Conner. (*Id.* ¶11). Newman saw Garbisch standing in the driver's doorway of his squad as the Nissan approached. Newman yelled "Stop!" at the driver multiple times as the driver headed straight for Garbisch. (*Id.* ¶¶12-13). Newman heard the Nissan accelerate, heard a gunshot, saw the Nissan aimed at Garbisch, and feared for Garbisch's safety. (*Id.* ¶13-14). Newman heard the Nissan accelerate, and in an effort to protect Garbisch, fired his gun at the Nissan. (*Id.* ¶15).

At the time Newman fired his gun, he had probable cause to believe that Guled posed a threat of serious danger to Garbisch, as well as to himself and others who were in the path of the Nissan. *See Sykes*, 131 S.Ct. at 2274. Newman made a split second decision to try to prevent Guled from harming Garbisch and others in the area. According to investigative records, Newman fired 4 rounds and stopped shooting once the Nissan no longer posed a threat. (Glampe Ex.B, p.3; Newman Aff., ¶19). Newman's use of force was "objectively reasonable under the circumstances as [he] perceived them." *Molina-Gomes*, 676 F.3d at 1152-53.

5. Powell.

Powell, while working with Newman on a suspicious person stop, heard dispatch air that a stolen vehicle (Nissan) was being pursued. (Powell Aff., ¶8). Powell was in the process of returning to his squad from searching for evidence pertaining to the stop when he heard sirens; he saw headlights and emergency lights from a squad following the car.

(*Id.* ¶¶10-11). The driver did not appear to hesitate or slow down. (*Id.* ¶13). Powell saw the driver of the Nissan angle the vehicle toward Garbisch; Garbisch was standing between the frame of his squad and the driver's door. (*Id.*). Powell was standing across from Garbisch, and saw that the Nissan was driving toward the space between the parked squads. Powell saw that Garbisch was trapped and could not escape. (*Id.* ¶14). Powell feared Garbisch might be severely injured or killed, and fired his gun at the Nissan. Powell believed that if he did not take action, Garbisch could be killed. (*Id.* ¶15).

The driver of the Nissan appeared to hesitate, but then accelerated again toward Garbisch. (*Id.* ¶17). Powell saw that Garbisch was still pinned, and fired his gun at the Nissan again because the driver continued to flee through the officers and directly at Garbisch. (*Id.* ¶18).

At the time Powell fired his gun, he had probable cause to believe that Guled posed a threat of serious danger to Garbisch, to himself, and to others who were in the path of the Nissan. *See Sykes*, 131 S.Ct. at 2274. Powell made a split second decision to try to prevent Guled from harming Garbisch and others in the area. According to investigative records, Powell fired 7 rounds and stopped shooting once the Nissan no longer posed a threat. (Glampe Ex.B, p.3; Powell Aff., ¶18-21). Powell's use of force was "objectively reasonable under the circumstances as [he] perceived them." *Molina-Gomes*, 676 F.3d at 1152-53.

6. Internal Affairs Unit (IAU) Investigation.

The Minneapolis Police Department conducted an Internal Affairs Unit ("IAU") investigation into this matter. The IAU investigation found that the tactics employed by

the officers were appropriate under the circumstances. (Glampe Ex.B, p.9). It was determined that the officers did not have a chance to retreat to a safer location because of the rapid approach of the stolen vehicle (Nissan). Officer Garbisch tried to seek refuge in his squad but the speed with which the Nissan approached made that effort only marginally successful and Garbisch became pinned by the door of his squad car. (*Id.*). Sgt. Denno noted in his investigative report, that "involved officers fired only when [Guled's] vehicle was actively approaching them. They stopped firing when it briefly stopped and fired again when [Guled's vehicle] began to drive at Off. Garbisch a second time." (Glampe Ex.B, p.8). "The involved officers all stated that they fired their handguns at the driver of the vehicle in order to protect Off. Garbisch." (*Id.*). The investigation found that "[t]he officers were within MDP Policy and Procedures Guidelines when they fired at Mr. Guled." (*Id.*). Consequently, Defendants' use of force was found to be objectively reasonable.

As stated *supra*, in determining the reasonableness of the force used, the courts review the facts from the "perspective of a reasonable officer on the scene with knowledge of the attendant circumstances and facts, and balance the risk of bodily harm to the suspect against the gravity of the threat the officer sought to eliminate." *McCullough*, 559 F.3d at 1206 (citing *Scott v. Harris*, 550 U.S. at 383-85). Where a suspect is perceived to be using a car to run down an officer, the use of deadly force has been held objectively reasonable. *Sanders*, 474 F.3d at 526-27; *Hernandez*, 340 F.3d at 623; *Cole*, 993 F.3d at 1333.

Defendants first verbally ordered Plaintiff to stop but he refused. In *Loch v. City of Litchfield,* 689 F.3d 961 (8th Cir. 2012), the Court held that it was objectively reasonable for a police officer to draw his firearm and order a suspect to the ground where the officer was responding to a call of an intoxicated man attempting to leave in a vehicle and was reportedly armed with a firearm. *Id.* 966-67.[3] Although Defendants did not know whether Guled was armed, his actions in attempting to drive the Nissan toward Garbisch made the use of deadly force against him in an effort to stop his perceived threat objectively reasonable. *See Sanders*, 474 F.3d at 526-27. In summary, Plaintiff's allegations should be disregarded because they ignore: the perspective of the Defendants; the immediate risk; and, the fact that Guled was not responding to the officers' commands but instead, was actively resisting and voluntarily used the Nissan as a lethal weapon.

II. QUALIFIED IMMUNITY.

As a general rule, qualified immunity shields government officials from liability whose conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Cornell v. Woods*, 69 F.3d 1383, 1390 (8th Cir. 1995) (internal citations omitted). In examining claimed violations, courts apply a two-part test: (1) whether the plaintiff can demonstrate a constitutional violation and, (2) whether that constitutional right was clearly established at the time of the violation.

[3] Ultimately, the Court of Appeals held that it was objectively reasonable for the officer to use deadly force on that suspect. *Loch*, 689 F.3d at 966-67.

See Pearson v. Callahan, 555 U.S. 223, 232 (2009). A court may use its sound discretion in deciding which of these two questions to address first. *Id.* 236.

For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). A precedential case need not be on all fours to clearly establish a constitutional violation, but it must be sufficiently analogous to put a reasonable officer on notice that his conduct was unconstitutional. *Meloy v. Bachmeier*, 302 F.3d 845, 849 (8th Cir. 2002). A plaintiff must show that the right was clearly established in a particularized sense relevant to the case at hand. *Mettler v. Whitledge*, 165 F.3d 1197, 1203 (8th Cir. 1999), (citing *Anderson*, 483 U.S. at 640).

The right to be free from excessive force is included under the Fourth Amendment's prohibition against unreasonable seizures of the person. *Guite v. Wright*, 147 F.3d 747, 750 (8th Cir. 1998). Even if Defendants' use of force to subdue and arrest Guled were found to be constitutionally unreasonable, which Defendants expressly deny, they are still entitled to immunity because there is no precedent that would put a reasonable officer on notice that their actions could be deemed unconstitutional. Defendants had reason to believe that Guled was about to cause serious bodily harm or death to Garbisch and possibly others.

There was no clearly established law that any of the force used by Defendants was unreasonable. To the contrary, *Graham*, *Garner, Brosseau, Hernandez*, and *Loch*, and other cases noted *supra,* establish that the level of force used by Defendants was objectively reasonable.

In *Sanders v. City of Minneapolis*, 474 F.3d 523 (8th Cir. 2007), Sanders was driving a vehicle erratically when he pulled over and parked. Police arrived, parked their squads, exited, and approached Sander's vehicle. He was ordered to put up his hands, but he refused. Instead, Sanders put the car in reverse, backed into a security guard's car next to where the security guard was standing, and accelerated forward down the alley toward a different officer. Officers on the scene standing to the side of Sander's vehicle (as well as others), believed their fellow officers were in danger and fired their guns at Sanders's vehicle as it passed them. *Id.* 525. The Eighth Circuit held, citing to *Brosseau,* that "[w]here the officer has probable cause to believe that the suspect posed a threat of serious physical harm . . . it is not a constitutionally unreasonable to prevent escape by using deadly force." *Id.* 526 (internal quotation omitted). The court ignored eye-witness statements who viewed the incident from a different vantage point, and upheld summary judgment, finding the officers' use of force reasonable. *Id.* 526-27.

III. PLAINTIFF'S STATE LAW CLAIMS FAIL.

A. Assault, battery, and wrongful death.

An assault is an unlawful threat to do bodily harm to another with the present ability to carry out the threat. A battery is an intentional, unpermitted offensive contact

with another. *Paradise v. City of Minneapolis*, 297 N.W.2d 152, 155 (Minn. 1980). Because police officers may come into contact with individuals for legitimate purposes, the use of force by a police officer must be excessive to constitute a battery. *Johnson v. Peterson*, 358 N.W.2d 484, 485 (Minn. App. 1984).

The elements of wrongful death are the appointment of a trustee and death. caused by a wrongful act or omission of the defendant, which causes pecuniary loss to the next of kin. Minn. Stat. §573.02 (2012;) 28A Minn. Prac. Elements of Actions §22:1. Plaintiff can point to no wrongful act or omission causing Guled's death. Guled decision to use the vehicle he drove as a lethal weapon necessitated the Defendant Officers' use of deadly force. The officers' actions were entirely reasonable and not wrongful.

For each of these claims, Plaintiff must establish that the officers used an unreasonable amount of force against Guled. *Johnson*, 385 N.W.2d at 485. The Minnesota Supreme Court has emphasized that this "burden of proof should be a substantial one in an action against police officers acting within the normal scope of law enforcement duties." *Morgan v. McLaughlin*, 188 N.W.2d 829, 832 (Minn. 1971).

For the same reasons Plaintiff fails to state an actionable claim for excessive force under §1983, his state law claims for assault, battery, and wrongful death fail. There can be no dispute that Defendants were acting within the scope of their legitimate duties as law enforcement officers in attempting arrest Guled as he fled in the Nissan, and in attempting to protect the safety of Garbisch and others who might have been in the path of Guled's vehicle. There is no evidence of willful or malicious conduct by the officers in this case. Rather, the officers who fired their handguns at Guled, stopped shooting as

soon as the threat to Garbisch and others no longer existed. Therefore, Plaintiff's state tort claims should be dismissed.

B. Intentional infliction of emotional distress.

To sustain a claim of intentional infliction of emotional distress, Plaintiff must establish: (1) the conduct was extreme and outrageous; (2) the conduct was intentionally reckless; (3) is caused emotional distress; and (4) the distress was severe. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 439 (Minn. 1983) ("A complainant must sustain a similarly heavy burden of production in his allegations regarding the severity of his mental distress."). Plaintiff was not at the scene, had no personal interaction with any of the officers, and presented no evidence to support this claim. As argued *supra*, the officers' actions were reasonable under the totality of the circumstances and this claim should be dismissed.

C. Negligence.

Plaintiff alleges that Defendants were negligent in failing to supervise, control, and intervene, thereby allowing Guled to be shot. (Ex.A, ¶¶31-33). If, as here, the alleged act is discretionary, official immunity protects the officers from liability in negligence. *Williams-Brewer v. Minneapolis Park & Rec. Bd.*, CIV. 09-3524 (JRT/JJG), 2011 WL 3610097, at *2 (D. Minn. Aug. 15, 2011). The Minnesota's Tort Claims Act generally allows government entities to be held liable for their torts subject to certain exceptions and limitations. One of those exceptions to the general rule of liability is the "discretionary function" exception codified as Minn. Stat. §466.03, subd. 6, which provides that a political subdivision is not liable for its torts and those of its officers,

employees and agents acting within the scope of their employment: "for any claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused."

For the same reasons Plaintiff fails to state an actionable claim for failure to train (*see* argument *infra*), his claim of negligence fails and must be dismissed.

D. Official Immunity.

Moreover, Defendants are entitled to official immunity on Plaintiff's assault, battery, intentional infliction of emotional distress, negligence and wrongful death claims. Official immunity rests on the fundamental principle that the threat of litigation should not deter a public official from exercising discretion in the execution of his or her duties. *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991). Official immunity applies when the conduct in question: (1) was discretionary and not ministerial; and, (2) was not malicious or willful. *See Davis v. Hennepin Cnty.*, 559 N.W.2d 117, 122 (Minn. App. 1997).

Minnesota courts consider the duty of law enforcement and crime prevention as broadly discretionary, which entitles police officers to official immunity. *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 664 (Minn. 1999) (citations omitted). Official immunity is never more all-encompassing than when police officers act in tense situations. *See Pletan v. Gaines*, 494 N.W.2d 38, 41 (Minn. 1992) (holding that a municipality cannot expect its police officers to perform effectively if each and every action is subject to *post hoc* review).

Official immunity provides a complete defense to state law tort claims based on a public official's discretionary conduct as long as the conduct is not willful or malicious. *Mumm v. Mornson*, 708 N.W.2d 475, 490 (Minn. 2006). "In the official immunity context, willful and malicious are synonymous." *Rico*, 472 N.W.2d at 107. Malice "means nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right." *Id.* "Bare allegations of malice" do not survive summary judgment. *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982).

To establish "malice" to defeat official immunity, a plaintiff must prove that the defendant knowingly violated clearly established law at the time he acted. *Rico*, 472 N.W.2d at 108. The question of malice is an objective inquiry into the legal reasonableness of an official's actions. *Miskovich v. Indep. Sch. Dist.*, 381, 226 F.Supp.2d 990, 1021 (D. Minn. 2002) (quotations omitted).

The official immunity question, including the "willful or malicious wrong" issue, is appropriately resolved on summary judgment. *Reuter v. City of New Hope*, 449 N.W.2d 745, 749 (Minn. App. 1990). Once the official immunity is extended to the police officer, the immunity is vicariously applied to the municipal employer. *Pletan*, 494 N.W.2d at 43. Plaintiff can advance no evidence of willful or malicious conduct by the Defendants.

E. Defendant Officers' force used against Guled was not malicious.

None of the Defendants acted maliciously. As soon as the risk of serious bodily harm or death from Guled's vehicle ended, Garbisch, Powell, and Newman stopped firing

at Guled. Not only did their actions lack malice but their actions showed restraint and concern for Guled once the need to forcibly stop him had passed. Their intent was to stop Guled from harming Garbisch and others. Once that goal was accomplished, Defendants sought the necessary medical treatment for Guled's injuries. The undisputed facts show that Guled alone created the danger that caused Tucker and Bartholomew to pursue him. Similarly, the undisputed facts show that Guled alone created the danger that caused Garbisch, Powell and Newman to deploy their handguns. Given Guled's ongoing efforts to flee and his disregard for public and private property, as well as for the safety of Garbisch, the officers' decisions to use deadly force was not excessive or malicious.

Based on the arguments presented *supra*, Defendants' actions were reasonable when viewed in light of the totality of the circumstances facing the officers. Plaintiff has presented no evidence that Defendants' actions were malicious or wanton.

IV. *MONELL* CLAIM.

Plaintiff failed to respond to any discovery. The only evidence presented to support his *Monell* claim are his allegations as set forth in his Complaint (Ex.A) at paragraphs 21-24.

Under 42 U.S.C. §1983, a municipality cannot be liable for employees' alleged unconstitutional acts under respondeat superior. *Monell v. Dept. of Soc. Servs. of N.Y.*, 436 U.S. 658, 691 (1978). When a police officer violates a citizen's constitutional rights, *Monell* permits recovery only if the citizen proves: (1) a constitutional violation; (2) a municipal policy or custom was the "moving force"

behind the violation; and, (3) the municipality was deliberately indifferent to the violation. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 388-91 (1989).

A. No constitutional violation.

To maintain a *Monell* claim, a plaintiff must first show that a government employee deprived the plaintiff of constitutional rights. *Golberg v. Hennepin Cnty.*, 417 F.3d 808, 812-13 (8th Cir. 2005). As discussed above, Plaintiff fails to establish a constitutional violation because the officers' use of force was objectively reasonable.

B. No City policy or custom was the "moving force" behind the alleged violation.

Plaintiff must next show an injury resulted from "action pursuant to official municipal policy of some nature" or the alleged misconduct was so pervasive among non-policy making employees so as to constitute a custom or usage with the force of law. *McGautha v. Jackson Cnty., Mo., Collections Dept.*, 36 F.3d 53, 55-56 (8th Cir. 1994). "For a municipality to be liable, a plaintiff must prove that a municipal policy or custom was 'the moving force [behind] the [alleged] constitutional violation.'" *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999) (quoting *Monell*, 436 U.S. at 694). Only "deliberate" actions by a municipality can meet the "moving force" requirement. *Bd. of Cnty. Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 400 (1997).

i. City policy prohibits officers from engaging in unlawful or unconstitutional conduct.

"[A] 'policy' is an official policy, a deliberate choice of a guiding principle or procedure made by the municipal official who has final authority…." *Mettler*, 165 F.3d at 1204. Minneapolis City policy does not permit officers to engage in

unlawful or unconstitutional conduct; in contrast, it prohibits such conduct. (Harteau Aff., ¶¶11-12.) Complaints of alleged misconduct are promptly investigated. (*Id.*) When allegations are substantiated, officers are appropriately counseled or disciplined. (*Id.* ¶39.) In light of the MPD's commitment to the protection of individuals' constitutional rights, Plaintiff cannot identify any improper municipal policy, much less prove that any purported policy was the moving force behind any alleged constitutional violation.

ii. No City custom condones misconduct.

To establish an unconstitutional custom, Plaintiff must show "[t]he existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees." *Mettler*, 165 F.3d at 1204. The pattern must be so pervasive among non-policymaking employees that it constitutes a "custom or usage" with the force of law. *See Ware v. Jackson Cnty., Mo.*, 150 F.3d 873, 880 (8th Cir. 1998). Usually, single events are insufficient to establish an unconstitutional custom or practice. *Dick v. Watonwan Cnty.*, 738 F.2d 939, 942 (8th Cir. 1984). Plaintiff cannot show such a pattern.

1. **MPD vigorously investigates allegations of misconduct and appropriately disciplines officers.**

Without prior incidents to support his claim, Plaintiff makes the vague allegation that the MPD acted with indifference by tolerating a pattern and practice of the use of excessive force on the part of Garbisch, Conner, Powell, Newman, Tucker and Bartholomew. (Ex.A, ¶¶22-24). This allegation is totally unsupported by the record.

City policy requires that complaints against officers be vigorously and immediately investigated and, when misconduct is detected, disciplinary action be taken if appropriate. (Harteau Aff., ¶¶11, 39.) There is no official or unofficial policy, custom, or practice of hiring or retaining police officers who have a history of violence, harassment, or misconduct, unconstitutional or otherwise, against citizens or property. (*Id.* ¶12.)

The City has an established track record of investigating allegations of misconduct and imposing appropriate discipline. Disciplinary actions taken have ranged from coaching to suspension and termination. (Glampe Aff., ¶6). As established by the record, Garbisch, Conner, Powell, Newman, Tucker and Bartholomew, when charged with allegations of excessive force, have been investigated by the Minneapolis Police Department Internal Affairs Unit or the Minneapolis Police Civilian Review Authority. (Harteau Aff., ¶¶42-43, 45-46, 47-48, 51-52, 54-55, 57-58). This undisputed evidence is proof that Plaintiff cannot support a *Monell* claim on the basis of his statements in Paragraphs 22-24 of his Complaint. Plaintiff cannot establish any pattern of condoning misconduct.

2. Alleged investigation deficiencies do not create *Monell* liability.

A single, post-incident failure to investigate cannot establish an unconstitutional custom. *Mettler*, 165 F.3d at 1205; *see also Scheeler v. City of St. Cloud, Minn.*, 402 F.3d 826, 832 (8th Cir. 2005) (no *Monell* liability where post-incident homicide investigation "could have been handled more professionally"); *Youa Vang Lee v. Anderson*, 2009 WL 1287832 at *6 (D. Minn. May 6, 2009) *aff'd sub nom. Lee v.*

Andersen, 616 F.3d 803 (8th Cir. 2010) ("Plaintiff's assertion that a single after-the-fact decision or act by the police can establish an unconstitutional policy or custom by inference is not accurate.") Consequently, even if the investigations of this incident were somehow deficient, such deficiencies do not create *Monell* liability.

Here, however, the investigations were properly conducted consistent with MPD policies. In most officer-involved shootings, the incident is deemed a "critical incident" pursuant to MPD policy. (Glampe Aff., ¶¶8,9.) When conducting an investigation pursuant to MPD's critical incident policy, MPD investigators collect all pertinent evidence, interview necessary witnesses, and interview the MPD officers involved in the incident. (*Id*. ¶10). In a critical incident, such as here, the Minneapolis Police Department's Homicide Unit ("Homicide") conducts an investigation which is criminal in nature. When Homicide investigators complete their investigation, they present the case to the Office of the Hennepin County which determines whether criminal charges will be filed, and against whom. (Glampe Aff., ¶¶11,17). Further, in a critical incident, the Minneapolis Police Department's Internal Affairs Unit ("IAU") examines the evidence of the incident to determine the propriety of the involved officers' actions. (Glampe Aff., ¶¶13).

Following their investigation, homicide investigators prepared a final report which was provided to the Hennepin County Attorney. The Hennepin County Attorney presented the matter to the Grand Jury in Decenber 2009, and returned a verdict of "No Bill." No indictments were issued, no charges were filed against the involved officers and the matter was closed. (Glampe Aff., ¶¶11,17-18).

Pursuant to MPD critical incident policy, IA conducted its parallel administrative investigation ("force review") of this incident. (Glampe Aff., ¶¶12-14.) IA investigators have equal access and investigative rights to the scene of the critical incident, witnesses to the critical incident, and evidence of the critical incident. (*Id.* ¶12.) IA has access to all of the investigative materials and reports produced by the Homicide Unit during the investigation of the critical incident. (*Id.*) The purpose of the force review is to ensure the officers' use of force was within MPD policy and clearly established law. (Glampe Aff., ¶13.) The scope of the force review is determined by the Chief of Police, Assistant Chief of Police and Deputy Chiefs. (*Id.*)

Sgt. Denno, the IAU investigator assigned to this case, concluded Officers Garbisch, Powell, and Newton's use of force was authorized. His conclusion was reviewed by the Force Review Panel, which concurred with Sgt. Denno. (Glampe Aff., ¶¶14,15; Glampe Ex.C).

iii. No evidence of prior notice of any alleged pattern of unconstitutional conduct.

Even if Plaintiff could establish that this incident represents a constitutional violation, the City did not have notice of the alleged misconduct until after the incident. "To establish a city's liability based on its failure to prevent misconduct by its employees, the plaintiff must show that city officials had knowledge of prior incidents of police misconduct and deliberately failed to take remedial action." *Parrish v. Luckie*, 963 F.2d 201, 204 (8th Cir. 1992). A plaintiff must show that prior similar

constitutional violations have occurred. *Mettler*, 165 F.3d at 1205. Plaintiff can made no such showing.

iv. Any alleged unconstitutional conduct was not the moving force behind Guled's injuries and death.

Plaintiff cannot establish that the allegedly unconstitutional policies/customs of the MPD caused Guled's injuries and death. Post-injury wrongful conduct cannot be the moving force behind the injury at issue. *Mettler*, 165 F.3d at 1205. "Wrongful conduct after an injury cannot be the proximate cause of the same injury." *Tompkins v. Frost*, 655 F.Supp. 468, 472 (E.D. Mich. 1987). This is true even if the post-injury conduct is an allegedly flawed investigation of the underlying incident. *See Scheeler*, 402 F.3d at 832.

Post-injury evidence cannot establish liability. Plaintiff cannot establish that a municipal custom was the "moving force" behind the alleged constitutional violation.

C. Deliberate indifference.

There is no evidence that the City acted with deliberate indifference to any alleged unconstitutional act. "Municipal liability under §1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives by city policymakers." *Harris*, 489 U.S. at 389 (internal quotes omitted). "[A] plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or

obvious consequences." *Brown*, 520 U.S. at 407. Only where a municipality's deliberate indifference to its inhabitants' constitutional rights caused its failure to adopt adequate safeguards will the municipality be liable. *See Harris v. City of Pagedale*, 821 F.2d 499, 505-06 (8th Cir. 1987) (deliberate indifference where evidence clearly established a pattern of sexual misconduct by police officers, especially defendant officer, officials were repeatedly notified of these acts, and officials failed to take "any remedial action."); *Parrish*, 963 F.2d at 204-05 (deliberate indifference where overwhelming evidence showed "police officers operated in a system where reports of physical or sexual assault by officers were discouraged, ignored, or covered up").

Plaintiff cannot support his assertion that the City of Minneapolis has a custom or practice of deliberate indifference to the use of excessive force by its officers. (Ex.A, ¶22). The City investigates allegations of misconduct against its officers. (Harteau Aff. ¶¶28, 29). When allegations of misconduct are verified, appropriate disciplinary action is taken. (Harteau Aff., ¶39, Glampe Aff. ¶6).

Given the City's history of imposing discipline on its officers, Plaintiff cannot show that the City acted with deliberate indifference. Nothing in the record even hints at a practice or pattern of excessive force on the part of the involved officers, or the fact that complaints regarding them were not taken seriously or investigated. Because the City did not act with deliberate indifference, Plaintiff cannot establish support for his *Monell* claim, and it must fail.

D. Failure to train and negligent hiring.

Plaintiff alleges that the City of Minneapolis "was negligent in hiring, supervising, training, controlling and retaining Defendants Christopher Garbisch, Jeffrey Newman, Shawn Powell, Chad Conner, Brandon Bartholomew, and Chris Tucker in a manner amounting to deliberate indifference to the constitutional rights of the Decendent and his heirs and next-of-kin." (Ex.A, ¶¶22-24). Plaintiff never answered any discovery requests nor supplied Defendants with any facts to support this allegation.

To establish municipal liability based on a failure to train claim, a plaintiff must show that the failure evinces a "deliberate indifference" to the constitutional rights of its citizens. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989). Accordingly, a plaintiff must establish that the municipality had notice that its training procedures were constitutionally deficient and likely to cause a constitutional violation. *Thelma D. By & Through Delores A. v. Bd. of Educ. of City of St. Louis*, 934 F.2d 929, 934 (8th Cir. 1991). Municipal liability will not be found when a plaintiff proves that either a particular officer is inadequately trained or if an injury or accident could have been avoided by better or more training. *Harris*, 489 U.S. at 390-91. Officers "occasionally make mistakes" and such mistakes will not provide a legal basis for municipal liability. *Id*. 391.

a. No violation of Plaintiff's constitutional rights.

As argued above, Plaintiff cannot establish that a constitutional violation has occurred. Therefore, a failure to train claim cannot be sustained. *Carpenter v. Gage*,

686 F.3d 644, 651 (8th Cir. 2012) (citing *City of L.A. v. Heller*, 475 U.S. 796, 799 (1986)).

b. MPD's training procedures are not deliberately indifferent to individuals' constitutional rights.

The United States Supreme Court discussed a failure to train claim as follows:

> Plaintiffs seeking to impose §1983 liability on local governments must prove that their injury was caused by 'action pursuant to official municipal policy', which includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. A local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for §1983 purposes, but the failure to train must amount to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.' Deliberate indifference in this context requires proof that city policymakers disregarded the 'known or obvious consequence' that a particular omission in their training program would cause city employees to violate citizens' constitutional rights.

Connick v. Thompson, 131 S.Ct. 1350, 1359–60 (2011) (internal citations omitted).

To establish deliberate indifference on a failure to train claim, a plaintiff must show the municipality had either actual or constructive notice that its procedures were deficient and failed to take remedial steps. *Thelma D.*, 934 F.2d at 935. Moreover, deliberate indifference is a stringent standard of fault and will be established only where a constitutional violation is "plainly obvious" to occur as a result of the municipality's failure to train. *Bd. of County Com'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 410-11 (1997).

Plaintiff must show, with evidence in the record, "that in light of the duties assigned to specific officers or employees, the need for more or different training is 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." *Harris,* 489 U.S. at 390; *see also Thelma D.*, 934 F.2d at 934–35 (holding that five complaints of sexual abuse against a teacher over a 16-year period did not constitute a persistent and widespread pattern of unconstitutional misconduct warranting liability for a school board's failure to act before occurrence of present misconduct); *Pliakos v. City of Manchester*, 2003 WL 21687543 at *15–17 (D.N.H. July 15, 2003) (noting that when the municipality produced one video on the dangers of positional asphyxia, plaintiff could not establish deliberate indifference, and thus could not establish its failure to train claim); *Parrish v. Ball*, 594 F.3d 993, 997–99 (8th Cir. 2010) (holding that training an officer for a total of two days prior to unsupervised patrol duty was enough to defeat a failure to train claim).

The required training that the City gives its officers includes annual in-service training on the proper use of force, focusing on the criteria outlined in *Graham v. Connor*, and the use of force continuum. (Harteau Aff., ¶¶17-19). All officers are required to complete forty-eight hours of training every three years. (*Id.* ¶17). Trainers focus on updating officers on current use of force standards at the federal and state level as well as updates to MPD policy. (*Id.* ¶20).

Officers are trained on how to identify whether a use of force will be objectively reasonable under the circumstances. (Harteau Aff., ¶21). Annual in-service training includes instruction on the authorized use of force, the use of firearms, and the use of deadly force. (*Id*. ¶17*).*

In order to become Minneapolis police officers, Garbisch, Conner, Powell, Newman, Tucker and Bartholomew were required to be licensed by the Minnesota Police Officers Standards and Training (POST) Board. (Harteau Aff., ¶13). Thus, prior to becoming police officers, the Defendant officers were trained in all facets of police work including weapon training and use of force, which includes the use of deadly force. (*Id.*).

As Minneapolis Police Officers, Garbisch, Conner, Newman, Powell, Tucker and Bartholomew are required to attend MPD's in-service training every year. (Harteau Aff., ¶17). Pursuant to State law, the MPD is required to provide annual instruction to all of its officers on the use of force, deadly force, and use of firearms. (*Id.*) Minneapolis has always been in compliance with that law. (*Id.*). Thus, Garbisch, Conner, Newman, Powell, Tucker and Bartholomew, are required to attend yearly training on the use of deadly force.

The record establishes that the City takes great efforts to ensure its officers are well trained and have knowledge regarding the proper use of force, firearms and deadly force. The record does not support a finding that the City was deliberately indifferent to the training of its officers in the use of deadly force. Plaintiff can set forth no evidence that a genuine issue of material fact exists regarding his claim of failure to train.

V. IN THE ALTERNATIVE, THIS MATTER SHOULD BE DISMISSED FOR FAILURE TO PROSECUTE.

Pursuant to Rule 41(b), "[i]f the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it." Fed. R. Civ. P. 41(b). "There is little doubt that a trial court has the power, with or without motion, to dismiss an action for failure to prosecute or for refusal to comply with orders of the court." *Welsh v. Automatic Poultry Feeder Co.*, 439 F.2d 95, 96 (8th Cir. 1971); *Redfield v. Ystalyfera Iron Co.*, 110 U.S. 174, 176 (1884). "Dismissal is, however, a drastic sanction which should be sparingly exercised and is reviewable for abuse of discretion." *Welsh*, 439 F.2d at 96; *but see*, *Link v. Wabash Railroad Co.*, 379 U.S. 626, 629, 633-35 (1962) (affirming dismissal due attorney's failure to attend a pretrial scheduling conference and failure to provide a reasonable reason for his nonappearance).

"Willful as used in the context of a failure to comply with a court order or failure to prosecute implies a conscious or intentional failure to act, as distinguished from accidental or involuntary noncompliance and no wrongful intent need generally be shown." *Welsh*, 439 at 97. Plaintiff's conduct throughout this matter demonstrates a systematic, willful, and intentional pattern of delay. He has taken no affirmative steps toward prosecuting this matter. Virtually all Plaintiff has done is file a Complaint with the Court.

The Rule 16 hearing was initially schedule for April 2, 2012, (ECF 5), was postponed to June 28, 2012, long enough for Plaintiff to find a translator, (ECF 7, 8, 9, &

10), and then the Rule 16 Hearing was postponed again until August 24, 2012, because Plaintiff was out of the country (ECF 13). On August 24, 2012, after having scheduled the Rule 16 Hearing three times, Plaintiff failed to attend, failed to notify the Court, and has failed to adhere to any of the deadlines articulated in the Court's Scheduling Order (ECF 14, 15).

Plaintiff's continued failure to adhere to the Court's scheduling order, and failure to respond to Defendants' discovery requests, has significantly prejudiced Defendants, continues to abuse the Court's judicial resources, and merits dismissal with prejudice.

CONCLUSION

For all of the above reasons, Defendants move this Court for an Order dismissing all claims against them.

Respectfully submitted,

Dated: May 30, 2013

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By

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