No. 24-1032

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GENE RAYMOND BELL, JR.,

Plaintiff-Appellee,

v.

CITY OF SOUTHFIELD, MI

Defendant,

and

ANTHONIE KORKIS, OFFICER; ARTHUR BRIDGEFORTH, OFFICER; THOMAS LANGEWICZ, II, OFFICER

Defendants-Appellants.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Case No. 2:19-cv-13565-GAD-EAS (Drain, J.)

BRIEF FOR PLAINTIFF-APPELLEE GENE RAYMOND BELL, JR.

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May 21, 2024

UNITED STATES COURT OF APPEALS
FOR T E SIXT CIRCUIT

i clo u e of Co po ate Affiliation and Financial Interest

Sixth Circuit
Case Number: 24-1032 **D** ase Name: Bell v. City of Southfield et al.

Name of counsel: Brian Wolfman

Pursuant to 6th Cir. R. 26.1, Gene Raymond Bell, Jr.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named **D** party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest **D** in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on May 21, 2024 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record. **D**

s/Brian Wolfman

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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Introduction

Defendants are right about one thing. This is a simple case. Nothing has meaningfully changed since this Court last dismissed Defendants' interlocutory appeal of the district court's denial of qualified immunity for lack of jurisdiction. This appeal should therefore meet the same fate.

Defendants are Southfield police officers who stopped Gene Bell because of an unregistered license plate. Bell declined to provide his driver's license until the officers explained why they had pulled him over. When Defendants told Bell he would be pulled from the car and arrested, Bell offered multiple times to exit his vehicle. Instead, after hurling a racial slur at Bell, a 61-year-old Black man, Defendants pulled Bell out and tackled him.

Crucial to this case is what happened inside Bell's car in the moments before Officer Anthonie Korkis, a white man, twisted Bell's wrist and screamed, "Boy, I'll break your fucking hand." Defendants say that Bell knocked Korkis's hand away as Korkis tried to unlock Bell's car. Bell denies this. This Court previously watched the video recordings of these events and found it "unclear who initiated the physical altercation." *Bell v. City of Southfield*, 37 F.4th 362, 366 (6th Cir. 2022). The Court therefore dismissed that portion of Defendants' interlocutory appeal for lack of jurisdiction. *Id.*

On remand, discovery produced two things that Defendants say "definitively" prove Bell slapped Korkis's hand, giving this Court jurisdiction to consider Defendants' entitlement to qualified immunity. Defs' Opening Br. 26. One, Defendants submitted affidavits asserting that Bell

started the altercation. And two, Bell gave deposition testimony in which he supposedly misremembered events other than the alleged slap. But neither of these things, even if taken for all Defendants say they are worth, negates the dispute of material fact created by the videos, particularly given Bell's consistent position that he never fought or actively resisted Defendants.

As the district court found at summary judgment, Defendants are not entitled to qualified immunity because the videos are no clearer now than they were the last time Defendants appealed. This Court should again dismiss Defendants' interlocutory appeal for lack of jurisdiction.

Statement Regarding Oral Argument

We urge the Court to decide this appeal without oral argument. As explained below, straightforward application of settled appellate-jurisdiction principles requires dismissal. Defendants' interlocutory appeal from a non-final order has already imposed undue delay, one of the evils that the final-decision rule seeks to eliminate. *See Flanagan v. United States*, 465 U.S. 259, 263-64 (1984). Expedition is particularly appropriate because this Court has already heard oral argument once in this case and rejected the same arguments that Defendants now rehash.

Jurisdictional Statement

This Court does not have jurisdiction over this interlocutory appeal. Defendants suggest jurisdiction exists because Plaintiff-Appellee Gene Bell's

deposition "testimony … blatantly contradicts the record." Defs' Opening Br. 9. As explained below (at 16-26), that is not correct.

Under 28 U.S.C. § 1291, the district court's denial of qualified immunity is immediately appealable as a "final decision" only if the appeal raises purely legal questions. *See Bell v. City of Southfield*, 37 F.4th 362, 365 (6th Cir. 2022). This Court dismissed Defendants' previous interlocutory appeal of the denial of qualified immunity for the same claim at issue here because the video evidence did not "blatantly contradict[] or utterly discredit[] Bell's account." *Id.* at 366. Therefore, this Court "lack[ed] jurisdiction to wade into factual disputes" underlying the appeal. *Id.* at 365. Undeterred, Defendants again assert that these same videos blatantly contradict Bell's position. Defs' Opening Br. 9. That's wrong. As explained below, this Court still lacks jurisdiction to consider factual disputes over what happened during Bell's arrest, and this appeal must be dismissed.

Statement of the Issues

I. So far, four federal judges in this case have determined that the video recordings of the incident are unclear about who initiated the physical altercation between Officer Anthonie Korkis and Gene Bell at Bell's car window.

The first and dispositive issue is whether this Court lacks interlocutory jurisdiction to resolve a factual dispute over what happened when Korkis reached into Bell's car.

II. Bell maintains that this Court lacks jurisdiction. If this Court agrees, it should dismiss this appeal, as it did the first time this case was here. But assuming this Court has jurisdiction, the second issue presented would be whether, on the record viewed in the light most favorable to Bell, Defendants are entitled to qualified immunity.

III. Assuming (counterfactually) that Defendants are correct that the record clearly shows that Bell initiated the physical altercation through his car window, the third issue presented would be whether this Court lacks interlocutory jurisdiction to resolve a factual dispute over whether reasonable officers would perceive Bell as having ceased any active resistance during the moments in which he told police several times that he was not fighting them and offered to exit his vehicle and submit himself for arrest.

Statement of the Case

I. Factual background

One afternoon in June 2019, Gene Bell, a 61-year-old Black man, was driving home from golf and lunch when he noticed police lights behind him. (Order, RE 94, PageID# 1209; Bell Dep. Tr., RE 88-5, PageID# 1129; Korkis Video, RE 77-2 at 0:52). He knew he was not speeding and had not run a traffic light. (Bell. Dep. Tr., RE 88-5, PageID# 1129). Unsure what the lights signified (*id.*), Bell first came to a stop along the curb (Korkis Video, RE 77-2

at 1:01-1:14), and then pulled into a parking lot as Officer Anthonie Korkis instructed him to do over his vehicle speaker (*id.* at 1:13-1:30).

Korkis, a white Southfield police officer (Order, RE 94, PageID## 1211, 1214 n.1), followed Bell into the parking lot, muttering to himself that Bell was a "fucking idiot" (Korkis Video, RE 77-2 at 1:08-1:10), and asking, "Jesus Christ, is he an idiot?" (*id.* at 1:26-1:28). Unknown to Bell (Bell. Dep. Tr., RE 88-5, PageID# 1129), Korkis had stopped him because an electronic verification of Bell's license plate returned "no record" (Order, RE 94, PageID# 1209), due to an issue with Bell's registration (Bell Dep. Tr., RE 88-5, PageID# 1135).

Exiting his vehicle and approaching Bell's driver-side window, Korkis demanded Bell's license, registration, and insurance. (Korkis Video, RE 77-2 at 2:00-2:05; Korkis Video Tr., RE 93-1, PageID# 1180). Confused, Bell asked, "what did I do wrong?" (Korkis Video, RE 77-2 at 2:05-2:06; Korkis Video Tr., RE 93-1, PageID# 1180).

Korkis refused to explain why he had detained Bell, instead repeating his demand. (Korkis Video, RE 77-2 at 2:06-2:14; Korkis Video Tr., RE 93-1, PageID# 1180). When Bell again asked Korkis to clarify why he had been stopped, Korkis radioed for help with an "uncooperative driver." (Korkis Video, RE 77-2 at 2:15-2:18; Korkis Video Tr., RE 93-1, PageID# 1180). Their impasse continued, with Korkis requesting Bell's documents several times and Bell responding that he was "not resisting" but wanted to understand

the basis for the stop. (Korkis Video, RE 77-2 at 2:19-2:41; Korkis Video Tr., RE 93-1, PageID## 1180-81).

About one minute after approaching Bell, Korkis threatened that more police were coming and Bell was "going to be pulled out of the car here in a second and … placed under arrest." (Korkis Video, RE 77-2 at 3:16-3:22; Korkis Video Tr., RE 93-1, PageID# 1182). Hearing that, Bell offered to "pull into a [parking] spot [and] turn [his] car off." (Korkis Video, RE 77-2 at 3:31-3:34; Order, RE 94, PageID# 1212). Korkis told Bell not to, and Bell complied. (Korkis Video, RE 77-2 at 3:34-3:44; Order, RE 94, PageID# 1212).

Officers Arthur Bridgeforth and Thomas Langewicz arrived in separate vehicles. (Order, RE 94, PageID# 1212). Bridgeforth approached the passenger window of Bell's car (Korkis Video, RE 77-2 at 3:53-4:00), and Korkis directed Langewicz to park in front of Bell's vehicle to "[b]lock him in" (*id.* at 3:53-4:03; Korkis Video Tr., RE 93-1, PageID# 1183). Bell twice explained he was "not going anywhere." (Korkis Video, RE 77-2 at 3:55-4:00; Order, RE 94, PageID# 1212). Korkis repeated that Bell would be arrested if he did not surrender his documents, and Korkis began to put on gloves to drag Bell out. (Korkis Video, RE 77-2 at 4:43-4:55; Order, RE 94, PageID## 1212-13).

Bell volunteered that he would take off his seatbelt and "get out of [his] car [himself]," rather than be pulled out as Korkis had threatened. (Korkis Video, RE 77-2 at 5:12-5:16; Langewicz Video, RE 77-4 at 2:23-226; Korkis Video Tr., RE 93-1, PageID# 1184). Korkis replied, "we're gonna do it our

way." (Langewicz Video, RE 77-4 at 2:27-2:30; Langewicz Video Tr., RE 93-3, PageID# 1203). At this point, Bell appears to pass a phone from his left hand to his right hand, turning toward Bridgeforth at the passenger window. (Langewicz Video, RE 77-4 at 2:23-2:30). Korkis then reached into Bell's vehicle. (Korkis Video, RE 77-2 at 5:16-5:20; Langewicz Video, RE 77-4 at 2:30-2:32).

As the district court twice found, and this Court confirmed, none of the police dashcam recordings clearly shows what happened next inside the car. (Opinion and Order, RE 31, PageID# 334; Order, RE 94, PageID## 1210, 1213; *Bell v. City of Southfield*, 37 F.4th 362, 366 (6th Cir. 2022)). Defendants' assert that Bell "slapped [Officer] Korkis['s] left hand off the [door] lock by moving his hand in an upward sweeping motion." Opening Br. 23. Bell denies that he resisted by grabbing or hitting Korkis, testifying, "I never fought them. I never was combative." (Bell Dep. Tr., RE 88-5, PageID# 1130).

What the videos do clearly show is Korkis using both hands to grab Bell's left hand and bend it backward while yelling at the 61-year-old Bell: "Boy, I'll break your fucking hand." (Korkis Video, RE 77-2 at 5:22-5:26; Langewicz Video, RE 77-4 at 2:32-2:38; Korkis Video Tr., RE 93-1, PageID# 1184). Stunned at Korkis's virulent racial slur, Bell asked, "Did you call me 'boy'?" and raised his phone to film Korkis. (Langewicz Video, RE 77-4 at 2:32-2:40; Order, RE 94, PageID# 1214). Langewicz aimed his taser at Bell and screamed, "Fuck around and you're going to get tased!" (Korkis Video,

RE 77-2 at 5:26-5:29; Langewicz Video, RE 77-4 at 2:36-2:39; Order, RE 94, PageID# 1214).

Bridgeforth attempted to open the passenger door. (Langewicz Video, RE 77-4 at 2:36-2:46). Bell turned toward Bridgeforth, raising his phone to film. (*Id.* at 2:40-2:45). Bell again tried offering to step out of his car, explaining "I'm getting out. I'm not fighting." (*Id.* at 2:42-2:45; Langewicz Video Tr., RE 93-3, PageID# 1204). But Korkis refused, saying "No you're not, you're getting out our way now." (Langewicz Video, RE 77-4 at 2:44-2:46; Order, RE 94, PageID# 1214). Bell replied calmly, "I'm fine. You do what you want to." (Korkis Video, RE 77-2 at 5:35-5:37; Bridgeforth Video, RE 77-3 at 10:23-10:24).

With the door open, Korkis released Bell's hand, and Bell tried to step out, still holding the phone in his right hand. (Korkis Video, RE 77-2 at 5:37-5:41; Langewicz Video, RE 77-4 at 2:47-2:51). Bridgeforth ran around as Korkis and Langewicz yanked Bell out and shouted: "get on the fucking ground." (Korkis Video, RE 77-2 at 5:38-5:44; Langewicz Video, RE 77-4 at 2:50-2:55, Korkis Video Tr., RE 93-1, PageID# 1185). Bell said he would not get on the ground as Korkis kicked Bell's leg and the three officers "tackle[d]" him. (Korkis Video, RE 77-2 at 5:40-5:48; Korkis Video Tr., RE 93-1, PageID# 1185; Bell Dep. Tr., RE 88-5, PageID# 1133). Korkis pressed his body onto Bell's head and torso, scraping Bell's face on the ground. (Korkis Video, RE 77-2 at 5:47-6:08). Langewicz tased Bell twice. (Korkis Video, RE 77-2 at 5:55-6:20; Korkis Video Tr., RE 93-1, PageID# 1186). Bell pleaded, "I don't know what

to do." (Korkis Video, RE 77-2 at 6:03-6:06; Korkis Video Tr., RE 93-1, PageID# 1185).

Bridgeforth handcuffed Bell. (Korkis Video, RE 77-2 at 6:15-6:35). Bringing Bell to his feet, Korkis forced Bell's body and face onto a police car exterior. (*Id.* at 7:00-7:35; Bridgeforth Video, RE 77-3 at 12:20-12:25; Korkis Video Tr., RE 93-1, PageID# 1186). Bell exclaimed that the exterior was burning hot, but an officer told Bell he was "fine." (Korkis Video, RE 77-2 at 7:33-7:38; Bridgeforth Video, RE 77-3 at 12:20-12:25; Bridgeforth Video Tr. RE 93-2, PageID# 1199). Bridgeforth observed that Bell's head was cut. (Bridgeforth Video, RE 77-3 at 12:30-12:33; Bridgeforth Video Tr., RE 93-2, PageID# 1199). Police took Bell to the hospital later that day, and he received treatment for his head injury. (Bell Dep. Tr., RE 88-5, PageID# 1132).

In the moments after Bell's arrest, Korkis discussed his conduct with the other officers, admitting "I lost my mind." (Korkis Video, RE 77-2 at 8:02-8:03; Bridgeforth Video, RE 77-3 at 12:50-12:52; Korkis Video Tr., RE 93-1, PageID# 1186). Another officer asked, "You good bud?" (Korkis Video, RE 77-2 at 8:03-8:04; Bridgeforth Video, RE 77-3 at 12:51-12:52, Bridgeforth Video Tr., RE 93-2, PageID# 1200). Korkis responded affirmatively, and Langewicz replied, "Yeah, I fucking drive stunned him twice [with a taser], dude." (Korkis Video, RE 77-2 at 8:04-8:07; Bridgeforth Video, RE 77-3 at 12:52-12:55; Bridgeforth Video Tr., RE 93-2, PageID# 1200). Korkis commented that Bell was "just being stupid." (Korkis Video, RE 77-2 at 8:17-

8:18; Bridgeforth Video, RE 77-3 at 13:05-13:06; Bridgeforth Video Tr., RE 93-2, PageID# 1200).

II. Procedural background

A. Bell's lawsuit and this Court's first dismissal for lack of appellate jurisdiction. Bell sued Korkis, Langewicz, Bridgeforth, and the City of Southfield in Michigan state court under 42 U.S.C. § 1983, alleging that the officers used excessive force against him in violation of the Fourth Amendment. (Opinion and Order, RE 16, PageID# 213; Am. Complaint, RE 21, PageID# 241). After removal to federal court (Opinion and Order, RE 16, PageID# 213), Bell amended his complaint, dismissing claims against the City. (*Id.*, PageID## 218, 228). The officers then moved to dismiss, arguing that they were entitled to qualified immunity for both forcefully pulling Bell from his vehicle and tasing him. (Motion to Dismiss, RE 25, PageID## 272, 278). The district court denied the motion (Opinion and Order, RE 31, PageID# 321), and the officers appealed. (Notice of Appeal, RE 33, PageID## 339-40).

This Court reversed in part and dismissed in part. *Bell v. City of Southfield*, 37 F.4th 362, 368 (6th Cir. 2022). It found that the officers had qualified immunity for their taser use but that it lacked jurisdiction to resolve the factual questions necessary to determine whether the officers were entitled to qualified immunity for their forceful removal of Bell from his car. *Id.* at 366, 368. The Court concluded that the dashcam videos were "unclear [on] who initiated the physical altercation." *Id.* at 366. Because of this "factual

dispute[],” the district court’s denial of the motion to dismiss the forceful-removal claim was not an appealable order. *Id.* at 365.

B. Remand proceedings. After discovery on remand, the officers again moved for summary judgment on the forceful-removal claim solely on qualified-immunity grounds. (Motion for Summary Judgment, RE 77, PageID# 899). The district court again denied their motion, finding that discovery had not resolved the underlying factual dispute that had previously caused this Court to dismiss for lack of jurisdiction—“whether [Bell] was actively resisting arrest” when the officers grabbed Bell and dragged him from the car. (Order, RE 94, PageID# 1226). That factual dispute, the district court concluded, “must be decided by a jury.” (*Id.*, PageID# 1229).

Summary of the Argument

I. The central dispute in this case is whether Korkis or Bell initiated the physical altercation through Bell’s car window. Because this question is a factual one, this Court lacks jurisdiction to address it on an interlocutory basis. Defendants fail to satisfy either exception to that basic rule: their videos don’t blatantly contradict Bell’s assertion that he did not strike Korkis, and they refuse to concede a version of the facts favorable to Bell. The Court should go no further and dismiss this appeal for lack of jurisdiction, allowing a jury to resolve this factual dispute without additional delay.

II. If, despite Defendants' unwillingness to do so, this Court assumes as true the facts and inferences most favorable to Bell—namely, that he did not strike Korkis—so that it can reach the merits of this case, then the officers are not entitled to qualified immunity. Bell was not suspected of a severe crime, posed no threat, and did not attempt to flee or resist arrest. In fact, he repeatedly offered to step out of the car on his own to help facilitate his arrest. On these facts, Defendants' use of force in pulling Bell from his car and tackling him to the ground was unreasonable. Use of force against a non-resisting suspect is clearly established as unconstitutional. The officers are therefore not entitled to qualified immunity, and this Court should affirm the district court's ruling saying so.

III. Finally, even if we assume (counterfactually) that the videos do blatantly contradict Bell's position that he did not strike Korkis, other factual disputes would still deprive this Court of jurisdiction. A jury could find that even if Bell pushed Korkis's hand away, he did so inadvertently or that Bell had stopped actively resisting by the time he was forcefully pulled from the car and, therefore, Defendants' force was excessive. Because Defendants' entitlement to qualified immunity depends on resolving the factual dispute of whether Bell was actively resisting or had surrendered before Defendants dragged him out, this Court lacks jurisdiction. Like the rest of this case, that question must first go to a jury.

Standard of Review

This Court, like all federal courts, is required to determine its own jurisdiction before entertaining the merits. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). As explained below, this Court lacks jurisdiction.

Assuming (counterfactually) that this Court has jurisdiction, it is "bound by the district court's determinations about genuine disputes of fact" when reviewing the denial of a motion for summary judgment on qualified-immunity grounds. *Meadows v. City of Walker*, 46 F.4th 416, 421 (6th Cir. 2022). That means that the Court must ignore Defendants' efforts to dispute facts or inferences drawn by the district court in Bell's favor because Bell is the non-movant. *Adams v. Blount County*, 946 F.3d 940, 948-49 (6th Cir. 2020).

Departure from this basic summary-judgment principle is permissible only when the district court's finding that there is a disputed material fact is "blatantly contradicted by the record." *Meadows*, 46 F.4th at 421 (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). To find that the record blatantly contradicts the district court's finding of a factual dispute, this Court must conclude that a parties' factual position is demonstrably false "so that no reasonable jury could believe it." *Scott*, 550 U.S. at 380; *accord Austin v. Redford Twp. Police Dep't*, 690 F.3d 490, 496 (6th Cir. 2012).

Argument

As we explain in Part I, no exception permits this Court to exercise jurisdiction over Defendants' interlocutory appeal of a non-final denial of

qualified immunity. The record does not blatantly contradict the district court's finding of a material factual dispute regarding whether Bell or Korkis started the physical altercation, and Defendants do not concede a view of the facts favorable to Bell. That disposes of Defendants' appeal. But as discussed in Part II, Defendants fare no better if this Court reaches the merits. Instead, construing the record in the light most favorable to Bell and assuming that Korkis started the altercation—as this Court must at summary judgment—Defendants are not entitled to qualified immunity.

Defendants argue that the record definitively establishes that Bell started the altercation. They are wrong, but assuming they are not, Part III shows that they are still not out of the woods. Instead, further factual disputes would remain about the nature of the contact between Bell and Korkis and how reasonable officers would perceive Bell's conduct afterward. These disputes, which cannot be resolved at summary judgment, would determine whether Defendants are entitled to qualified immunity and would therefore still deprive this Court of jurisdiction.

I. This Court lacks jurisdiction because a factual dispute exists over who initiated the altercation in Bell's car.

A denial of qualified immunity at summary judgment is immediately appealable only "to the extent that it turns on an issue of law." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Federal courts of appeals thus do not have jurisdiction over interlocutory appeals from a district court's rejection of qualified immunity based on a "determination that the summary judgment

record in [a] case raised a genuine issue of fact." *Johnson v. Jones*, 515 U.S. 304, 313 (1995). "This limitation is not prudential, optional, or discretionary," but "derives from the limited nature of … interlocutory appellate jurisdiction under 28 U.S.C. § 1291." *Romo v. Largen*, 723 F.3d 670, 674 n.2 (6th Cir. 2013).

This rule serves the same purposes as the final-decision requirement writ large: "preserv[ing] the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the pre-judgment stages of litigation," "reduc[ing] the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals," and protecting "the efficient administration of justice." *Flanagan v. United States*, 465 U.S. 259, 263-64 (1984).

There are only two exceptions to the rule against interlocutory appeals from fact-based denials of qualified immunity. *Barry v. O'Grady*, 895 F.3d 440, 443 (6th Cir. 2018). First, under *Scott v. Harris*, 550 U.S. 372, 380 (2007), an appellate court may exercise jurisdiction when video or other evidence "blatantly contradict[s]" the non-movant's version of events, definitively eliminating any genuine dispute. Second, the party seeking review may, for purposes of appeal, concede the version of the facts most favorable to the non-movant, isolating a purely legal issue. *Akima v. Peca*, 85 F.4th 416, 422 (6th Cir. 2023). If neither of these exceptions applies, however, the court of appeals is "required by the limitations on interlocutory appeals of qualified immunity denials to accept the district court's finding that a genuine dispute of material fact existed." *Romo*, 723 F.3d at 674.

Neither exception is satisfied here as explained below, and this Court should therefore dismiss this appeal for lack of jurisdiction. Doing so would save the Court from "additional, and unnecessary, appellate" proceedings and prevent further "delay, add[ed] costs and diminishing coherence" as this litigation proceeds. *Johnson*, 515 U.S. at 309.

A. This case does not satisfy the *Scott v. Harris* exception.

1. The dashcam videos do not blatantly contradict Bell's testimony that he did not strike Korkis.

Scott v. Harris is a "narrow," "limited exception" to the general rule barring interlocutory appeals from denials of summary judgment based on disputes of genuine issues of material fact. *Kindl v. City of Berkley*, 798 F.3d 391, 399 (6th Cir. 2015). Under the exception, if video evidence "blatantly" and "clearly contradicts" the non-movant's version of what happened "so that no reasonable jury could believe it," *Scott v. Harris*, 550 U.S. 372, 378-80 (2007)—that is, when there is no genuine dispute at all—a court of appeals can take the facts shown by the video as given and exercise jurisdiction. Conversely, if the video is in any way unclear or does not depict the key "moment of impact," it does not blatantly contradict the non-movant's version of the facts, *Godawa v. Byrd*, 798 F.3d 457, 461-63 (6th Cir. 2015), a factual dispute remains, and the court of appeals lacks jurisdiction, *Johnson v. Jones*, 515 U.S. 304, 313 (1995).

Scott v. Harris itself is an example of a blatant contradiction: the key fact question was whether the non-movant "was driving in such fashion as to

endanger human life." 550 U.S. at 379-80. The non-movant's version of the story was that "the roads were mostly empty" and that he "slowed for turns and intersections." *Id.* at 378-79 (citation omitted). But because dashcam video clearly showed him "swerve around more than a dozen other cars" and "run multiple red lights" while driving "at speeds that are shockingly fast," any dispute about whether his driving endangered life was not genuine. *Id.* at 379-80. This Court similarly found no genuine dispute in *Marvin v. City of Taylor* where the non-movant asserted that he was innocently turning around when officers grabbed his arm but video "clearly show[ed]" he swung his arm, with a closed fist, at an officer. 509 F.3d 234, 241 (6th Cir. 2007). In both *Scott* and *Marvin*, then, the video clearly depicted the specific facts at issue.

By contrast, when a video's view is obstructed or does not clearly depict the relevant facts—as is the case here—the video cannot blatantly contradict the non-movant's version of those facts. *E.g.*, *Lindsly v. Worley*, 423 F. App'x 516, 517-19 (6th Cir. 2011) (no blatant contradiction where parties disputed how many times officers struck the plaintiff and "the officers' bodies obstruct[ed] the camera's view"). This happens frequently in excessive-force cases when a key disputed fact is whether the plaintiff was the first aggressor or physically resisted police officers. *E.g.*, *Godawa*, 798 F.3d at 461, 463 (no blatant contradiction where parties disputed who initiated an impact between an officer and the plaintiff's car and "the precise moment of impact occur[ed] just off-screen"); *Rowlery v. Genesee County*, 641 F. App'x 471, 477

(6th Cir. 2016) (same where parties disputed whether the plaintiff resisted being handcuffed and "the deputies who gathered around him partially blocked the view of his body" on the video); *McKinney v. Lexington-Fayette Urb. Cnty. Gov't*, 651 F. App'x 449, 461 (6th Cir. 2016) (same where parties disputed whether the plaintiff was "physically aggressive" and the "Overhead Video [did] not clearly show [his] movements"); *Lunneen v. Village of Berrien Springs*, 2023 WL 6162876, at *8 (6th Cir. Sept. 21, 2023) (same where parties disputed whether the plaintiff "grapple[d] with the officers" and the video did "not provide a full picture of [his] actions, instead focusing, for example, on only [his] face"); *Yatsko v. Graziolli*, 2021 WL 5772527, at *3, *7 (6th Cir. Dec. 6, 2021) (same where parties disputed "who initiated the fight" and video showed the plaintiff and officer only from the waist down).

The videos in *Sevy v. Barach*, 815 F. App'x 58 (6th Cir. 2020), are particularly analogous to the dashcam videos here. In that case, Officer Barach asserted that his use of force against Sevy was justified because, while Barach escorted Sevy out of a building, "Sevy was physically resistive by knocking Barach's hand down," a fact that Sevy disputed. *Id.* at 59, 61-62. Two videos captured the interaction, but their "view of the vestibule [was] at least partially obstructed by the door." *Id.* at 61. This Court noted that it could "see Sevy turn around after Barach placed his hand on Sevy's back," but it was "not clear whether the events unfolded exactly as Barach describe[d]," and *Scott v. Harris* therefore did not apply. *Id.* Because the

excessive-force "issue [came] down to the disputed question of whether Sevy did anything to provoke Barach throwing him down," this Court "lack[ed] jurisdiction to review that issue." *Id.* at 62.

As in *Sevy*, the key issue here is whether Bell did anything to provoke the officers' use of force. Defendants argue that he did by slapping Korkis's hand, a fact that Bell disputes, saying he "never fought them" and "never was combative." (*Compare* Defs' Opening Br. 30, *with* Bell Dep. Tr., RE 88-5, PageID# 1130). Like the *Sevy* videos, the dashcam videos show movement by both Korkis and Bell, but—as this Court and the district court have already held—it is not clear "who initiated the physical altercation." (*Bell v. City of Southfield*, 37 F.4th 362, 366 (6th Cir. 2022); *accord* Order, RE 94, PageID# 1213, 1226; *see also* Opinion and Order, RE 31, PageID# 334). Because "[t]he videos neither blatantly contradict, nor utterly discredit, Bell's contention that Korkis initiated the scuffle," *Bell*, 37 F.4th at 366, the *Scott v. Harris* exception does not apply, and this Court still lacks jurisdiction to review this disputed question of fact.[1]

2. Defendants' contrary arguments are factually and legally wrong.

Defendants do not argue that the video clearly shows Bell slapping Korkis. Instead, they assert that (a) parts of Bell's deposition are inconsistent

[1] We maintain that even if Bell had slapped Korkis's hand, that would not have justified the officers' subsequent use of force. *See infra* at 38-43. But, as we explain in this section of the brief, this Court need not—indeed may not—reach that question.

with the video; (b) this Court should therefore ignore his testimony altogether; and (c) this Court should instead rely exclusively on the officers' affidavits to "establish[] what occurred where the video cannot answer the question." Defs' Opening Br. 22-23. All three arguments are flatly wrong.

a. First, the purported factual inconsistencies that Defendants identify between Bell's deposition and the video are, at most, not about what events occurred but about the order in which they occurred—in other words, even if we accede to Defendants' purported inconsistencies, a jury could find that all of the events described by Bell did in fact take place. Defendants identify several facts that Bell describes as happening after he left his vehicle and that the videos show happening while he was exiting the vehicle: using his phone to record the officers, the phone getting knocked out of his hand, and Korkis grabbing him and hitting him. Defs' Opening Br. 22-23. The videos do not blatantly contradict that any of these events took place. In fact, they are largely consistent with Bell's narrative. (Langewicz Video, RE 77-4 at 2:23-2:45 (Bell holding up phone); *id.* at 2:48-2:52 (phone knocked out of hand); Korkis Video, RE 77-2 at 5:38-5:48 (Korkis grabbing, kicking Bell)). The other facts that Defendants identify—Bell leaning down as if to pick up his phone, an officer tasing him, and officers rushing at him and jumping on him, Defs' Opening Br. 23—are depicted by both the video and in Bell's deposition testimony as happening after Bell exited the car. (Korkis Video, RE 77-2 at 5:40-5:48, 5:55-6:05; Bell Dep. Tr., RE 88-5, PageID# 1130).

But even assuming that Bell's testimony—given some four years after the traffic stop—did not exhibit perfect recall about the timing of events in a fast-paced, violent encounter, that would not resolve the factual dispute in the manner necessary to grant summary judgment or to create appellate jurisdiction. *See, e.g.*, *Bomar v. City of Pontiac*, 643 F.3d 458, 460, 463 (6th Cir. 2011) (dismissing appeal for lack of jurisdiction even when the plaintiff's witnesses contradicted each other about whether an officer punched the plaintiff before or after she was handcuffed); *Jones v. Yancy*, 420 F. App'x 554, 557-58 (6th Cir. 2011) (same where plaintiff testified he was "not sure" whether he was pepper sprayed before or after he was handcuffed). That's because whenever a non-movant's evidence at summary judgment contains inconsistencies, the summary-judgment standard requires construing those inconsistencies in the non-movant's favor because weighing evidence and determining which account is more credible can only be done by a jury. *E.g.*, *Amerson v. Waterford Township*, 562 F. App'x 484, 487-88 (6th Cir. 2014) (denying summary judgment to officers on excessive-force claim even though the plaintiff's story was inconsistent about how many times he was beaten and by whom).

The rule that credibility determinations cannot negate a factual dispute is especially true when those determinations involve how well a plaintiff remembers the disputed events. *See Coffey v. Carroll*, 933 F.3d 577, 588 (6th Cir. 2019) (finding no appellate jurisdiction over challenge to credibility of plaintiff's testimony at summary judgment when defendant-officers argued

plaintiff "had no memory of the relevant events"). Here, Bell's deposition occurred four years after the event in question, and, prior to his deposition, Bell had not seen any of the videos to refresh his memory. (Bell Dep. Tr., RE 88-5, PageID# 1120). Accordingly, a jury could find that any discrepancies in the order of events Bell described at his deposition do not undermine his credibility significantly or at all.

b. Second, "[e]ven if part of [Bell]'s testimony is blatantly contradicted by the … recording, that does not permit [a court] to discredit his entire version of the events" at summary judgment. *Coble v. City of White House*, 634 F.3d 865, 870 (6th Cir. 2011). This Court soundly rejected that position in *Younes v. Pellerito*, 739 F.3d 885, 889 (6th Cir. 2014), where the defendant-appellant officers—like Defendants here—"argue[d] that because of the difference between their account of the incident and [the plaintiff]'s, combined with the contradictions in some parts of [his] statement of facts, the district court should have ignored all of [the plaintiff]'s account." This Court explained "[t]hat is not the analysis we undertake," noted that facts were still disputed despite the apparent contradictions, and then dismissed the appeal for lack of jurisdiction. *Id.* at 889-90.

Marvin v. City of Taylor, 509 F.3d 234 (6th Cir. 2007), illustrates the analysis that this Court *does* properly undertake. Officers there argued that three parts of Marvin's testimony were blatantly contradicted by video evidence: his testimony that he did not hit an officer, that officers pulled him forcefully out of a car and pushed him down, and that officers tackled him to the

ground. *Id.* at 241, 248-50. The Court analyzed each assertion individually and held that, although the first and third were blatantly contradicted, the second piece of Marvin's testimony—that he was forcefully pulled out of a car and pushed down—was not "[b]ecause the vehicle obstruct[ed] the view" of the video. *Id.* at 248-49.[2]

Here, even if some parts of Bell's deposition testimony are blatantly contradicted by the dashcam videos, that would not negate his testimony that he did not strike any officers. That piece of testimony—on the critical issue—is not contradicted by the video, and Defendants do not attempt to argue otherwise.

c. Even if Bell had never testified at all, there would still be a genuine factual dispute, and this Court would still lack jurisdiction. "[T]o the extent that facts shown in videos can be interpreted in multiple ways or if videos do not show all relevant facts," this Court must view those facts "in the light most favorable to the non-moving party." *King v. City of Rockford*, 97 F.4th 379, 389 (6th Cir. 2024) (quoting *Latits v. Phillips*, 878 F.3d 541, 547 (6th Cir.

[2] The only decision other than *Scott v. Harris* that Defendants cite for their argument premised on the dashcam videos also employed this fact-by-fact, rather than all-or-nothing, analysis. *See* Defs' Opening Br. 22 (citing *White v. City of Southfield*, 2022 WL 17736348, at *2 n.1 (E.D. Mich. Dec. 16, 2022)). In *White*, the district court noted that the plaintiff's testimony was contradicted by the video in "several … respects," but that other "portion[s] of [her] testimony [were] uncontradicted by the video." 2022 WL 17736348, at *2 n.1. The district court there granted summary judgment only because the uncontradicted portions of the plaintiff's testimony did not create a material factual dispute, *id.*, which is not the case here.

2017)). Similarly, when there are "gaps or uncertainties left by the videos," this Court is required to "make all reasonable inferences in [the non-movant's] favor when undertaking the qualified immunity analysis on summary judgment." *Shumate v. City of Adrian*, 44 F.4th 427, 438 (6th Cir. 2022) (first quoting *Latits*, 878 F.3d at 544, and then quoting *Godawa v. Byrd*, 798 F.3d 457, 463 (6th Cir. 2015)).

So, even without Bell's testimony, as already explained, the video still does not show whether Bell or Korkis initiated contact through the car window. On the officers' motion for summary judgment, that ambiguity must be construed in Bell's favor, and thus the video—with the required assumption that Bell did not strike Korkis—is itself the evidence that creates a genuine dispute with the officers' affidavits. *See, e.g.*, *Bomar v. City of Pontiac*, 643 F.3d 458, 462 (6th Cir. 2011) ("The facts as alleged by the plaintiff are not simply the facts that can be gleaned from the plaintiff's deposition testimony, but are rather the facts in the entire record, interpreted in the light most favorable to the plaintiff.").

Defendants' contrary argument that the officers' affidavits "establish[] what occurred where the video cannot answer the question" and thereby resolve the factual dispute, Defs' Opening Br. 23, has repeatedly been rejected by this Court. In *Oliver v. Greene*, 613 F. App'x 455, 456 (6th Cir. 2015), for example, a prison guard seeking qualified immunity in an excessive-force case appealed after the district court had denied his motion for summary judgment because despite the presence of surveillance video,

a genuine dispute of fact still existed as to whether the plaintiff posed a threat to the guard. *Id.* The guard argued that *Scott v. Harris* applied, but — just like Defendants here—did *not* argue that this Court should "'trust their eyes [because the] videotape unequivocally shows what happened during [the] encounter,' … or that the video 'speaks for itself.'" *Id.* at 458-59 (alterations in original) (first quoting *Carter v. City of Wyoming*, 294 F. App'x 990, 992 (6th Cir. 2008), and then quoting *Scott v. Harris*, 550 U.S. 372, 378 n.5 (2007)). Instead, the officer "urge[d] [the Court] to interpret the video in line with his argument and his supporting evidence," *id.* at 459, the same thing Defendants here ask this Court to do. The Court's answer in *Oliver* was clear: "That is not the law," and a factual dispute remained. *Id.*

More recently, in *Heeter v. Bowers*, 99 F.4th 900, 911-12 (6th Cir. 2024), a defendant officer who fatally shot the plaintiff's husband made the same argument, again without success. The key fact was whether the plaintiff's husband had a gun in his right pocket or hand when he was killed, and the officer argued on appeal that this Court should accept "the allegations in his affidavit because the video does not show the right side of Mr. Heeter's body and there is no other affidavit … to contradict his." *Id.* at 912. This Court soundly rejected that argument, explaining that "do[ing] so would sidestep [the] obligation to construe 'gaps or uncertainties' in the videos in the [non-movant]'s favor," *id.* (quoting *Latits*, 878 F.3d at 544), and would "flip *Scott* on its head to use self-serving affidavits to contradict (or, at best, fill holes) in a video," *id.*

This Court's answer here should be the same as it was in *Oliver* and *Heeter*. On the officers' motion for summary judgment, the ambiguity in the video must be construed in Bell's favor regardless of how many affidavits the officers submit. This is especially true because here a jury could discredit the officers' "self-serving" account for a number of reasons, *Heeter*, 99 F.4th at 912, including that Korkis demonstrated racial animus towards Bell. (Order, RE 94, PageID# 1214 n.1). Because a factual dispute exists between the video, as properly construed at summary judgment, and the officers' affidavits, the Court lacks jurisdiction over this appeal.

B. Defendants do not concede the version of facts most favorable to Bell and instead premise their arguments on factual inferences improperly drawn in their favor.

Given the inapplicability of *Scott v. Harris*, Defendants' only other pathway to interlocutory appellate jurisdiction for a denial of qualified immunity is "conced[ing] the most favorable view of the facts to the plaintiff." *Akima v. Peca*, 85 F.4th 416, 422 (6th Cir. 2023) (quoting *Adams v. Blount County*, 946 F.3d 940, 948 (6th Cir. 2020)). That complete concession is a "jurisdictional prerequisite." *Gillispie v. Miami Township*, 18 F.4th 909, 917 (6th Cir. 2021). "[W]here … the defendant purports to concede the plaintiff's view of the facts but in effect still litigates the factual dispute," this Court lacks interlocutory jurisdiction. *Anderson-Santos v. Kent County*, 94 F.4th 550, 555 (6th Cir. 2024); *see also Barry v. O'Grady*, 895 F.3d 440, 444 (6th Cir. 2018).

For starters, Defendants don't "purport[] to concede [Bell's] view of the facts." *Anderson-Santos*, 94 F.4th at 555. They make a fragmentary suggestion that their force was justified solely because Bell did not surrender his license. Defs' Opening Br. 31. But, at best, that implies a momentary concession of just one fact favorable to Bell, and Defendants spend the rest of their brief arguing from the assumption that this Court will resolve factual disputes and draw inferences in *their* favor, not Bell's. *E.g.*, *id.* at 29-30, 33. In doing so, they do not genuinely invoke the concession pathway to appellate jurisdiction and forfeit any contrary arguments. *See Anderson-Santos*, 94 F.4th at 555; *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997).

Defendants assert that Bell's "verbal resistance and conduct in the car prior to the slap are sufficient to justify physical[ly] removing Plaintiff, then, when coupled with his physical resistance once the controlled removal began with unlocking his car, this factor weighs in favor of the Officers." Defs' Opening Br. 31. The latter half of this sentence—which disputes Bell's testimony that he "never was combative" as Defendants pulled him from the car (Bell Dep. Tr, RE 88-5, PageID# 1130)—shows that Defendants do not concede a version of the crucial facts favorable to Bell, as required for appellate jurisdiction, *see Gillispie*, 18 F.4th at 917.

But even taking the sentence's first clause in isolation, Defendants' suggestion that Bell's forceful removal was justified solely based on his verbal noncompliance and conduct in the car is not itself a concession of facts favorable to Bell. *See Anderson-Santos*, 94 F.4th at 555. Instead, Defendants

argue that Bell's conduct during the stop indicated that he might flee or strike officers with his vehicle, justifying their force. *See* Defs' Opening Br. 19-20, 30. But the district court concluded that Bell had complied with Korkis's instruction to remain parked and inferred Bell had not attempted to flee. (Order, RE 94, PageID## 1224-25).

Moreover, Defendants' argument that they are entitled to qualified immunity repeatedly (and improperly) assumes that disputed facts will be found in their favor. *See, e.g.*, Defs' Opening Br. 29 (arguing Bell assaulted Korkis and needed to be pulled from his vehicle "to prevent further assault"); *id.* at 30 (arguing Bell "demonstrated a willingness to put his car in drive and avoid removal by hitting an officer"); *id.* at 33 (arguing Bell slapped Korkis to prevent Bell's removal from the vehicle). But this Court has already dismissed one interlocutory appeal in this case because it would have required resolving the factual dispute over who started the altercation in Bell's car. *Bell v. City of Southfield*, 37 F.4th 362, 366 (6th Cir. 2022). To repeat: Defendants' continuing disagreement with the inferences drawn in Bell's favor at summary judgment is not a basis for interlocutory appeal. *Adams*, 946 F.3d at 948-49.

Finally, Defendants forfeit arguments that this Court has jurisdiction based on a concession of facts favorable to Bell or that Defendants' conduct was justified solely because of Bell's words. Issues are forfeited when they are merely "adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation." *McPherson*, 125 F.3d at 995 (citation

omitted). Defendants have offered a "single conclusory sentence" that, at best, might be read as a partial concession to Bell. *EPLET, LLC v. DTE Pontiac N., LLC*, 984 F.3d 493, 502 (6th Cir. 2021). That falls well short of the developed argument required to present an issue on appeal. *See Watkins v. Healy*, 986 F.3d 648, 666-67 & n.26 (6th Cir. 2021) ("[B]are mention of 'qualified immunity' constitutes forfeiture."); *Lou's Transp., Inc. v. NLRB*, 945 F.3d 1012, 1027 (6th Cir. 2019) ("[C]laim set out in a single page, with no citation to caselaw … is forfeited for lack of proper development.").

* * *

During their first appeal, "[t]he problem for the officers [wa]s the videos do not clearly show what happened." *Bell*, 37 F.4th at 366. Without new video evidence or a concession of facts favorable to Bell, that's still their problem. This Court should therefore resolve Defendants' interlocutory appeal by dismissing for lack of jurisdiction, like it did the last time around.

II. Viewing the facts in the light most favorable to Bell, Defendants are not entitled to qualified immunity.

Even setting aside their forfeiture of this argument, Defendants are not entitled to qualified immunity on the facts viewed in the light most favorable to Bell. An officer is not entitled to qualified immunity at summary judgment if "the facts viewed in the light most favorable to the plaintiff[] show that a constitutional violation has occurred" and "the violation involved a clearly established constitutional right of which a reasonable person would have known." *Brown v. Lewis*, 779 F.3d 401, 411 (6th Cir. 2015) (alteration in

original) (citation omitted). Viewing the facts in the light most favorable to Bell and accepting his testimony that he did not initiate the physical altercation with Korkis, the force used against Bell violated the Fourth Amendment, and reasonable officers would have known that their conduct was unconstitutional. Defendants are therefore not entitled to qualified immunity.

A. Defendants used excessive force, in violation of the Fourth Amendment, when they pulled Bell from his car and tackled him to the ground.

The Fourth Amendment prohibits excessive force during an arrest or investigatory stop, and any use of force must be reasonable in light of the circumstances surrounding the encounter. *Graham v. Connor*, 490 U.S. 386, 394-96 (1989). Relevant circumstances include (1) the severity of the suspected crime at issue, (2) "whether the suspect pose[d] an immediate threat to the safety of the officers or others," and (3) whether the suspect was "actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396.

1. Nonviolent misdemeanors are not considered severe crimes, *Coffey v. Carroll*, 933 F.3d 577, 588 (6th Cir. 2019), and "[c]onduct that is not a violent or serious crime does not permit an officer to use increased force absent other factors," *Vanderhoef v. Dixon*, 938 F.3d 271, 277 (6th Cir. 2019). The district court concluded that the crime at issue here was not severe and rejected Defendants' argument, Defs' Opening Br. 28, that driving an unregistered vehicle was "suggestive of a more violent offense of being a stolen vehicle"

(Order, RE 94, PageID# 1223). In *Brown v. Chapman*, 814 F.3d 447, 459 (6th Cir. 2016), the misdemeanor of refusing to provide a driver's license did not weigh in favor of finding that the force used was reasonable—just as the suspected misdemeanors of driving an unregistered vehicle and refusing to provide identification do not support a finding that Defendants' use of force was reasonable. (Order, RE 94, PageID## 1223-24).

2. Erratic behavior or a reasonable belief that the suspect has a weapon, for example, may indicate that a suspect poses an immediate threat to the safety of officers. *See, e.g.*, *Fox v. DeSoto*, 489 F.3d 227, 237 (6th Cir. 2007) (weighing the dangerousness of the situation in favor of reasonableness when suspect was "believed to be armed, had been removed from [a] flight for creating a disturbance, continued to be uncooperative, and refused to identify himself or answer any questions"). A safety concern may be heightened when members of the public are present. *See Bozung v. Rawson*, 439 F. App'x 513, 520 (6th Cir. 2011).

Bell was not behaving erratically. He slowed when Korkis's lights turned on and stopped in the parking lot that Korkis directed him to over the radio. (Korkis Video, RE 77-2 at 1:01-1:30). Viewed in the light most favorable to Bell, his offer to move his car into a parking space was a response to Korkis's threat that he would be pulled from his vehicle and communicated Bell's intent to cooperate. This understanding is also supported by Bell's statements that he was "not going anywhere" and the fact that he complied with Korkis's instruction to not move the car. (Order, RE 94, PageID# 1212;

Korkis Video, RE 77-2 at 3:55-4:00). Defendants' argument, *see* Defs' Opening Br. 30, that Bell's offer to park his car indicated that he was willing to flee draws an inference against Bell that is not appropriate at summary judgment. And any supposed danger posed by possible flight would have been mitigated by Langewicz's vehicle, which was blocking Bell's car. (Korkis Video, RE 77-2 at 3:53-4:03; Korkis Video Tr., RE 93-1, PageID# 1183; Order, RE 94, PageID# 1225).

Defendants cannot point to any facts that would suggest to a reasonable officer that Bell posed a danger. He was not armed, and officers had no reason to be concerned that he had a weapon. Defendants argue that the possibility that he was armed contributed to the dangerousness of the situation, Defs' Opening Br. 29, but "the remote risk that [a suspect] could have been armed does not establish that he posed a reasonable threat of danger," *Browning v. Edmonson County*, 18 F.4th 516, 528 (6th Cir. 2021); *see also Shumate v. City of Adrian*, 44 F.4th 427, 444 (6th Cir. 2022) ("A reasonable officer would not believe that [the suspect] posed an immediate threat of harm when there was nothing—no evasive movements towards a waistband, no threats of violence, no charging towards the officer—suggesting possession or intent to possess a weapon."). There was also no crowd in the parking lot that would have been a concern to the officers. (Korkis Video, RE 77-2 at 1:36). And though Bell was larger than the individual officers, Defs' Opening Br. 30, the district court concluded that "no reasonable jury could find that one unarmed, non-violent sexagenarian

posed a meaningful threat of harm to three trained, armed officers" (Order, RE 94, PageID# 1225).

3. Passive resistance is distinguishable from active resistance, and "noncompliance alone does not indicate active resistance." *Browning*, 18 F.4th at 527 (quoting *Eldridge v. City of Warren*, 533 F. App'x 529, 535 (6th Cir. 2013)) (finding that noncompliance without any sign of verbal hostility or physical resistance was not active resistance). Bell did not attempt to flee. Bell was not verbally hostile. His exchange with Korkis consisted of asking what he did wrong, while reiterating that he was "being cooperative," "trying to be polite," and "not resisting" (Korkis Video Tr., RE 93-1, PageID# 1180-81). Defendants argue that Bell physically resisted by slapping Korkis's hand, Defs' Opening Br. 31, but Bell testified that "[he] never fought them … [and] never was combative" (Bell Dep. Tr., RE 88-5, PageID# 1130). Resolving the factual dispute of who initiated the physical altercation in Bell's favor requires accepting his testimony and concluding that he did not physically resist before Korkis grabbed him.

Instead of giving Korkis his documents, Bell asked what he did wrong. At most, this inquiry would be considered noncompliance, which does not constitute active resistance and does not indicate that Bell resisted arrest. This Court observed as much in *Chapman*, 814 F.3d at 460-61, where the analysis of whether the suspect actively resisted considered the suspect's actions at the time of arrest, not his failure to provide identification. The

district court here similarly noted that the "evidence does not show that [Bell] resisted an order to submit to the arrest." (Order, RE 94, PageID# 1228).

Bell was never given the opportunity to get out of his car so that Defendants could arrest him before they forcibly removed him. In the two minutes between when Korkis threatened that Bell would be "pulled out of the car" if he did not provide his documents (Korkis Video, RE 77-2 at 3:16-3:22; Korkis Video Tr., RE 93-1, PageID# 1182), and when Defendants used force to grab him and pull him from the car, the officers did not give any arrest-related commands.

Bell offered to get out of his car. This case isn't one where it is "not clear whether Plaintiff understood or was given sufficient time or opportunity to comply with some of the orders before he was thrown to the ground." *LaPlante v. City of Battle Creek*, 30 F.4th 572, 579 (6th Cir. 2022). Nor is it one where the suspect was "unwilling to budge on his own, [so] the officers had little choice but to remove him" from his vehicle. *Ashford v. Raby*, 951 F.3d 798, 802 (6th Cir. 2020). Instead, Bell volunteered to "get out of [the] car [him]self" (Korkis Video, RE 77-2 at 5:12-5:16; Korkis Video Tr., RE 93-1, PageID# 1184), and Korkis rejected his offer by insisting that they were "gonna do it [Defendants'] way." (Langewicz Video, RE 77-4 at 2:27-2:30; Langewicz Video Tr., RE 93-3, PageID# 1203). Their way was to grab a 61-year-old Black man—who was not suspected of a severe crime, did not pose a danger, and did not resist arrest—throw a racial slur at him, threaten to "break [his] fucking hand" (Korkis Video, RE 77-2 at 5:22-5:26; Langewicz

Video, RE 77-4 at 2:32-2:38; Korkis Video Tr., RE 93-1, PageID# 1184), pull him from his car, and tackle him to the ground.

B. The right of an individual not actively resisting arrest to be free from officers' use of force was clearly established at the time of the incident.

"Drawing the line at a suspect's active resistance defines the right at a level of particularity appropriate for a claim pursued under § 1983." *Coffey v. Carroll*, 933 F.3d 577, 589 (6th Cir. 2019). Defendants do not—and cannot—dispute that use of force against a non-resisting individual violates a clearly established constitutional right. The assertion that this Circuit has "permitted such force when removing individuals who had previously resisted commands," Defs' Opening Br. 32, misrepresents the case law and ignores more recent precedent that "when a suspect does not resist, or has stopped resisting, [officers] cannot" use force, *Rudlaff v. Gillispie*, 791 F.3d 638, 642 (6th Cir. 2015). Defendants' argument is therefore not only irrelevant because Bell never actively resisted and twice offered to get out of his car, but also unsupported and outdated.

Defendants argue that the right of an individual who has previously resisted to be free from officers' use of force was not clearly established when Defendants pulled Bell from his vehicle. Defendants lack support for this argument because, as noted by the district court (Order, RE 94, PageID## 1220-21), they cite cases that involve suspects resisting officers at the time force was used. In *Fox v. DeSoto*, 489 F.3d 227, 231-32 (6th Cir. 2007), the

officer placed the suspect in an arm-bar hold after he "stiffened, made a fist, and reached for his right side" where he was carrying a firearm. In *Bozung v. Rawson*, 439 F. App'x 513, 520-21 (6th Cir. 2011), the straight-arm bar takedown occurred after the suspect refused to put his hands behind his back as instructed by the officer handcuffing him.

The cases that Defendants cite where an individual was pulled from a vehicle involve suspects who led officers on car chases and resisted arrest-related commands at the time force was used. In *Dunn v. Matatall*, 549 F.3d 348, 354-55 (6th Cir. 2008), the suspect was pulled from his vehicle only after he struggled with the officer and refused to exit his vehicle following a two-minute car chase. In *Ryan v. Hazel Park*, 279 F. App'x 335, 338 (6th Cir. 2008), the suspect was removed from her vehicle after she led officers on an eight-minute car chase, ignored orders to show her hands and exit her vehicle, and pulled away from the officers who were trying to remove her.

Defendants are required to cite outdated caselaw because "since at least 2009, the use of violence against a subdued and non-resisting individual has been clearly established as excessive." *Brown v. Lewis*, 779 F.3d 401, 419 (6th Cir. 2015); *see also LaPlante v. City of Battle Creek*, 30 F.4th 572, 583 (6th Cir. 2022) ("[T]akedown maneuvers are excessive when officers deal with a 'generally compliant' suspect …." (quoting *Smoak v. Hall*, 460 F.3d 768, 984 (6th Cir. 2006))); *Goodwin v. City of Painesville*, 781 F.3d 314, 328 (6th Cir. 2015) ("We have held that 'the right to be free from physical force when one is not resisting the police is a clearly established right ….'" (quoting *Wysong v. City*

of Heath, 260 F. App'x 848, 856 (6th Cir. 2008))); *Smith v. City of Troy*, 874 F.3d 938, 945 (6th Cir. 2017) ("It was well-established at the time of the incident in this case that a non-violent, non-resisting, or only passively resisting suspect who is not under arrest has a right to be free from an officer's use of force.").

Eldridge v. City of Warren observed that failing to comply with an officer's commands to get out of the car did not constitute active resistance and held that "the right of a suspect to be free from the use of physical force when he is not resisting police efforts to apprehend him" was clearly established. 533 F. App'x 529, 535 (6th Cir. 2013). As discussed (at 33-35), Bell never resisted arrest. He never refused to get out of the car. In fact, he twice offered to step out of the vehicle. As the district court held, the right of a non-resisting individual to not be pulled from his vehicle and tackled to the ground was clearly established when Defendants did exactly that to Bell.

This case is similar to *Lewis*, which held that "pulling a compliant detainee out of her car and throwing her to the ground in the process of handcuffing her is clearly established excessive force." 779 F.3d at 419. Brown, the plaintiff, complied with arrest-related commands by putting her hands up and moving to get out of her car as directed. *Id.* at 408. Bell similarly demonstrated his willingness to facilitate his own arrest by offering to move his car to a parking spot after Korkis threatened that Bell would be arrested and pulled from his vehicle. (Korkis Video, RE 77-2 at 3:31-3:44; Order, RE 94, PageID# 1212). Bell also volunteered to get out of the car prior to the use

of force. (Korkis Video, RE 77-2 at 5:12-5:16; Korkis Video Tr., RE 93-1, PageID# 1184). But in a manner similar to how officers grabbed Brown "before her foot touched the ground" and threw her down, *Lewis*, 779 F.3d at 408, Defendants pulled Bell from his vehicle as he was saying, "Sir, I'm getting out," (Langewicz Video, RE 77-4 at 2:36-2:46; Order, RE 94, PageID# 1214), and tackled him to the ground.

III. Even if the video clearly showed Bell knocking Korkis's hand away, this Court still lacks jurisdiction to resolve Bell's appeal because a jury could find that Defendants used excessive force by pulling Bell from his car when he had stopped any active resistance.

Bell denies slapping Korkis's hand when Korkis reached into the car. (Bell Depo Tr., RE 88-5, PageID# 1130). Defendants maintain otherwise, meaning that there's a dispute of material fact that may not be resolved at summary judgment. But that's not the only factual dispute that prevents this Court from having interlocutory jurisdiction to answer a purely legal question about Defendants' entitlement to qualified immunity.

Assuming (counterfactually) that every reasonable jury would conclude that Bell knocked Korkis's hand away—as would be required to reverse the district court on that issue—a jury could also find that Defendants nevertheless used excessive force to remove Bell when he was attempting to surrender, violating clearly established law. *See Scott v. Harris*, 550 U.S. 372, 380-81 (2007); *Grawey v. Drury*, 567 F.3d 302, 311, 314 (6th Cir. 2009). On appeal from the denial of summary judgment, this Court cannot resolve disputes over whether reasonable officers would perceive Bell's contact with

Korkis as inadvertent (and not active resistance) or whether Bell's conduct demonstrated that he had ceased any active resistance before Defendants pulled him from his car. *See Moser v. Etowah Police Dep't*, 27 F.4th 1148, 1154 (6th Cir. 2022); *Perez v. Simpson*, 83 F.4th 1029, 1031 (6th Cir. 2023). Because Defendants' entitlement to qualified immunity turns on the resolution of these additional factual disputes, this Court would still lack interlocutory jurisdiction even if it concluded Bell clearly slapped Korkis's hand. *See Johnson v. Jones*, 515 U.S. 304, 313-14 (1995).

A. As discussed (at 35-38), Bell had a clearly established right to be free from police force when not actively resisting arrest. *Rudlaff v. Gillispie*, 791 F.3d 638, 642 (6th Cir. 2015); *Coffey v. Carroll*, 933 F.3d 577, 589 (6th Cir. 2019); *Shumate v. City of Adrian*, 44 F.4th 427, 450 (6th Cir. 2022). And it was clearly established that police may not use force against someone who has stopped actively resisting. *Meadows v. City of Walker*, 46 F.4th 416, 422 (6th Cir. 2022). That is because "active resistance does not include … 'hav[ing] stopped resisting.'" *Rudlaff*, 791 F.3d at 641 (alteration in original) (quoting *Hagans v. Franklin Cnty. Sheriff's Off.*, 695 F.3d 505, 509 (6th Cir. 2012)); *see also Goodwin v. City of Painesville*, 781 F.3d 314, 328 (6th Cir. 2015). Moreover, "some physical contact does not automatically rise to the level of active resistance" when it "d[oes] not evidence an intent to physically interfere with … arrest." *Moser*, 27 F.4th at 1154; *see also Smith v. City of Troy*, 874 F.3d 938, 945 (6th Cir. 2017).

Defendants suggest previous resistance justifies force. Defs' Opening Br. 32. But as noted (at 35-36), the cases they cite uniformly involved ongoing active resistance when police used force. Instead, a belief that Bell had previously actively resisted would not itself justify force. *See Shumate*, 44 F.4th at 440-41; *Saalim v. Walmart*, 97 F.4th 995, 1000, 1004 n.5 (6th Cir. 2024) (jury could conclude plaintiff's conduct was not serious despite menacing, resisting-arrest, and obstruction charges). Moreover, the district court concluded that the idea that the 61-year-old Bell "posed a meaningful threat of harm to three trained, armed officers … strain[ed] credulity." (Order, RE 94, PageID## 1225-26). Because a reasonable jury could agree, this Court should defer to that inference. *See Shumate*, 44 F.4th at 438.

B. A jury could find that reasonable officers would perceive that any contact Bell made with Korkis's hand was inadvertent and non-resistant, made while focused on Bridgeforth or while attempting to open the door to facilitate arrest. And whether or not Bell actively resisted by brushing away Korkis's hand, a reasonable jury could find he was not resisting by the time police pulled him from the car and, therefore, that Defendants' force was unjustified. *See Meadows*, 46 F.4th at 422.

In the moments before Defendants claim that Bell slapped Korkis's hand, Bell appeared to turn toward Bridgeforth. (Langewicz Video, RE 77-4 at 2:23-2:30). After the contact between Bell and Korkis, Korkis bent Bell's left hand backward, shouting, "Boy, I'll break your fucking hand." (*Id.* at 2:34-2:38). Far from struggling with Korkis after the initial contact, Bell used his

right hand to film the interaction, turning his attention away from Korkis—who continued to twist Bell's left hand—and recording Bridgeforth at the passenger door. (*Id.* at 2:36-2:46). Bell attempted to surrender, explaining, "I'm getting out. I'm getting out. I'm not fighting you." (Bridgeforth Video, RE 77-3 at 10:20-10:22). Korkis heard and refused Bell's submission, saying, "No you're not. You're getting out our way now." (*Id.* at 10:22-10:23). Bell again tried signaling he was not resisting by responding, "I'm fine. You do what you want to," and starting to exit the car. (*Id.* at 10:23-10:24; Korkis Video, RE 77-2 at 5:38-5:40). But Korkis and Langewicz forcefully pulled Bell from his vehicle. (Korkis Video, RE 77-2 at 5:40).

C. This Court has previously dismissed the interlocutory appeal of a denial of qualified immunity for lack of jurisdiction because the appeal turned on a factual dispute regarding whether reasonable officers would have perceived that an actively resisting plaintiff had stopped resisting prior to police use of force. *Perez*, 83 F.4th at 1031. In *Perez*, the plaintiff actively resisted, fleeing from police, but maintained that she had "surrendered the *instant* before [defendant] tased her." *Id.* (emphasis added). In holding that it lacked jurisdiction, *Perez* necessarily concluded that the force would be excessive if the plaintiff had stopped actively resisting, as she maintained. *See id.*; *see also Oliver v. Buckberry*, 687 F. App'x 480, 484 (6th Cir. 2017) (finding no jurisdiction over interlocutory qualified-immunity appeal because reasonable jury could find that plaintiff had stopped resisting when he made minimal movements and verbally denied he was resisting). Here,

Korkis had sufficient opportunity to perceive Bell's attempt at surrendering—in fact, Korkis verbally rejected it. (Bridgeforth Video, RE 77-3 at 10:22-10:23).

The question whether reasonable officers would perceive Bell as stopping any active resistance and surrendering in the moments before he was pulled from the car raises additional factual issues about which the record is inconclusive. *See LaPlante v. City of Battle Creek*, 30 F.4th 572, 579-580 (6th Cir. 2022). A jury could view the videos as we have described them above, concluding that reasonable officers would perceive that Bell's contact with Korkis was inadvertent and therefore not active resistance. *See Moser*, 27 F.4th at 1154. A jury could also find that reasonable officers "would have perceived [Bell] as no longer actively resisting arrest" when Bell explained that he was not fighting Korkis and wanted to exit his vehicle to be arrested. *Perez*, 83 F.4th at 1031 (emphasis omitted). And a jury could find that Korkis refused to allow Bell to surrender so that Defendants' subsequent (and quite potent) use of force was excessive. *See id.* Whether a jury would agree with us depends on factual questions left unresolved by the videos: where Bell was looking before the contact; what he was doing with his arms after the contact; how forceful any contact with Korkis was. *Cf. LaPlante*, 30 F.4th at 580 (finding factual dispute over whether the plaintiff's noncompliance and arm movements were active resistance when video was inconclusive).

We acknowledge that Defendants disagree with our characterization of the video evidence. But because the Court "cannot completely determine the

nature of the interaction or the communications between Plaintiff and Officer [Korkis] from the video alone[,] [t]hat task is best left to a jury." *LaPlante*, 30 F.4th at 581. This Court therefore lacks jurisdiction to resolve the factual questions required to determine Defendants' entitlement to qualified immunity—whether reasonable officers would perceive Bell as not actively resisting, *id.* at 580-81, during the moments in which he told Korkis, "I'm getting out. I'm not fighting you." (Bridgeforth Video, RE 77-3 at 10:20-10:22).

Conclusion

This Court should dismiss this appeal for lack of appellate jurisdiction or, alternatively, affirm the district court's denial of Defendants' motion for summary judgment.

Respectfully submitted,

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Certificate of Compliance

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May 21, 2024

/s/ Brian Wolfman
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Designation of Relevant Documents

Under Sixth Circuit Rules 28(b) and 30(g), Appellee designates the following filings in the district-court record as entries relevant to this appeal:

Description of entry	**Docket No.**	**PageID**
Notice of Removal and Complaint	RE 1	1-15
Opinion Granting in Part Leave to Amend Complaint and Denying as Moot Defendants' Motion for Judgment on Pleadings	RE 16	213-230
Amended Complaint	RE 21	238-243
Defendants' Motion to Dismiss	RE 25	247-279
Opinion Denying Motion to Dismiss	RE 31	321-336
Defendants' First Notice of Appeal	RE 33	339-340
Answer to Amended Complaint	RE 41	388-398
Defendants' Motion for Summary Judgment	RE 77	898-925
Index of Exhibits	RE 77-1	926
Ex. 1—Ofc. Korkis's Dashcam Video	RE 77-2	927
Ex. 2—Ofc. Bridgeforth's Dashcam Video	RE 77-3	928
Ex. 3—Ofc. Langewicz's Dashcam Video	RE 77-4	929

Certificate of Service

I certify that on May 21, 2024, I filed this brief with the Clerk of the Court electronically via the CM/ECF system. All participants in this case are registered CM/ECF users and will be served electronically via that system.

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