

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
EASTERN DIVISION

ESTATE OF CLARENCE MICHAEL THURMAN, III,)	
BY ITS SPECIAL ADMINISTRATOR JANICE THURMAN,)	
CARMEN EVANS, A MINOR, BY SABRINA EVANS,)	
HER GENERAL GUARDIAN, AND JANICE THURMAN,)	
)	
<i>Plaintiffs,</i>)	
)	No. 99 C 0877
-vs-)	
)	(Judge Adelman)
CITY OF MILWAUKEE, etc., al.,)	
)	
<i>Defendants.</i>)	

**PLAINTIFFS’ MEMORANDUM IN OPPOSITION
TO DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

On August 3, 1996, defendant Keith Miller, an off-duty Milwaukee police officer,¹ shot and killed plaintiffs’ decedent, Michael Thurman. In their complaint, plaintiffs² raised a variety of federal and state claims against Miller, the City of Milwaukee, and the Chief of Police. After the close of discovery, plaintiffs narrowed their federal claims to a Fourth Amendment excessive force claim against defendant Miller and a Section 1983 policy claim against the City

1. Defendants concede that Miller was acting under color of state law and within the scope of his employment when he killed Thurman.

2. Plaintiffs are Sabrina Evans, the mother of Michael Thurman’s child Carmen Evans, and Janice Thurman, Michael Thurman’s mother. Ms. Thurman sues individually and as special administrator for the estate; Ms. Evans sues as the guardian of her minor child Carmen Evans. Defendants do not raise any issue about the standing of any plaintiff to raise federal claims; we respond at 18 below to defendants’ challenge to the claims asserted for the minor child.

of Milwaukee. On further reflection, plaintiffs have chosen not to assert any policy claim against the City of Milwaukee.³ Accordingly, the only claims at issue in this lawsuit involve the use of deadly force by defendant Miller: the Fourth Amendment claim is advanced against Miller in his individual capacity and the state law claims are advanced against Miller and his employer, the City of Milwaukee.

Defendants seek summary judgment on the ground that Miller acted reasonably in killing Thurman. Defendants start with a view of the facts that disregards the cardinal rule of summary practice procedure that the Court must "construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party." *Myers v. Hasara*, 226 F.3d 821, 825 (7th Cir. 2000). Moreover, while citing *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994) (Def.Mem. 25), defendants overlook the "particular care" that is required in assessing a witness' credibility when "the officer defendant is the only witness left alive to testify." *Id.* at 1147. As we discuss below, none of the uncorroborated assertions made by defendant Miller can be accepted as true on his motion for summary judgment.

We show below that a jury would be justified in finding that Miller's use of force was unreasonable: Miller was chasing a person who had committed a

3. To avoid any ambiguity, plaintiffs file with this memorandum a pleading entitled "Plaintiffs' Notice of Waiver of Section 1983 Policy Claims."

burglary of a garage and an attempted theft of a lawnmower.⁴ Miller had not seen the offender with a weapon (Miller Dep. 126), never felt a hard object on the offender's person (Miller Dep. 144) and never saw a weapon in the offender's hands. (Id.) After the suspect had fled the scene, Miller promptly discovered the suspect's address. (Miller Dep. 112.) Instead of calling for on-duty officers to apprehend the suspect, Miller set out in plain clothes after Thurman without any non-lethal weapon (Miller Dep. 106) or handcuffs or other device to restrain an arrestee. (Miller Dep. 109.)

Plaintiffs' theory of the case is that this case involves a revenge killing, rather than a police officer's use of force in making a lawful arrest: a reasonable jury could conclude that Miller was angry at Thurman for attempting to steal his lawnmower and pursued Thurman to beat him and inflict serious personal injuries, rather than to detain Thurman so that he could be formally charged with an offense. Defendants' motion for summary judgment should be denied.

I. Background Facts

A. Initial Confrontation

The initial confrontation between defendant Miller and Michael Thurman took place at the garage behind Miller's home.

4. Defendants are incorrect in seeking to characterize (Def.Mem. 20, 29) the offense as involving a "robbery." See *infra* at 9.

Miller saw Thurman walking out of Miller's garage pulling a lawnmower; Miller followed with his gun drawn. (Spencer Dep. 34, Defendants' Exhibit I.) Miller was barefoot. (Spencer Dep. 37, 39, Defendants' Exhibit I) Miller said words to the effect "bring my lawnmower back." (Spencer, Inquest Testimony⁵ 74, Plaintiffs' Exhibit 1.)

None of the witnesses heard Miller announce that he was a police officer. (Patten, Inquest Testimony 34, Plaintiffs' Exhibit 1; Garner, Inquest Testimony 63, Plaintiffs' Exhibit 1; Spencer Dep. 17-18, Defendants' Exhibit I.) Robert Spencer, the youth who was to ride with Miller on his hunt for Thurman, never saw Miller's police badge. (Spencer Dep. 18, Defendants' Exhibit I.)

Thurman left the lawnmower and tried to run away. (Spencer, Inquest Testimony 74-75, Plaintiffs' Exhibit 1.) Miller, holding his gun in one hand, grabbed Thurman with his other hand and started "kicking him in the stomach and stuff." (Spencer Dep. 12, Defendants' Exhibit I.) Miller was beating up Thurman. (Spencer Dep. 36, Defendants' Exhibit I.) Thurman was not hitting back. (Spencer Dep. 45, Defendants' Exhibit I.)

One of the witnesses, a 13 year old named Calvin Green, saw Miller point his gun at Thurman's head and threaten to kill him. (Green, Inquest Testimony 11, Plaintiffs' Exhibit 1.)

5. "Inquest Testimony _" refers to page numbers in the transcript of the inquest, which plaintiffs submit as Exhibit 1 with this memorandum.

The beating continued until Mrs. Miller drove up and Thurman broke loose and ran away.⁶ (Spencer, Inquest Testimony 77, Plaintiffs' Exhibit 1.)

After Thurman had left the scene, Miller asked the boys if any knew the man who had run off. Robert Spencer answered that he did. (Spencer Dep. 39, Defendants' Exhibit I.) Miller then went inside his house and returned with his shoes. (Spencer Dep. 39, Defendants' Exhibit I.)

Mrs. Miller tried to stop her husband from chasing Thurman. (Spencer Dep. 40, Defendants' Exhibit I.) Mrs. Miller said "Don't go blowin' off your head," and Miller responded "I'm just gonna beat him down some more." (Green, Inquest Testimony, 15, 24, Plaintiffs' Exhibit 1.)

Miller then took off with Robert Spencer in his wife's vehicle. Miller did not telephone the police when he was inside of his house; nor did Miller ask his wife to telephone the police. (Miller Dep. 98, Defendants' Exhibit F.) A reasonable jury could conclude that Miller left his house intending to misuse his police powers on a personal mission of vengeance.

B. The Chase

After returning with his shoes, Miller told Spencer to "show me where he lives at" and Spencer got into Miller's van. (Spencer Dep. 41, Defendants' Exhibit I.) Spencer directed Miller to an alley in the vicinity of 40th Street and Hampton, where Miller got out of the car and spoke with some men who were

6. Miller has a different version, asserting that his scuffle with Thurman ended before Mrs. Miller drove up. (Miller Dep. 97, Defendants' Exhibit F.)

"fixing cars." (Spencer Dep. 19, Defendants' Exhibit I.) At least one of these men did not recognize Miller as a police officer. (Miller Dep. 128, Defendants' Exhibit F.) Spencer could not hear any conversation between Miller and the men. (Spencer Dep. 20, Defendants' Exhibit I.) Miller's claims about his conversation are set out in paragraph 3.71 of defendants' proposed findings of facts.⁷ All of the men who had been in the alley were interviewed by the Milwaukee Police Department during its investigation of the shooting incident; none corroborated Miller's version of their conversation. (Detective Lieutenant Clarke, Inquest Testimony 108, Plaintiffs' Exhibit 5.)

After Miller entered and searched the garage in which Spencer believed Thurman resided, (Spencer Dep. 19, Defendants' Exhibit I), Miller got back in the van and drove for several blocks until Spencer saw Thurman and stated "There's Mike there." (Spencer Dep. 41, Defendants' Exhibit I.) Miller then drove his van at high speed "about 65, 70" miles per hour (Spencer Dep. 20, 42, Defendants' Exhibit I), in the alley towards Thurman. Spencer was scared during the high speed chase: Miller almost hit several small children who were walking in the alley (Spencer Dep. 20, Defendants' Exhibit I), and the van was moving at such a high rate of speed that Spencer "thought both of use was

7. "3.71 As a result of Officer Miller's inquiry regarding Clarence, one of the gentlemen said that Officer Miller should bring Clarence back to them, and that they would 'all kick his ass because [they're] tired of him breaking into [their] shit.' As a result of Officer Miller's inquiry regarding Clarence, one of the gentlemen said that Officer Miller should bring Clarence back to them, and that they would 'all kick his ass because [they're] tired of him breaking into [their] shit.'"

going to die or flip over or something." (Spencer Dep. 46, Defendants' Exhibit I.) Miller got out of the van and ran after Thurman. (Spencer Dep. 43, Defendants' Exhibit I.) Spencer heard a shot a minute or two later. (Id.)

C. The Shooting

The only witnesses to the shooting are Keith Miller and Michael Jones, who was then seven years of age. Jones, who is now in the fifth grade (Jones Dep. 21, Defendants' Exhibit G), testified at his deposition that he saw two men (one wearing a white T-shirt, the other wearing a "dirty" T-shirt) who seemed to be "boxing." (Jones Dep. 19, Defendants' Exhibit G.) Jones did not hear either of the men state that he was a police officer. (Jones Dep. 10-11, Defendants' Exhibit G.) Jones saw the man wearing the white T-shirt pull a gun from his pocket and "[h]e was trying to shoot it." (Jones Dep. 19, Defendants' Exhibit G.) Jones saw the gun fall to the ground, observed the two men struggle for the gun and then heard a shot. (Jones Dep. 12-13, Defendants' Exhibit G.) According to Jones, the man with the dirty T-shirt fell down "right where he was standing." (Jones Dep. 13, Defendants' Exhibit G.)

Miller's present story is quite different.

Miller refused to make any statement to the first uniformed officers on the scene until he had legal representation. (Police Reports, page 54 of Defendants' Exhibit A, submitted as Plaintiffs' Exhibit 2.) Miller then gave a brief statement to detectives Moore and Burems, stating, in pertinent part, that he had cornered Thurman at a fence and Thurman had then punched Miller in the mouth. (Police Reports, page 80 of Defendants' Exhibit A, submitted as Plaintiffs' Exhibit 3.) Miller told the detectives that this punch caused him to fall to the ground; his service pistol fell from its holster as he fell to the ground, (Id.) Thurman went for the gun and picked it up with one hand; Miller then grabbed

Thurman's hand and regained control of the pistol. (Id.) "Police Officer MILLER stated that at this time the suspect leapt towards him and he (Police Officer MILLER) felt that the suspect was going to be able to disarm him and kill him so he pointed the pistol at the suspect and fired once." (Id.)

After giving this first statement, Miller told the detectives that he did not wish to further discuss the incident until he had consulted with counsel. (At his deposition, Miller denied that he had made any request to confer with counsel. Miller Dep. 152, Defendants' Exhibit F.)

Miller was permitted to consult with counsel from the Milwaukee Police Association and declined to participate in a more in depth interview with detectives. (Police Reports, page 81 of Defendants' Exhibit A, submitted as Plaintiff's Exhibit 3.)

Six days later, on August 9, 1996, Miller made a detailed statement about the incident to a prosecutor. After catching Thurman at the fence, instead of being forced to the ground by a punch from Thurman, Miller offered the following scenario to explain what had occurred:

Basically, what I'm saying is that he was fighting and during the fight and when I started hitting him, he wasn't connecting. He wasn't connecting with his, so I grabbed him by the front of his shirt, and I said, "You're under arrest. You're going to jail," at which time he punched me in the left side of my face, so we started physically fighting again, at which time my weapon falls to the ground."

Police Reports, page 151 of Defendants' Exhibit A, submitted as Plaintiffs' Exhibit 4

According to Miller, Thurman then picked up the gun, the two men struggled for it and after Miller regained control of his firearm,

He comes back at me, and he's swinging, and the guy — He never would stop. I order for me to be able — I guess at that time I was scared that this individual would get my gun back again, and that's when I squeezed the trigger, and I shot him."

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Miller repeated the second version — that his gun came out "during the course of me swinging and him swinging and fighting" at his deposition. (Miller Dep. 144, Defendants' Exhibit F.) Miller also repeated at his deposition the second version that he was standing up when the gun fell from his holster. (Miller Dep. 145, Defendants' Exhibit F.)

II. DEFENDANTS' INCORRECT VIEW OF THE FACTS

Defendants succinctly state their incorrect view of the facts in ten sentences at page 26 of their memorandum. We set out each of defendants' contentions in *italic* font below:

1. *Officer Miller caught Clarence committing a robbery.* This is incorrect. Robbery involves the use of force against a person. Wis.Stat. §943.32(1)(b). Miller conceded at his deposition that Thurman had not used any force in attempting to steal the lawnmower from Miller's garage. (Miller Dep. 89, Defendants' Exhibit F.) Thurman's acts could constitute the Class C felony of burglary, Wis.Stat. §943.10(1)(a) as well as misdemeanor attempt theft. Wis.Stat. §943.20. *Cf. Tennessee v. Garner*, 471 U.S. 1 (1985) (unreasonable to use deadly force to apprehend fleeing burglar).
2. *At that time, Officer Miller had his police badge displayed and his gun in his hand and he told Clarence he was going to jail after the officer identified himself as a police officer.* None of the independent witnesses

saw Miller's badge or heard him identify himself as a police officer. See *ante* at 4.

3. *They fought in the alley behind Officer's Miller's garage.* Miller was beating Thurman; the independent eyewitnesses never saw Thurman hit back. See *ante* at 4.
4. *Clarence fled the scene.* This is correct.
5. *Officer Miller caught up with him.* This is somewhat misleading; Miller went into his house, put on his shoes, decided not to call "911" and, with Robert Spencer as his guide, drove to Thurman's residence. This case does not involve any "hot pursuit."
6. *They fought again.* Based on the deposition testimony of Michael Jones (discussed above at 7), a jury could find that the "fight" consisted of Thurman trying to defend himself.
7. *Clarence struck Officer Miller causing injury.* None of the independent eyewitnesses saw Thurman land a punch.
8. *Officer Miller's gun fell to the ground.* The independent eyewitness, Michael Jones, saw the gun fall to the ground after Miller had pointed it at Thurman. See *ante* at 7.
9. *Both men tried to grab it.* Based on the testimony of Michael Jones, a jury could find that Thurman was reasonably acting in self-defense when he tried to grab the handgun. (In 1996, Wisconsin recognized the common law right to resist an unlawful arrest. See *infra* at 11-12.)

10. *Officer Miller succeeded [in retrieving his handgun], and when Clarence came at him again, Officer Miller feared for his life and shot Clarence.* This contention is not corroborated by the civilian witness and turns on Miller's credibility and, as discussed *infra* at 15-17, cannot therefore be accepted on defendants' motion for summary judgment.

III. A DISPUTED QUESTION OF MATERIAL FACT: WAS MILLER SEEKING TO MAKE AN ARREST AND DETAIN THURMAN SO THAT HE COULD BE CHARGED WITH AN OFFENSE OR WAS MILLER ENGAGED ON A PERSONAL MISSION OF REVENGE?

The Fourth Amendment permits a police officer to use "objectively reasonable" force in making an arrest. *Graham v. Connor*, 490 U.S. 386 (1989). The record in this case presents a genuine dispute as to whether Miller was trying to arrest Thurman or simply beat him up.

To constitute an arrest, the seizure of the person must be "for the actual or purported purpose of bringing [him] before a court, or of otherwise securing the administration of the law." Restatement of Torts 2d, §112. An arrest made without such a purpose is unlawful. Restatement of Torts 2d, §127. Under these standards, a seizure for personal vengeance is an unlawful arrest.

The question of whether Miller was seeking to make a lawful arrest is material to this case because at the time of the incident in 1996, Wisconsin recognized the common law right to resist an unlawful arrest. As the Wisconsin Supreme Court explained in *State v. Hobson*, 218 Wis.2d 350, 577 N.W.2d 825 (1998), the right to resist an unlawful arrest was "part of the right to resist any unlawful official process. Action by an official exceeding his lawful authority constituted a trespass and a provocation, and could be resisted by physical

force." 218 Wis.2d at 359, 577 N.W.2d at 829. The right to resist an unlawful arrest existed in Wisconsin until May 27, 1998, when the Wisconsin Supreme Court announced its decision in *Hobson*.⁸ Plaintiffs do not dispute the rule that the legality of an arrest is independent of the "actual motivations of individual officers." *Whren v. United States*, 517 U.S. 806, 813 (1996). Our point is that a police officer may not disguise a personal vendetta by claiming that he was making an arrest when the officer did not intend to take a person into custody for the initiation of criminal proceedings. This is hardly a novel principle — in *Williams v. United States*, 341 U.S. 97 (1951), the Court upheld a criminal civil rights conviction where a police officer had been accused of beating a citizen "for the purpose of forcing him to make a confession and for the purpose of imposing illegal summary punishment upon him." *Id.* at 104. We show below this the disputed material fact of whether Miller was seeking to make a lawful arrest or whether he was engaged on a personal mission of revenge requires a trial to assess the constitutional reasonableness of Miller's use of deadly force.

IV. THE TIMEFRAME FOR ASSESSING THE CONSTITUTIONAL REASONABLENESS OF MILLER'S USE OF DEADLY FORCE BEGINS WHEN MILLER SET OUT FOR THURMAN'S HOME

In *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994), the Court stated that "[t]he time-frame is a crucial aspect of excessive force cases." *Id.* at 1150. The appropriate method of analysis is to "'carve up the incident into segments and

8. The post-*Hobson* standard is that a citizen's right to resist an arrest — lawful or unlawful — is limited to situations involving the use of "unreasonable force." 218 Wis.2d at 379, 577 N.W.2d at 837.

judge each on its own terms to see if the officer was reasonable at each stage." Id.

The first segment involves Miller's actions when he saw Thurman in the garage and tried to apprehend Thurman in the alley behind Miller's house. Although it is arguable that Miller's actions in the alley involved excessive force, it is not clear that Miller's actions were so unreasonable as to deprive him of qualified immunity under *Saucier v. Katz*, 531 U.S. 991 (2001). Plaintiffs do not raise any claim involving this first segment.

The second segment involves Miller's actions after Thurman had left the scene, when Miller declined to call "911" and instead drove off, without handcuffs or any non-lethal weapon, to see if he could find Thurman at his home. This segment, which ended immediately before Miller cornered Thurman at a fence, did not involve a Fourth Amendment seizure. *California v. Hodari D.*, 499 U.S. 621, 624 (1991). Events that occurred during the seizure are relevant to the inquiry demanded by *Browder v. County of Inyo*, 489 U.S. 593 (1989), i.e., whether Miller manipulated the situation "in such manner as to be likely to kill [plaintiffs' decedent]." Id. at 592.

The third segment starts when Miller cornered Thurman at a fence. This action constituted a seizure under the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 17 (1985); *Johnson v. City of Milwaukee*, 41 F.Supp. 917, 924 (E.D.Wisc. 1999).

Defendants appear to argue that the Court should only be concerned with a fourth segment that began when Miller's gun fell to the ground, and that the reasonableness of Miller's use of deadly force should be determined solely by

considering what happened during the brief instant that passed after Miller gained control of his weapon. Such an argument is contrary to *Deering v. Reich*, 183 F.3d 645 (7th Cir. 1999).

In *Deering v. Reich, supra*, the Court of Appeals reaffirmed its emphasis upon the "totality of the circumstances" and expressly held that determination of the reasonableness of a police officer's use of deadly force "cannot be limited to the precise moment when [the officer] discharged his weapon." 183 F.3d at 649. Instead, the analysis must include the information known to the officer, *id.* at 650, the nature of the underlying crime, *id.*, and the governmental interest in making the seizure at the time, place, and manner. *Id.* at 652.

Under the "totality of the circumstances," a jury could find that it was unreasonable for Miller to seize Thurman at the fence.

1. Thurman had not committed a crime of violence or a crime against a person. See *ante* at 9.
2. Thurman was not armed; there was no risk of harm if Thurman's apprehension was delayed until uniformed officers arrived on the scene.
3. Miller did not have handcuffs or any instrument with which to restrain Thurman. Miller had not called for a uniformed officer to transport Thurman to a police station. Nor had Miller requested that the police be telephoned by his wife or any of the citizens he encountered while looking for Thurman.
4. Miller knew where Thurman lived and there would have been no harm in postponing an arrest until uniformed officers were on the scene.

As set out above, the reasonableness of Miller's actions presents a jury question.⁹ The same is true *a fortiori* when the Court considers specific factors Miller's credibility.

V. FACTORS MINIMIZING MILLER'S CREDIBILITY COMPEL TRIAL

The general rule is that summary judgment should be denied when the party opposing summary judgment comes forward with specific facts challenging the credibility of the moveant's evidence. *Corrugated Paper Products, Inc. v. Longview Fibre Co.*, 868 F.2d 908, 914 (7th Cir. 1989); *Rand v. CF Industries, Inc.*, 42 F.3d 1138, 1146 (7th Cir. 1994) (specific facts that raise significant issues of credibility); *Wisconsin Title, Inc. v. Title One, Inc.*, 53 F.Supp.2d 1031, 1032 (E.D.Wis. 1999) ("raise significant issues of credibility").

One factor minimizing Miller's credibility is his conviction for making a false police report. (Plaintiffs' Response to Defendants' Proposed Findings of Fact, Additional Factual Proposition, par. __-__.)

A second factor minimizing his credibility is his willingness to use excessive force when his orders are ignored or his authority questioned. (Plaintiffs' Response to Defendants' Proposed Findings of Fact, Additional Factual Proposition, par. __-__.) *United States v. Brown*, 250 F.3d 580, 585 (7th Cir. 2001).

9. Defendants "expert opinion" testimony cannot be decisive, because the "expert" bases his opinion on Miller's version of the incident, *Bazan v. Hidalgo County*, 246 F.3d 481, 493 (5th Cir. 2001) and fails to consider the totality of the circumstances.

A third factor minimizing Miller's credibility is his use of drugs and alcohol. (Plaintiffs' Response to Defendants' Proposed Findings of Fact, Additional Factual Proposition, par. __-__.) These issues are discussed in an sealed submission.

The final factor minimizing Miller's credibility includes the numerous contradictions between his testimony and the testimony of disinterested witnesses:

- a. Miller claimed that had been wearing leather shoes when he first left his house and encountered Thurman. (Miller Dep. 61-62, Defendants' Exhibit F.) The independent witnesses recalled that Miller was barefoot and went into his house to get shoes before he left in his wife's car to chase Thurman. See *ante* at 4
- b. None of the independent eyewitnesses ever heard Miller state that he was a police officer. See *ante* at 4.
- c. Miller's story that men working on cars had asked him to "kick his [Thurman's] ass," Defendant's Findings of Facts, par. 3.71, was not corroborated by any of the witnesses interviewed in the thorough police investigation. See *ante* at 6.
- d. At his deposition, Miller denied that he had consulted with counsel and was unable to explain why the detectives would file a false police report about this matter. (Miller Dep. 152, Defendants' Exhibit F.)
- e. Six days after the incident, Miller changed his story: Instead of being forced to the ground by a punch from Thurman and his handgun falling to

the ground with him, as in his first statement, Miller stated that he was standing up when Thurman punched him and his weapon fell to the ground. See *ante* at 8.

"The award of summary judgment to the defense in deadly force cases may be made only with particular care whether the officer defendant is the only witness left alive to testify." *Plakas v. Drinski*, 19 F.3d 1143, 1147 (7th Cir. 1994); *Bazan v. Hildalgo County*, 246 F.3d 481 (5th Cir. 2001). The court must be cautious to "ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story — the person shot dead — is unable to testify." *Scott v. Heinrich*, 39 F.3d 912, 915 (9th Cir. 1994). Defendants motion for summary judgment should be denied

VI. MILLER IS NOT ENTITLED TO QUALIFIED IMMUNITY

Defendants argue that Miller is entitled to qualified immunity because "there is no caselaw which holds that it is unconstitutional for a police officer to fire his weapon at a suspect, after he caught the suspect committing a robbery, and the suspect attempted to gain control of the officer's weapon while the suspect and the officer were engaged in a close, physical struggle." (Def.Mem. 29.)

First, this case does not involve a "robbery." See *ante* at 9. Second, for the reasons set out above, there are disputed questions of material fact about the totality of the circumstances of the shooting. Miller is not entitled to qualified immunity.

VII. STATE LAW ISSUES

A. THE MINOR CHILD CARMEN EVANS

Defendants point out that, under Wisconsin law, the minor child Carmen Evans may not prosecute an action for wrongful death unless the paternity of Clarence Thurman had been adjudicated, admitted in open court, or acknowledged in a signed writing.¹⁰ (Def.Mem. 24.) Wisconsin law, however, permits an action for wrongful death to be "brought by the personal representative of the deceased person or by the person to whom the amount recovered belongs." Wis.Stat. §895.04(1). The amount recovered for the death of Michael Thurman either belongs to Carmen Evans or, under Wis.Stat. §852.01, to his mother, plaintiff Janice Thurman. *See Bruflat v. Prudential Property & Cas. Inc. Co.*, 233 Wis.2d 523, 529-30, 608 N.W.2d 371, 375 (2000). Thus, Janice Thurman has standing to prosecute a wrongful death action, either individually or in her capacity as Special Administrator for the estate of Michael Thurman.

B. A TRIAL IS REQUIRED ON THE STATE LAW EXCESSIVE FORCE CLAIMS

In *Wirsing v. Krzeminski*, 61 Wis.2d 513, 213 N.W.2d 37 (1973), the Wisconsin Supreme Court adopted the principles set out in the Restatement of Torts, 2d as governing a police officer's privilege to use force in making an arrest. The Court reaffirmed adoption of the Restatement standards in *Johnson v. Ray*, 99 Wis.2d 777, 781-82, 299 N.W.3d 848, 852 (1981).

10. Plaintiffs believe that Thurman acknowledged his paternity in a signed writing submitted in child support proceedings.

Under the Restatement, a police officer is privileged to use force in making an arrest only "for the actual or purported purpose of bringing [him] before a court, or of otherwise securing the administration of the law." Restatement of Torts 2d, §112.

Wisconsin law strongly supports a jury determination of the reasonableness of the police use of force: "The reasonableness of the force depends upon the facts of each case, and is a question to be resolved by the jury." *Johnson v. Ray*, 99 Wis.2d at 782, 299 N.W.2d at 852.

C. State Law Immunity

The record in this case, viewed in the light most favorable to plaintiffs, contains sufficient evidence that Miller's actions were "malicious, willful, and intentional," one of the recognized exceptions to governmental immunity. *Willow Creek Ranch v. Town of Shelby*, 235 Wis.2d 409, 425, 611 N.W.2d 693, 700 (2000); *Wilson v. Milwaukee*, 138 F.Supp. 1126, 11132 (E.D.Wis. 2001). Defendants' invocation of state law immunity must therefore be rejected.

VIII. CONCLUSION

For the reasons above stated, defendants' motion for summary judgment should be denied.

Respectfully submitted,

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QUALIFIED IMMUNITY: Miller believed that Thurman was a threat because "he had just committed a felony act and showed — proved to me that he was unwilling to be apprehended, that he wanted to further his — the crime that he's doing." (Miller Dep. 104-05.)

Usual non-lethal weapons: asp (expandable baton()), mace, long nightsticks. (Miller Dep. 105.) Verbal judo (107) No handcuffs or any way to restrain arrestee other than compliance. (Miller Dep. 109.) Only knew about one man, learned about second offender after shooting. (Miller Dep. 116.)