UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MICHAEL J. ROSE, individually and as father of Jessie Lee Rose, and as the administrator of the estate of Jessie Lee Rose; and CHRISTINE ALMAS ROSE, individually and as mother of Jessie Lee Rose,

6:14-cv-01256 (BKS/TWD)

Plaintiffs,

v.

THE CITY OF UTICA; and OFFICER ANTHONY ELLIS, individually and as a police officer of the City of Utica,

Defendants.

APPEARANCES:

For Plaintiffs:
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For Defendants:
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Hon. Brenda K. Sannes, United States District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiffs Michael J. Rose and Christine Almas Rose bring this action under 42 U.S.C. § 1983 and New York law asserting claims arising out of the July 14, 2013 death of their son, Jessie Lee Rose. (Dkt. No. 31). On October 23, 2017, Defendants City of Utica and Anthony

Ellis moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, (Dkt. No. 116), and moved to preclude Plaintiffs' experts Keith Howse, Kevin Dix, and Jane Woodruff Carroll from offering any testimony or opinions, (Dkt. No. 118). Plaintiff filed several extension requests; the Court reserved ruling on the last of Plaintiffs' requests but authorized the submission of a proposed opposition, (Dkt. No. 128), portions of which Defendants have sought to seal, (Dkt. No. 145). Oral argument on Defendants' motion for summary judgment and Plaintiffs' request for a further extension was held on January 5, 2018. For the reasons stated below, the Court grants the request for a further extension and accepts Plaintiffs' proposed opposition papers, grants the motion to seal, denies the motion to preclude as moot,[1] and grants the motion for summary judgment on qualified immunity grounds.

II. PLAINTIFFS' REQUEST TO EXTEND TIME TO FILE OPPOSITION

On December 20, 2017, Plaintiffs' counsel filed a letter in which he acknowledged having missed the deadline for filing Plaintiffs' opposition to the motion for summary judgment and the motion to preclude—a deadline that the Court, on November 7, 2017, had already extended from November 20, 2017 to December 15, 2017, (*see* Dkt. No. 124)—and requested a further filing extension until December 26, 2017. (Dkt. No. 125). The letter contains the following explanation:

> Apparently, I (or my staff) misread thee-e-mail [sic] and scheduled the wrong return date for when the papers were due in the Rose case.
>
> My calendar has the paperwork due on December 22, 2017.
>
> I just found out that the paperwork was in fact due on December 15, 2017 and I am late.
>
> It was physically impossible to complete it by December 15, 2017.

[1] As discussed below, however, the supplemental affidavit of Kevin Dix, submitted in opposition to the summary judgment motion, is excluded.

(*Id.*). Defendants opposed the further extension, noting that Rule 6(b)(1) permits extensions of time for good cause "on motion made *after the time has expired* if the party failed to act because of *excusable neglect*." (Dkt. No. 126, at 2 (quoting Fed. R. Civ. P. 6(b)(1)). Defendants argued that Plaintiffs had not made the requisite showing of excusable neglect. (*Id.* at 3–4). Without leave of court, Plaintiffs filed a reply letter, which stated:

> There are additional reasons for the brief not being done. I have had an incredibly busy fall. There has been elections, a trial, a nomination for a judgeship, emergency bankruptcies, in October I had 2-3 things scheduled almost weekday [sic], a looming major trial in January[,] and an inquest. Otherwise I would have this done by now.
>
> Further I have dyslexia and astigmatism which makes proofreading and certain tasks like transcribing very difficult. I can literally read an e-mail and reverse parts of it or think it reads something it does not. In this case most likely on[e] date was read as the other. I also need a new prescription for my glasses because I am getting older.

(Dkt. No. 127, at 1–2). By text order dated December 21, 2017, the Court reserved ruling on the extension request, gave Plaintiffs permission to supplement their request with supporting authorities and to file a proposed opposition to the pending motions on December 26, 2017, and lastly scheduled oral argument on the summary judgment motion and the extension request for January 5, 2018. (Dkt. No. 128).

Despite these clear instructions, Plaintiffs filed their supplemental authority in support of the extension request (Dkt. No. 129) and their proposed opposition to the pending motions (Dkt. Nos. 130–138) one day late, on December 27, 2017. On January 1, 2018, Plaintiffs' counsel submitted a letter listing the following reasons for the second delay:

> I discussed the filing of the opposition papers with your clerk who said that the matter would be dealt with at the hearing on Friday, But prophalactly Iam explaining what happened.
>
> I would like to move to accept the late filing.
>
> I worked through the weekend on the papers non stop.

> After working all weekend on the answering papers, at 3:00 am I tried to file them. They would not file. The computer gave me meaningless symbols as the explanation for not being able to file. I tried several times. Each try took about a half hour. On the fourth try I changed browsers, this time I got an explanation that one file was too big. (it had a number of pictures)I split the file in two.It would still not file. I tried several times several ways. No explanation was given for the inability to file. Finally,I broke the file into units of four. It started filing. Until I came to a file in the Williams deposition. This refused to file. I optimized it and it finally filed. by then it was morning.

(Dkt. No. 141 (typographical errors in original)). Defendants timely responded to Plaintiffs' submissions on January 3, 2018. (Dkt. No. 142). They objected to Plaintiffs' "twice tardy filing," arguing that the supplemental authority quoted by Plaintiffs, *United States v. Known Litigation Holdings, LLC*, 518 F. App'x 4 (2d Cir. 2013), did not excuse Plaintiffs' failure to timely oppose the motion for summary judgment on December 15, 2017, and that Plaintiffs' "computer failures" did not excuse the second default on December 26, 2017. (Dkt. No. 142, at 9–11).

Courts assess whether to permit a late filing for excusable neglect under the four-part test enunciated in *Pioneer Investment Services Co. v. Brunswick Associates, L.P.*, 507 U.S. 380 (1993). *See Known Litigation Holdings*, 518 F. App'x at 5 ("Although *Pioneer* addressed the meaning of 'excusable neglect' in the context of a bankruptcy rule, we have applied the standard broadly to other situations in which a court is authorized to permit a late filing."). The four factors to be considered are: (1) "the danger of prejudice to the [nonmovant]"; (2) "the length of delay and its potential impact on judicial proceedings"; (3) "the reason for the delay, including whether it was within the reasonable control of the movant"; and (4) "whether the movant acted in good faith." *Pioneer*, 507 U.S. at 395. Given that the first two factors generally favor the

moving party and the absence of good faith is rarely at issue,[2] courts focus their inquiry on the third factor—the reason for the delay. *See Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 (2d Cir. 2003).

Defendants are correct that the Second Circuit has "taken a hard line" in applying the *Pioneer* test when a party has failed to "follow the clear dictates of a court rule," *id.* at 368, and that a calendaring error by a party's attorney is rarely a basis for excusable neglect, *see Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248, 249 (2d Cir. 1997) (affirming a district court's grant of summary judgment after plaintiff's counsel failed to timely oppose a motion for summary judgment because counsel had been running for elective office and also mistakenly believed that the opposition was not due until later); *Shervington v. Village of Piermont*, 732 F. Supp. 2d 423, 425 (S.D.N.Y. 2010) ("Law office failure rarely constitutes an excusable neglect."). Likewise, technical issues with a filing user's computer system typically do not constitute excusable neglect. *See Miller v. City of Ithaca*, No. 10-cv-597, 2012 WL 1565110, at *2, 2012 U.S. Dist. LEXIS 61708, at *5–6 (N.D.N.Y. May 2, 2012) (rejecting the plaintiff's late filing of opposition to motion for summary judgment despite counsel's proffered reason of "computer errors"). Viewed in light of this guidance, the reasons advanced by Plaintiffs' counsel for his late filings—calendaring mistake, overwork, technical issues, etc.—would ordinarily not constitute excusable neglect. Nevertheless, "excusable neglect is an elastic concept, that is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 228 (2d Cir. 2004). The filing delay at issue here was minimal, and Defendants were not prejudiced. At oral argument on January 5, 2018, Plaintiff's counsel represented to the Court that he was in the process of installing

[2] Indeed, in this case, Defendants do not argue that they have been prejudiced by Plaintiffs' filing defaults, that the delay has negatively impacted the judicial proceedings, or that Plaintiffs acted in bad faith. (*See* Dkt. No. 126, at 3). Defendants acknowledge that the analysis centers on the reasons proffered for the delay. (*See id.*).

calendaring software to avoid making similar errors in the future and that he would seek remedial assistance to improve his ECF filing proficiency. Defendants' counsel indicated that the Court had adequately addressed the issue. Despite the weakness of Plaintiffs' reasons for the late filings, the other factors, including Plaintiffs' counsel's remedial efforts, suffice in these circumstances to support a finding of excusable neglect. The Court stresses, however, that its decision should not be viewed "as a license to disregard the requirements imposed by the Federal Rules of Civil Procedure . . . [or] the Local Rules" of the Northern District of New York. *Blandford v. Broome Cty. Gov't*, 193 F.R.D. 65, 70 (N.D.N.Y. 2000) (quoting *Georgopolous v. Int'l Bhd. of Teamsters, AFL-CIO*, 164 F.R.D. 22, 24 (S.D.N.Y. 1995)).

III. DEFENDANTS' MOTION TO SEAL

As part of their submission in opposition to the summary judgment motion, Plaintiffs filed a number of documents relating to Defendant Ellis' personnel file, (*see* Dkt. No. 132-3, at 1; Dkt. No. 136, at 54–181), as well as a document containing personal identifiers, (*see* Dkt. No. 136-1, at 91). On December 28, 2017, Defendants filed an "emergency" letter request to seal or strike the confidential documents and redact personal identifiers, arguing that they were filed in violation of the Confidentiality Order (Dkt. No. 52). (*See* Dkt. No. 139). At oral argument on January 5, 2018, the Court granted Defendants leave to file a motion to seal the documents at issue and instructed Plaintiffs to refile Dkt. No. 136-1 with personal identifiers redacted. Defendants filed their unopposed motion to seal the portions of the record at page 1 of Dkt. No. 132-3 and pages 54 through 181 of Dkt. No. 136 on January 11, 2018. (Dkt. No. 145).

At common law, there is a presumption of public access to judicial documents. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006). Under the common law framework, a court must first determine whether the documents at issue are "judicial documents," i.e., items that are "relevant to the performance of the judicial function and useful in

the judicial process." *Id.* (quoting *United States v. Amodeo* (*Amodeo I*), 44 F.3d 141, 145 (2d Cir. 1995)). Second, the court must determine the weight of the common law presumption of access, which depends on "the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *Id.* (quoting *United States v. Amodeo* (*Amodeo II*), 71 F.3d 1044, 1049 (2d Cir.1995)). "Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance." *Id.* (quoting *Amodeo II*, 71 F.3d at 1049). However, the weight of the presumption is not a function of the degree "to which [the documents] were relied upon in resolving the motion" or of how a particular claim was decided. *Id.* at 123. Third, the court must "balance competing considerations against it," including but not limited to "the danger of impairing law enforcement or judicial efficiency" and "the privacy interests of those resisting disclosure." *Id.* at 120 (quoting *Amodeo II*, 71 F.3d at 1050).

"In addition to the common law right of access, it is well established that the public and the press have a 'qualified First Amendment right to attend judicial proceedings and to access certain judicial documents.'" *Id.* (quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004)). In *Lugosch*, the Second Circuit held that "documents submitted to a court in support of or in opposition to a motion for summary judgment are judicial documents to which a presumption of immediate public access attaches under both the common law and the First Amendment." *Id.* at 126; *see also id.* at 121 ("Our precedents indicate that documents submitted to a court for its consideration in a summary judgment motion are—as a matter of law—judicial documents to which a *strong* presumption of access attaches, under both the common law and the First Amendment." (emphasis added)). For a document to be sealed under the First

Amendment framework—which imposes "a higher burden on the party seeking to prevent disclosure than does the common law presumption"—there must be "specific, on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim." *Id.* at 124.

It is uncontested that the documents at issue are judicial documents.[3] (*See* Dkt. No. 145, at 2–3). Further, as the documents were filed in opposition to a motion for summary judgment, a strong presumption of public access applies under the First Amendment framework. The analysis must therefore focus on whether the preservation of "higher values" requires sealing and whether the requested sealing is narrowly tailored to that objective. Defendants argue that "not sealing the records will impair the effectiveness of law enforcement" and "could infringe on the officer's constitutional rights." (*Id.* at 3). Defendants contend that making an internal affairs investigation public, when officers under investigation are required to give compelled statements protected under *Garrity v. New Jersey*, 385 U.S. 493 (1967), and also given the impression of confidentiality, could impair law enforcement's ability to conduct future internal affairs investigations. Upon review of the specific personnel files sought to be sealed in this case, the Court finds that they reflect sensitive information, including information concerning a confidential Utica Police Department internal affairs investigation and that disclosure could

[3] Defendants point out that one of the documents that Plaintiffs filed (Dkt. No. 136, at 54–181) is a "document dump" and that Plaintiffs did not specifically cite or rely on it in their motion papers. (Dkt. No. 145, at 2). That same argument was advanced and rejected in *Prescient Acquisition Grp., Inc. v. MJ Pub. Tr.*, 487 F. Supp. 2d 374, 375–76 (S.D.N.Y. 2007), for reasons the Court finds persuasive and applicable here:

> Defendants argue that certain deposition transcripts which they submitted to the court ought not be considered judicial documents—or be entitled to only a weak presumption—because they were not cited to in their memoranda or Rule 56.1 Statements and were only included for context. The deposition transcripts which were submitted are fairly considered part of the record on the motion and, once submitted, could be relied upon by either party or the court. Moreover, as long as the legal or factual issue was raised and the transcript was actually in the record before this court, it would likely be deemed fair and appropriate for either side to rely upon it on appeal. The defendants' first instincts that the full transcripts would be useful to the court in assessing whether a triable issue of fact had been raised were not unreasonable ones.

impair law enforcement efficiency. *See Dorsett v. County of Nassau*, 762 F. Supp. 2d 500, 521 (E.D.N.Y. 2011) (Tomlinson, Mag. J.) (sealing a police internal affairs unit report documenting a police department's internal investigation to protect privacy interests and law enforcement efficiency), *aff'd*, 800 F. Supp. 2d 453 (Spatt, J.), *aff'd sub nom. Newsday LLC v. County of Nassau*, 730 F.3d 156 (2d Cir. 2013). Further, the Court finds that the limited sealing of the requested portion of the two exhibits submitted by Plaintiffs is a narrowly tailored means of protecting the integrity of the confidential internal law enforcement investigation and the privacy of the individuals who were involved in the investigation. *Cf. Collado v. City of New York*, 193 F. Supp. 3d 286, 291–92 (S.D.N.Y. 2016) (sealing internal police documents because they would "reveal operational details and other confidential information about an undercover law enforcement action"); *Hillary v. Village of Potsdam*, No. 12-cv-1669, 2015 WL 902930, at *4, 2015 U.S. Dist. LEXIS 25141, at *11–12 (N.D.N.Y. Mar. 3, 2015) (concluding that the police investigation documents at issue should remain under seal because they contained sensitive information concerning law enforcement investigative methods and procedures). Accordingly, the motion to seal is granted.

IV. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. Facts[4]

On July 14, 2013, around noon, Jessie Lee Rose ("Jessie" or the "individual") was observed discharging a firearm—which some witnesses recognized as a shotgun[5]—into the air

[4] Defendants filed a statement of material facts (the "SMF") in support of their motion for summary judgment. (*See* Dkt. No. 116-33). Plaintiffs filed a response (titled "Reply to Statement of Statement of Facts") denying or admitting assertions in the SMF. (*See* Dkt. No. 130-2). Additionally, Plaintiffs filed a "Counter Statement of Facts" setting forth their version of the events. (*See* Dkt. No. 130-1). Although this latter submission does not conform to Local Rule 7.1(a)(3), the recital of facts presented below is drawn from all three documents: undisputed material facts supported by the record are taken from the SMF, whereas disputed material facts supported by the record are taken from Plaintiffs' submissions. Further, the recital of facts cites directly to documents in the record where appropriate.

and ground while walking through a field in Addison Miller Park, a public park in Utica, New York.[6] (Dkt. No. 116-33, ¶ 1; Dkt. 116-5, at 2; Dkt. No. 116-7, at 11, 27; Dkt. No. 116-10, at 2; Dkt. No. 116-14, at 2). At the time, Lonnie Willis was on the park's basketball courts playing basketball with his son and daughter. (Dkt. No. 130-1, ¶ 7; Dkt. No. 116-10, at 2). Mr. Willis' daughter observed Jessie "racking the shotgun," (Dkt. No. 116-12, at 2), and Jessie cleared the shotgun of a spent casing after firing his last shot in the park field, (Dkt. No. 116-33, ¶ 3; Dkt. No. 130-2, ¶ 3). According to Mr. Willis, he and his children were the only other people in the park. (Dkt. No. 130-1, ¶ 7; Dkt. No. 116-10, at 2). Nevertheless, the shots were heard or seen not just by Mr. Willis and his children but also by neighbors in the park's vicinity, including Thomas and Monica Rabbia, who were in the driveway of Mr. Rabbia's parents' house, Robert Maddox, who was gardening, and his wife Deborah Maddox, who was outside on the porch of their house. (Dkt. No. 116-5, at 2; Dkt. No. 116-8, at 2; Dkt. No. 116-10, at 2; Dkt. No. 116-12, at 2; Dkt. No. 116-13, at 2; Dkt. No. 116-14, at 2; Dkt. No. 116-16, at 18–19).

After witnessing some of these shots, Mr. Willis and his children left the basketball courts, and Mr. Rabbia and Mr. Maddox called the police. (Dkt. No. 116-33, ¶¶ 7, 23). Mr. Maddox went inside his home and called the Utica Police Department station, but no one answered. (*Id.*; Dkt. No. 116-14, at 2). Mr. Rabbia "jumped" into the car with his wife and child, and, as his wife was driving the car away from the park, called 911. (Dkt. No. 116-5, at 2; *see also* Dkt. No. 116-33, ¶¶ 8–9). Mr. Rabbia was connected to the Oneida County Dispatch and stayed with the dispatcher throughout the incident.[7] (Dkt. No. 116-33, ¶¶ 9–10). As a result of

[5] There is no dispute that the firearm that Jessie possessed was a shotgun whose barrel had been shortened, with the part of the butt stock removed and some sort of strap affixed to it. (Dkt. No. 116-33, ¶¶ 5, 6). Further, both parties agree that possession of a shotgun altered in such a way is illegal. (*Id.*; Dkt. No. 130-2, ¶ 5).

[6] Scene processing later confirmed that Jessie discharged and ejected at least four rounds. (Dkt. No. 116-33, ¶ 2).

[7] Part of the recording of Mr. Rabbia's 911 call is inaudible. (*See* Dkt. No. 116-33, ¶ 10; Dkt. No. 130-2, ¶ 10; Dkt. No. 116-7 (Deposition Exhibit No. 103) (physically filed)).

the 911 call, the Oneida County Dispatch sent Defendant Ellis to the area on a shots-fired call. (*Id.* ¶ 13). While Defendant Ellis was en route, the Oneida County Dispatch advised him that there was a white male in a black shirt firing a shotgun in Addison Miller Park. (*Id.* ¶¶ 14, 27; Dkt. No. 130-2, ¶ 27). The Oneida County Dispatch never advised him of the direction of the shots.[8] (Dkt. No. 116-33, ¶ 15).

While on the phone with the 911 operator, Mr. Rabbia asked his wife to drive around the block and go back toward the park. (*Id.* ¶ 16; Dkt. No. 116-7, at 14–15). The Rabbias reached the street adjoining the park and stopped the car there, but Mr. Rabbia could not see the individual.[9] (Dkt. No. 116-7, at 15, 30). Mr. Rabbia believed that the individual had vacated the area. (*Id.* at 31; Dkt. No. 116-33, ¶ 17). The operator inquired whether Mr. Rabbia or anyone else was "in immediate danger." (Dkt. No. 116-7, at 32). Mr. Rabbia responded, "At the moment, no." (*Id.*). The 911 operator asked Mr. Rabbia if he could see a police officer approaching, (*id.* at 15, 32), and "all of a sudden" Mr. Rabbia saw Defendant Ellis' patrol car coming toward him, (*id.* at 15–16; Dkt. No. 116-33, ¶ 18). The operator told Mr. Rabbia to make contact with the officer. (Dkt. No. 116-7, at 16, 32; Dkt. No. 116-33, ¶ 19). In his deposition, Mr. Rabbia described his first contact with Defendant Ellis as follows:

> So I told [the operator] I see him. She says, flag him down, go to the officer. So I had my wife pull the car out onto York Street to basically cut him off. I jumped out of the car and waved to him. And he basically said, what's going on? I said, there is a person in the park with a gun. He goes, where? I said he was over there. He goes, where? And I said, I don't know, I don't see him now, he's over there.

[8] Nothing in the record suggests that Defendant Ellis received any information concerning the location of the shots. (Dkt. No. 116-33, ¶ 27; Dkt. No. 130-2, ¶ 27).

[9] Mr. Rabbia testified that he got out of the car the first time to see if he could locate the individual. (Dkt. No. 116-7, at 15, 30). It is not clear when Mr. Rabbia returned to the car, but it appears that he returned within two minutes and exited the car a second time after Defendant Ellis arrived at the scene shortly after. (*Id.* at 17, 30, 32; *see also* Dkt. No. 116-9, at 23–24).

(Dkt. No. 116-7, at 17). Meanwhile, upon seeing the patrol car, Mr. Willis and his children returned to the basketball courts. (Dkt. No. 116-33, ¶ 24; Dkt. No. 116-11, at 29–30).

Mr. Maddox saw the patrol car in front of his house and went outside. (Dkt. No. 116-33, ¶¶ 25–26; Dkt. No. 116-15, at 20). As Defendant Ellis was talking to Mr. Rabbia, Mr. Maddox proceeded to join them. (Dkt. No. 116-33, ¶¶ 25–26; Dkt. No. 116-14, at 2; Dkt. No. 116-15, at 23–24). Defendant Ellis asked where the individual was. (Dkt. No. 116-33, ¶ 28). Ms. Maddox, who was standing in her driveway, could see feet dangling from the slide in the park's jungle gym, and she pointed it out to the officer.[10] (*Id.* ¶ 29; Dkt. No. 116-16, at 25–28). Defendant Ellis then proceeded to the northern entrance to the park and exited his patrol car. (Dkt. No. 116-33, ¶ 22).

The parties present diverging narratives of what happened after Defendant Ellis got out of his car, but both parties agree that at some point Defendant entered the park from York Street (the street adjoining the park) using the northern gate.[11] (*See* Dkt. No. 116-33, ¶ 30; Dkt. No. 130-2, ¶ 30). Defendant Ellis testified that he saw someone "either sitting or crouching behind the furthest end of the jungle gym on the tube side" and was able to determine that the individual matched the description given by dispatch, a white male wearing a black shirt. (Dkt. No. 116-33,

[10] Mr. Maddox also testified as follows: "I think my wife saw his feet dangling from here (indicating). And I saw his feet, I said there he is right there." (Dkt. No. 116-15, at 20).

[11] Plaintiffs assert that Defendant Ellis did not "merely exit[] the patrol" but "charged from his patrol car with his gun drawn and started shooting while yelling and screaming commands." (Dkt. No. 130-2, ¶ 22). There is support for the fact that, upon exiting his car, Defendant Ellis "charged" with his gun drawn and told Jessie to drop the shotgun. (*See* Dkt. No. 116-15, at 25–26 (Mr. Maddox testifying that Defendant Ellis was "charging," "screaming drop the weapon, drop the weapon," and "running toward guy with the gun"); Dkt. No. 116-7, at 19 (Mr. Rabbia testifying that Defendant Ellis took his gun out "[p]retty much immediately" upon exiting his car)). On the other hand, Mr. Willis testified that Defendant Ellis started firing from the road by the rear of his car, not near the gate to the park. (Dkt. No. 116-11, at 60-61). According to him, Defendant Ellis was at the back of his car during the whole shooting incident and did not approach until Jessie lay on the ground. (*Id.* at 54, 60–61). Given their admission that Defendant Ellis entered through the northern gate, Plaintiffs do not seem to credit Mr. Willis' account of Defendant Ellis' location when the deadly shot(s) occurred, but they appear to rely on Mr. Willis' testimony for the timing of the first nondeadly shot(s). (*See* Dkt. No. 130-2, ¶ 22). In any event, these disputes are immaterial to the qualified immunity analysis. The record evidence concerning when Defendant Ellis shot is described further below. *See infra* pp. 14–15.

¶ 31). Plaintiffs deny that Defendant Ellis could identify Jessie when he exited his car because at that time Jessie was "sitting with his back to the charging and shooting officer."[12] (Dkt. No. 130-2, ¶ 31). In any event, Plaintiffs admit that "[s]econds later Ellis was able to identify Jessie because [Ellis] had charged into the park to the side of the gym." (Dkt. No. 130-2, ¶ 31).

Defendant Ellis testified that he said "show me your hands" repeatedly as he was walking toward Jessie. (Dkt. No. 116-33, ¶ 33; Dkt. No. 116-19, at 2). Several witnesses testified that they heard Defendant Ellis issue commands for Jessie to show his hands or drop his gun before any shooting began.[13] Plaintiffs deny that there was sufficient "time for repeated commands in the three seconds before Ellis started shooting."[14] But Plaintiffs concede that Jessie did not react to Defendant Ellis' commands. (Dkt. No. 130-1, ¶ 55).

As Defendant Ellis approached, Jessie stood and turned, and Defendant Ellis was able to see Jessie's shotgun.[15] (Dkt. No. 116-33, ¶ 35; Dkt. No. 130-2, ¶ 35; Dkt. No. 116-20, at 35-36).

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[12] As Plaintiffs provide no record cite for that proposition, their denial is ineffectual. *See* L.R. 7.1(a)(3).

[13] Per Mr. Rabbia, shots were heard after the officer had moved onto the playground and told Jessie to drop the gun. (*See* Dkt. No. 116-7, at 21–22). Per Mr. Maddox, Defendant Ellis was "charging," "screaming drop the weapon, drop the weapon," and "running toward guy with the gun." (Dkt. No. 116-15, at 25–26). No witness affirmatively testified the shooting started before the commands. Mr. Willis asserted in his witness statement that Defendant Ellis commanded Jessie to "Drop the gun and show me your hands," and that Jessie then "g[o]t up, start[ed] to walk towards the tree line and then [Jessie] turn[ed] the shotgun towards his body and fire[d] the shotgun." (Dkt. No. 116-10, at 2–3). In his deposition, Mr. Willis did not recall if or when the command to drop the gun was uttered, (Dkt. No. 116-11, at 31), but he never testified that the command was *not* uttered before the shooting.

[14] Nothing in the record supports that proposition. Plaintiffs cite Durand Begault's affidavit, which merely states that "three seconds after a male talker says 'there he is' there is a probable gun shot" and "there are one or two additional successive gunshots six seconds after the male ta[l]ker says 'there he is.'" (Dkt. No. 135-1, ¶¶ 5-6). Mr. Begault did not opine on the time it takes to make repeated commands or whether the commands occurred during the referenced six-second period. Plaintiffs' other citations likewise do not support the proposition that there was insufficient time.

[15] Defendant Ellis testified that he walked a couple of feet toward Jessie and, at that point, saw the firearm in Jessie's hands. (Dkt. No. 116-20, at 35–36). Then, according to his testimony, Defendant Ellis "yelled for [Jessie] to drop his gun," at which point Jessie "stood up" and turned clockwise until he faced Defendant Ellis. (*Id.* at 36–38). Plaintiffs do not deny this sequence of events; they acknowledge that Defendant Ellis "would have been able to see Jessie's gun as Jessie stood and turned." (Dkt. No. 130-2, ¶ 35). Plaintiffs deny that there was sufficient time for Defendant Ellis to command Jessie to drop the gun, (*id.* ¶ 36), but that proposition is not supported by the record, (*see supra* notes 13, 14). As discussed below, it is immaterial for qualified immunity purposes whether Defendant Ellis saw the shotgun before or while Jessie was turning around to face him. There is no dispute that Defendant Ellis saw the shotgun before he fired his first shot. Further, while Plaintiffs argue that Jessie had the sawed-off shotgun pointed toward himself when Defendant Ellis fatally shot him, (Dkt. No. 130-3, at 12; Dkt. No. 130-1, ¶ 71), they only cite

The parties disagree about what occurred when Jessie turned to face Defendant Ellis. Defendant Ellis testified that Jessie "racked" the shotgun while he was turning.[16] (Dkt. No. 116-20, at 39). Plaintiffs assert that "Ellis is lying," but cite no evidence in support of this assertion. (Dkt. No. 130-2, ¶ 65). According to Defendant Ellis, Jessie "discharged a round and [Defendant Ellis] immediately returned fire." (Dkt. No. 116-20, at 39–40). By contrast, Plaintiffs assert, without any citation to the record, that Defendant Ellis ordered Jessie to drop the gun and, as Jessie was turning, Defendant Ellis fired a shot.[17] (Dkt. No. 130-2, ¶¶ 35–36). In any event, whether or not Jessie discharged the shotgun before Defendant Ellis fired his weapon, Jessie was holding the shotgun with one or two hands when Defendant Ellis shot. (Dkt. No. 130-1, ¶¶ 60–63; Dkt. No. 116-10, 2–3; Dkt. No. 116-11, at 56, 63–64, 66–67 ; Dkt. No. 116-15, at 47–48). The parties agree that Defendant Ellis' first shot hit the jungle gym. (Dkt. No. 116-33, ¶ 44; Dkt. No. 130-2, ¶ 35; Dkt. No. 130-1, ¶ 67; Dkt. No. 116-20, at 42).[18]

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to a certain "Ex. 26" for that proposition, but no such exhibit has been filed with the Court. Defendant Ellis thought that Jessie's shotgun was pointed at Ellis, (Dkt. No. 116-20, at 40), whereas Mr. Rabbia "couldn't tell" in which direction the shotgun was pointed, (Dkt. No. 116-7, at 58). In his witness statement, Mr. Maddox recounted that he heard "2 or 3 pops" and thought "that was the Officer shooting at [Jessie]," following which "the man [i.e., Jessie] then tu[r]ned the gun on himself and shot." (Dkt. No. 116-14). Mr. Willis' witness statement, on the other hand, describes that Jessie "g[o]t up, start[ed] to walk towards the tree line and then he turn[ed] the shotgun towards his body and fire[d] the shotgun." (Dkt. No. 116-10, at 2–3). Plaintiffs do not rely on either Mr. Maddox's or Mr. Willis' version of the events, in which a suicidal Jessie turns the shotgun toward himself and kills himself. At any rate, these discrepancies are immaterial because qualified immunity shields Defendant Ellis' actions after he saw Jessie holding the shotgun, as explained below.

[16] Mr. Willis' son averred in his witness statement that, as Defendant Ellis walked toward the playground area, Jessie "cock[ed] his shotgun with his back turned to the Officer." (Dkt. No. 116-13, at 2).

[17] It is uncontroverted that Jessie did not actually shoot in Defendant Ellis' direction, but the parties dispute whether Defendant Ellis actually or reasonably believed that Jessie's shotgun pointed in the officer's direction. The Court acknowledges the dispute and will assume for purposes of this motion that Defendant Ellis did not perceive that a shot was fired in his direction or that the shotgun was pointed toward him. In any event, Kevin Dix, Plaintiff's firearm expert, testified that the shotgun could have been spun around and fired in less than a second. (*See* Dkt. No. 116-18, at 172–73). Although Plaintiffs now attempt to backtrack from that testimony, (*see* Dkt. No. 130-2, ¶ 42; Dkt. No. 135-3, at 5), Plaintiffs' denial is without record support, (*see infra* Part IV.B).

[18] Plaintiffs argue, without citation to any witness testimony, that, after Defendant Ellis fired his first shot, Jessie "started removing the gun by rotating the gun and raising his right hand over his head to clear the strap." (Dkt. No. 130-1, ¶ 68). Plaintiffs cite to Mr. Rabbia's deposition and Defendant Ellis' deposition. (Dkt. No. 130-1, ¶ 68). But Mr. Rabbia never testified that Jessie was in the process of "removing the gun" or "raising his right hand over his head to clear the strap." (*Id.*). Mr. Rabbia testified that "the last thing I saw Jessie do was stand up and start moving

The parties agree that Defendant Ellis shot a second time shortly after the first shot that hit the jungle gym. (Dkt. No. 116-33, ¶ 50; Dkt. 130-2, ¶ 50; Dkt. No. 130-1, ¶ 75; Dkt. No. 116-20, at 47) (Defendant Ellis testifying that "I fired my second round almost immediately")). Defendant Ellis' second shot entered the dorsal side of Jessie's left hand and exited on the palm side. (Dkt. No. 116-33, ¶ 44; Dkt. No. 130-2, ¶ 44). Relying on the opinion of his proposed expert Kevin Dix, Plaintiffs theorize that this second shot caused a "sympathetic nerve response," causing Jessie's right hand "to move/jerk setting off the [shot]gun or the [shot]gun to move and go off." (Dkt. No. 130-2, ¶ 77). In sum, whereas Defendants contend that Jessie discharged the shotgun first, followed by Defendant Ellis' two gunshots, (Dkt. No. 116-33, ¶ 50), Plaintiffs assert that Defendant Ellis fired his gun twice and that the second shot caused Jessie to discharge the shotgun, (Dkt. No. 130-2, ¶ 77). This difference is immaterial to the qualified immunity analysis.

Regardless of the sequence of the gunshots, both parties agree that when the second bullet struck Jessie's left hand, Jessie dropped the shotgun and fell to the ground. (Dkt. No. 116-33, ¶ 53). Defendant Ellis then approached Jessie, kicked off the shotgun away from Jessie, secured him in handcuffs, patted him down for any other weapons, called for backup and emergency medical services, and stood guard until backup arrived. (*Id.* ¶ 55). Officer Brian French arrived at the scene next and discovered that Jessie had a shotgun wound. (*Id.* ¶ 56–58). Emergency medical services transported Jessie to a hospital, where he later succumbed to his

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the gun around" and that the gun was "[r]otated 90 degrees from horizontal to vertical." (Dkt. No. 116-7, ¶ 67). Further, the Court could not find any reference in Defendant Ellis' deposition to Jessie's purported attempt to remove the gun. Nevertheless, it is undisputed that, after Jessie fell to the ground, Defendant Ellis approached and kicked the shotgun away from Jessie. (Dkt. No. 116-33, ¶ 55). Viewing that fact in the light most favorable to Plaintiffs, the Court infers that the gun was no longer strapped to Jessie by the time he landed on the ground. While such an inference may support Plaintiffs' after-the-fact assessment that Jessie was in the process of removing the gun when he was shot, a determination of qualified immunity must be made based upon the facts knowable to Defendant Ellis at the time of the shooting.

injuries. (*Id.* ¶ 60). The autopsy revealed that Jessie died of a shotgun wound to the abdomen. (*Id.* ¶ 61).

B. Motion to Preclude

Defendants move to preclude as unreliable the entirety of Keith Howse's expert testimony, part of Kevin Dix's expert testimony, and the entirety of Jane Carroll's expert testimony under Federal Rule of Evidence 702. (Dkt. No. 118). Through an attorney affidavit,[19] Plaintiffs oppose the motion to preclude the expert testimonies of Howse and Dix but withdraw Jane Carroll's expert report. (Dkt. No. 138).

Plaintiffs retained Howse, a former police officer and attorney licensed to practice law in Texas, to "evaluate the actions of Utica Police Officer Anthony Ellis and the Utica Police Department to determine whether their conduct and interaction with Mr. Jessie Rose was performed in a reasonable manner" and whether these actions, as well as the Police Department's training and policies, "violated any professional standards of care." (Dkt. No. 116-21, at 467, 477–79). Defendants argue that Howse's report and testimony "should be excluded *in toto*, as Howse has eschewed consideration of industry standards in forming his opinion, and instead bases his opinions on his own limited, subjective, experiences" and because "his opinions are based on misapprehensions of facts in the record." (Dkt. No. 118-3, at 15). Instead of squarely addressing Defendants' foundational challenges to Howse's opinion, Plaintiffs' opposition mostly reiterates the points made in Howse's report. (*See* Dkt. No. 138, ¶¶ 25–34). Given its ruling on the qualified immunity question, however, the Court need not decide this evidentiary dispute. Howse's testimony concerning whether Defendant Ellis' conduct was reasonable and conformed to professional standards of care would be relevant to determining whether Defendant

[19] Plaintiffs did not file a memorandum of law in opposition to the motion to preclude.

Ellis used excessive force in violation of Jessie's constitutional rights, but it has no bearing on whether it was clearly established at the time that the conduct at issue violated the law. *See, e.g.*, *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777 (2015) (noting that, "so long as a reasonable officer could have believed that his conduct was justified, a plaintiff cannot avoi[d] summary judgment by simply producing an expert's report than an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless" (alteration in original) (internal quotation marks omitted)). As discussed below, the parties have not cited—and the Court has not found—any clearly established authority indicating that Ellis' conduct was unlawful. Because Howse's testimony is immaterial to disposition of this case, the Court need not consider it.

Plaintiffs retained Dix, a retired police officer, firearm instructor, licensed gunsmith, and licensed firearms dealer, to testify about Jessie's shotgun, the ammunition that Jessie had loaded in the gun, the shots at the scene, and Dix's opinion about the circumstances leading up to Jessie's death. (Dkt. No. 116-18, at 194–201; Dkt. No. 138, ¶ 5). Defendants seek to exclude the portions of Dix's report containing his conclusions that: (1) Jessie did not rack the shotgun when he was sitting on the slide in the park because no spent casing was found in that area; (2) Jessie had the shotgun pointed toward himself when he turned to face Defendant Ellis and "may have been removing it" as "the gun was in a position consistent with removing the strap from his shoulder"; and (3) Jessie shot himself as a result of a sympathetic nerve response as a result of being shot in the hand by Defendant Ellis. (Dkt. No. 118-3, at 3, 6; Dkt. No. 116-18, at 197). Defendants argue that: (1) Dix failed to consider the possibility that Jessie could have ejected the spent casing in a different area than where he chambered the round that killed him; (2) Dix's opinion concerning the strap and the position of the shotgun is speculative; and (3) Dix is not

qualified to opine on sympathetic nerve response. (*Id.* at 7–12). None of these disputed facts, however, matter to the qualified immunity analysis set forth below. Even if Jessie had not racked the gun while sitting on the slide, kept the shotgun pointed toward himself when he faced Defendant Ellis, and shot himself as a result of a Defendant Ellis' bullet triggering a sympathetic nerve response, Defendant Ellis would still be entitled to qualified immunity. As discussed, there is no clearly established law putting a reasonable police officer on notice about the lawful use of deadly force in a situation such as this, where an armed individual who had been shooting in a public park was holding onto a shotgun when he faced the officer that shot him. Because the Court need not decide whether Dix's opinion is unreliable, Defendants' motion to preclude Dix's report is denied as moot.

Plaintiffs, however, submitted a supplemental affidavit by Dix in opposition to the motion for summary judgment, which added new, unsupported opinions. (Dkt. No. 135-3, at 5 ("Rotating the gun from pointing away to point at one self is very difficult and not likely with the sling attached."); *id.* ("Even if done to [sic] properly it would be impossible to engage the sights and accurately fire Jessie Rose's gun in question at anything, because he is shooting from the hip up to 20 yards.")). Plaintiffs' attempt to insert entirely new expert opinion at this stage of the case is untimely. *See Coene v. 3M Co.*, 303 F.R.D. 32, 44 (W.D.N.Y. 2014) (excluding expert's new opinion as untimely disclosed). Further, the Court finds that the statements in the supplemental affidavit fail to constitute admissible expert opinion under Rule 702 of the Federal Rules of Evidence. There is nothing in the supplemental affidavit to indicate that Dix's conclusory opinions are based on sufficient facts or data, are the product of reliable principles and methods, or reflect a reliable application of the principles and methods to the facts of this case. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)

(holding that a judge must ensure "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand"); *Restivo v. Hessemann*, 846 F.3d 547, 575–76 (2d Cir. 2017) ("Under *Daubert*, factors relevant to determining reliability include the theory's testability, the extent to which it has been subjected to peer review and publication, the extent to which a technique is subject to standards controlling the technique's operation, the known or potential rate of error, and the degree of acceptance within the relevant scientific community." (internal quotation marks omitted)). Dix's supplemental affidavit is therefore excluded.

C. Standard of Review on Summary Judgment

Under Federal Rule of Civil Procedure 56(a), summary judgment may be granted only if all the submissions taken together "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." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. A fact is "material" if it "might affect the outcome of the suit under the governing law," and is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248; *see also Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005) (citing *Anderson*). The movant may meet this burden by showing that the nonmoving party has "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322; *see also Selevan v. N.Y. Thruway Auth.*, 711 F.3d 253, 256 (2d Cir. 2013) (summary judgment appropriate where the nonmoving party fails to "'come forth with evidence sufficient to permit a reasonable juror to return a verdict in his or her favor on' an essential element of a claim" (quoting *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 509 (2d Cir.2010))).

If the moving party meets this burden, the nonmoving party must "set out specific facts showing a genuine issue for trial." *Anderson*, 477 U.S. at 248, 250; *see also Celotex*, 477 U.S. at 323-24; *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009). "When ruling on a summary judgment motion, the district court must construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 780 (2d Cir. 2003). Still, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), and cannot rely on "mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir.1986) (quoting *Quarles v. Gen. Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985)). Furthermore, "[m]ere conclusory allegations or denials . . . cannot by themselves create a genuine issue of material fact where none would otherwise exist." *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (quoting *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995)).

D. Discussion

1. § 1983 Claim Against Defendant Ellis

Plaintiffs claim that Defendant Ellis is liable under § 1983 for using excessive force when he shot Jessie on July 14, 2013. Defendants move for summary judgment on Plaintiffs' excessive force claim, arguing that the use of deadly force was reasonable under the circumstances, and further that Defendant Ellis is entitled to qualified immunity. (Dkt. No. 116-34, at 5–28). Plaintiffs respond that "the objective facts" indicate that Jessie posed no threat to Defendant Ellis or others, and that, in those circumstances, it was not reasonable for Defendant Ellis to shoot Jessie. (Dkt. No. 130-2, at 15–19). Further, Plaintiffs argue that Defendant Ellis is not entitled to qualified immunity because he "knew from his training what he was supposed to do"—i.e., not

shoot a nonthreatening individual who "was either committing suicide or removing the gun" as instructed. (*Id.* at 19–20). As discussed below, the Court concludes that Defendant Ellis is entitled to qualified immunity because his actions did not violate clearly established law; therefore, the Court does not reach the issue of whether Defendant Ellis used reasonable force in the circumstances. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (holding that courts need not determine whether a case's facts make out a violation of a constitutional right prior to examining whether the right at issue was "clearly established" at the time of the defendant's conduct).

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Kisela v. Hughes*, No. 17-467, 2018 WL 1568126, at *2, 2018 U.S. LEXIS 2066, at *5–6 (U.S. Apr. 2, 2018) (per curiam) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017)). "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Id.* (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)). An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014). While there need not be "a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Kisela*, 2018 WL 1568126, at *2, 2018 U.S. LEXIS 2066, at *5–6 (quoting *White*, 137 S. Ct. at 551). Further, the Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *Sheehan*, 135 S. Ct. at 1775–76 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). "[S]pecificity is especially important in

the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Kisela*, 2018 WL 1568126, at *3, 2018 U.S. LEXIS 2066, at *6–7 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)). Qualified immunity thus "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix*, 136 S. Ct. at 308 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

The facts in this case, viewed in the light most favorable to Plaintiffs,[20] present the following question: whether it was clearly established, on July 14, 2013, that a police officer could not lawfully use deadly force in a situation where an armed individual had reportedly been firing a shotgun inside a public park, did not react to the approaching officer's command to drop the shotgun, and turned toward the officer while holding the shotgun in his hands. The Court is aware of no authority, much less "clearly established" authority, holding that such conduct would violate the Fourth Amendment.

The only case that Plaintiffs cite in this connection is *O'Bert ex rel. Estate of O'Bert v. Vargo*, 331 F.3d 29, 34 (2d Cir. 2003), a case in which an unarmed man was shot when police officers entered his trailer and attempted to arrest him. The Second Circuit reiterated the general rule, expounded by the Supreme Court in *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989), that "[i]t is not objectively reasonable for an officer to use deadly force to apprehend a suspect unless the officer has probable cause to believe that the

[20] For purposes of the qualified immunity analysis, only the facts known to the defendant officer are relevant. *See Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) ("The reasonableness inquiry depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force."). Therefore, while the Court accepts Plaintiffs' version of the facts insofar as it is supported by the record evidence, and views all of the facts in the light most favorable to the Plaintiffs, the Court only considers those circumstances that were knowable to Defendant Ellis. *See White*, 137 S. Ct. at 550. It was not knowable to Ellis, for example, that Jessie was, as Plaintiffs argue, "emotionally disturbed," with no "desire to hurt anyone." (Dkt. No. 130-3, at 4). Ellis was dispatched on a shots-fired call; dispatch told Ellis that there was a white male in a black shirt firing a shotgun in Addison Miller Park. (Dkt. No. 116-33, ¶¶ 14, 27; Dkt. No. 130-2, ¶ 27). There is no evidence Ellis was told of the location of the shots Jessie fired before Ellis arrived. *Id.*

suspect poses a significant threat of death or serious physical injury to the officer or others." *O'Bert*, 331 F.3d at 36. Applying this rule to the "plaintiff's version of the facts, in which [the defendant] shot to kill [the plaintiff] while knowing that [the plaintiff] was unarmed," the court concluded that "it is obvious that no reasonable officer would have believed that the use of deadly force was necessary." *Id.* at 40.

O'Bert, however, does not help Plaintiffs. To the extent that they rely on the general formulation of the *Garner/Graham* rule that an officer may use deadly force only if there is a significant threat of death or serious physical injury to the officer or others, their reliance is unavailing, as "general statements of the law are not inherently incapable of giving fair and clear warning to officers . . . [and] the general rules set forth in *Garner* and *Graham* do not by themselves create clearly established law outside an obvious case." *Kisela*, 2018 WL 1568126, at *3, 2018 U.S. LEXIS 2066, at *7 (internal quotation marks omitted). *O'Bert* is likewise unhelpful to the extent Plaintiffs rely on its particular fact pattern, as it is not analogous to the facts presented here. Crucially, the person shot in *O'Bert* was unarmed. *See* 331 F.3d at 34; *cf. Estate of Devine*, 676 F. App'x 61, 63 (2d Cir. 2017) (remarking that the estate's argument "minimizes the critical fact of [the decedent] being armed with a deadly weapon," and noting that, "[w]hile the Estate maintains that [the decedent] never intended to harm anyone other than himself, the possession of a firearm is nevertheless a volatile circumstance, made all the more so by [the decedent's] refusal to surrender it and, thus, relevant to whether it was objectively reasonable for Defendants to believe that their actions were lawful").

That situation is a far cry from the events that unfolded in this case, where an armed individual who had been shooting in a public park was holding onto a shotgun when he faced the officer that shot him. *O'Bert* does not speak at all to the scenario encountered by Defendant Ellis,

and the Court has not been made aware of any clearly established authority holding that the conduct at issue in this case was unlawful. On the contrary, courts have found qualified immunity in situations involving armed individuals. *See Fortunati v. Campagne*, 681 F. Supp. 2d 528, 541 (D. Vt. 2009) (granting qualified immunity to officers who shot an armed man with nonlethal beanbag rounds and with lethal force after the armed man responded by pulling a gun from his waistband), *aff'd sub nom. Fortunati v. Vermont*, 503 F. App'x 78 (2d Cir. 2012); *Greenwald v. Town of Rocky Hill*, No. 09-cv-211, 2011 WL 4915165, at *8, 2011 U.S. Dist. LEXIS 119331, at *23–24 (D. Conn. Oct. 17, 2011) (granting qualified immunity to officer that shot a plaintiff who was holding a rifle). Indeed, there is no requirement under existing law that an officer wait for an active shooter to shoot first. *See White*, 137 S. Ct. at 552–53 (holding that an officer who shot an armed occupant of a house without first giving a warning was entitled to qualified immunity). In this case, Defendant Ellis had to make a split-second decision regarding an active shooter holding a shotgun, and Plaintiffs have failed to identify any authority clearly establishing that his decision to shoot violates the Fourth Amendment. Accordingly, the Court concludes that Defendant Ellis is entitled to qualified immunity and that summary judgment must be granted in his favor on the excessive force claim.

2. *Monell* Claim

The Third Amended Complaint asserts a claim of municipal liability—a so-called *Monell* claim[21]—against Defendant City of Utica for its alleged failure to train its officers in handling "potential suicide cases." (Dkt. No. 31, ¶¶ 131; *see also id.* ¶¶ 132–136). Defendant moved for summary judgment on that claim, arguing that "Plaintiffs have failed to identify any defects in [Defendant Ellis'] training." (Dkt. No. 116-34, at 31). As Defendants note in their reply brief,

[21] Such claims are named after the Supreme Court case that allowed recovery against municipalities under § 1983 in certain circumstances. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

Plaintiffs failed to respond to Defendants' argument. (Dkt. No. 142, at 11–12). At oral argument on January 5, 2018, Plaintiffs' counsel acknowledged that they were no longer pursuing the *Monell* claim. Accordingly, summary judgment is granted for Defendants on the *Monell* claim.

3. State Law Claims

As Plaintiffs have no remaining federal claims, and given the absence of any extraordinary circumstances, the Court declines to exercise supplemental jurisdiction over their state law claims. *See* 28 U.S.C. § 1367(c)(3); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988) (stating that, "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine . . . will point toward declining to exercise jurisdiction over the remaining state-law claims").

V. CONCLUSION

For these reasons, it is hereby

ORDERED that Plaintiffs' request (Dkt. No. 125) for an extension to file his opposition to Defendants' motion for summary judgment and motion to preclude Plaintiffs' expert witnesses is **GRANTED**, and Plaintiffs' proposed opposition papers (Dkt. Nos. 130–138) are deemed accepted; and it is further

ORDERED that Defendants' motion to seal (Dkt. Nos. 139 and 145) is **GRANTED**; and it is further

ORDERED that Defendants' motion to preclude Plaintiffs' expert witnesses (Dkt. No. 118) is **DENIED as moot**, but Dix's supplemental affidavit (Dkt. No. 135-3, at 5) is excluded; and it is further

ORDERED that Defendants' motion for summary judgment (Dkt. No. 116) is **GRANTED** in accordance with this Memorandum-Decision and Order; and it is further

ORDERED that the federal claims asserted in the Third Amended Complaint (Dkt. No. 31) are **DISMISSED with prejudice**; and it is further

ORDERED that the remaining claims asserted in the Third Amended Complaint (Dkt. No. 31) are **DISMISSED** for lack of subject-matter jurisdiction.

IT IS SO ORDERED.

Dated: April 19, 2018
Syracuse, New York

Brenda K. Sannes
U.S. District Judge