

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:09-cv-02802-REB- MEH

JEREMY C. MYERS,

Plaintiff,

v.

BRIAN KOOPMAN, in his individual capacity,

Defendant.

**DEFENDANT'S MOTION FOR LEAVE TO SUPPLEMENT DEFENDANT'S REPLY TO
PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

DEFENDANT Brian Koopman ("Koopman"), by and through his attorneys, Wick & Trautwein, LLC and the Loveland City Attorney's Office, respectfully moves that the Court grant leave for Koopman to supplement Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment [#237, filed 10/29/2012] ("Reply"), and in support hereof, states as follows:

D.C. COLO. LCivR 7.1.A. CERTIFICATION OF COMPLIANCE

Counsel for Koopman hereby certifies that he has conferred with counsel for Plaintiff Jeremy C. Myers ("Myers") concerning this motion. Myers objects to this motion.

1. Koopman has recently discovered Tenth Circuit and U.S. Supreme Court authority directly on point that constitutes governing law with respect to Koopman's request in his Reply that the Court determine that Myers' and his father's affidavits

opposing Defendant's Motion for Summary Judgment [#230, filed 09/24/2012] be determined to be sham affidavits and excluded from summary judgment consideration.

2. Judge Holmes, in his concurring opinion in *Thomson v. Salt Lake County*, 584 F.3d 1304, 1326 (10th Cir. 2009), while explaining the process of applying the summary judgment standard of review in the qualified immunity setting, cited *Green v. Post*, 574 F.3d 1294, 1296-97 & n.4 (10th Cir. 2009) as an example of the Tenth Circuit declining to incorporate into the "universe of relevant facts," within the context of qualified immunity summary judgment review, an allegation refuted by video-tape in the record. In *Green*, the plaintiff said that a Pueblo County sheriff's deputy whose vehicle collided with plaintiff's decedent had a red light, see *Green v. Post*, 2008 WL 707338 (D.Colo. 2008), which factual allegation was accepted by the district court in denying the sheriff's deputy qualified immunity. However, the Tenth Circuit, in *Green*, in reversing the denial of qualified immunity, noted that the videotape of the collision, obtained from the camera on the deputy's vehicle, showed that the light was yellow when the deputy collided with plaintiff's decedent, citing *Scott v. Harris*, 550 U.S. 372, 378-79, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (in noting its own review of the videotape of the incident involved, the Court observed that "[t]he videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals.") (further stating that at the summary judgment stage, facts must be viewed in the light most favorable to the non-moving party "only if there is a 'genuine' dispute as to those facts."). According to the Court in *Scott*, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court

should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." 550 U.S. at 380, 127 S.Ct. at 1776.

WHEREFORE, Koopman respectfully prays that the Court grant leave for the filing of this supplemental authority in support of his Reply.

DATED this 6th day of November, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2012, I electronically filed the foregoing DEFENDANT'S MOTION FOR LEAVE TO SUPPLEMENT DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following e-mail address:

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