APPENDICES

APPENDIX A

United States Court of Appeals for the Tenth Circuit

Cody William Cox,
Plaintiff-Appellant-Cross-Appellee,

v.

Don Wilson,
Defendant-Appellee-Cross-Appellant.

Nos. 18-1353, 18-1376

Decided: May 22, 2020

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:15-CV-00128-WJM-NYW)

Before Hartz and Eid, Circuit Judges*[1]

Hartz, Circuit Judge.

Plaintiff Cody Cox sued Defendant Don Wilson, a deputy in the Clear Creek County Sheriff's Department, under 42 U.S.C. § 1983. Cox alleged that when Wilson shot him in his vehicle while stopped on Inter-

[1] * * The late Honorable Monroe G. McKay, United States Senior Circuit Judge, heard oral argument and participated in the panel's conference of this appeal, but passed away before its final resolution. The practice of this court permits the remaining two panel judges, if in agreement, to act as a quorum in resolving the appeal. See *United States v. Wiles,* 106 F.3d 1516, 1516, n* (10th Cir. 1997); 28 U.S.C. § 46(d).

state 70, Wilson violated the constitutional prohibition against the use of excessive force by law-enforcement officers. Plaintiff appeals the judgment on the jury verdict against him. He argues that the district court erred in failing to instruct the jury to consider whether Wilson unreasonably created the need for the use of force by his own reckless conduct. We have jurisdiction under 28 U.S.C. § 1291 and affirm. Although the district court incorrectly stated that the Supreme Court had recently abrogated this court's precedents requiring such an instruction in appropriate circumstances, the evidence in this case did not support the instruction. No law, certainly no law clearly established at the time of the incident, suggests that Wilson acted unreasonably up to and including the time that he exited his vehicle and approached Cox's vehicle.

I. Background

A. The Shooting

Cox was shot on January 31, 2014, after a car chase on Interstate 70. It had been snowing so the Interstate was wet, and some parts were snow-packed or icy. The first officer to pursue Cox was Clear Creek County Deputy Sheriff Kevin Klaus. Although Klaus testified about his observations during the pursuit, the only evidence relevant to the propriety of Wilson's actions is what Wilson observed or what he was informed of by others. Therefore, our account of what happened before Wilson joined the pursuit is limited to what was broadcast on police radio channels that Wilson heard.

The radio traffic indicated a dangerous situation. It began as Cox's Toyota pickup passed Exit 235 on the interstate. The dispatcher said, "[W]e've got about

three 9-11 calls." Aplt. App., Vol. VII at 1566. An officer reported that Cox had "I-70 pretty-well blocked up behind him and he's having a hard time getting up the road." *Id.* at 1567. The officer described the vehicle as a "Silver Tacoma with damage all over the body and a camper shell on the back." *Id.* Klaus reported that at about mileage marker 232½, Cox "just wiped out in the, uh, number one lane. He's – was all over the road." *Id.* at 1568. Klaus also noted that his police vehicle did not have a siren. Id. Klaus then reported that near Exit 232 the pickup "got stuck, but he's trying to get away again. I'm not going to contact until I get some cover." *Id.* at 1569. He said: "I verbally told the party to turn off his car. I do have a good look of – at him, and he's taking off again. Westbound. All over the road." *Id.* An officer reported that traffic was "almost at a standstill" about 4 miles ahead. *Id.* Klaus said he needed help from someone with a siren and reported that there was "nobody in front of this guy, but we have a lot behind me." *Id.* After the other officer reported that he was at Exit 228, Klaus responded, "Uh, the way he's driving, I doubt we'll make it that far." *Id.* Another officer stated that he had "spike strips" (also referred to by officers as stop sticks) and would join the two police vehicles already at Exit 228. *Id.* at 1570. Klaus then reported that Cox was driving 60 miles per hour, then 70, and then 80 at mileage marker 230½.

After an officer reported that westbound traffic was stopped about a mile and a half ahead, Klaus said, "[W]e just caught up with this traffic. He is not going to stop." Id. Klaus continued, "[W]e're going to have to, uh, take some physical action on this vehicle. This guy has got to be very drunk, and he is not stopping." *Id.* at 1571. Shortly after that, Klaus reported, "We're in bumper-to-bumper traffic now at the 229½.

He is not stopping. He's just showing me a peace sign." *Id.* Another officer informed the others that he was at the 228 offramp with spike strips.

About that time, Wilson, whose vehicle had a siren, had caught up with Cox and taken over from Klaus as leader of the pursuit. For the next mile, traffic became heavily congested, moving slowly in a stop-and-go fashion. The pursuit proceeded at speeds between 5 and 15 miles per hour. Wilson observed Cox continue to drive dangerously. Each time Cox was momentarily stopped by the traffic, he would wait for an opening and then accelerate through any gaps in the cars, losing traction and fishtailing wildly nearly a dozen times and coming very close to striking nearby vehicles. He refused to pull over in response to Wilson's lights and sirens or Wilson's repeated orders over his loudspeaker that Cox stop his vehicle. Wilson believed that Cox was not going to stop.

Wilson was able to pull along the right side of Cox's vehicle, which was in the left-hand lane about five feet from the guardrail, while traffic continued to move very slowly in a stop-and-go fashion. Wilson had his window down and motioned for Cox to roll down his window, which Cox did. But Cox continued to ignore Wilson's repeated orders to turn off his engine. On several occasions Wilson observed Cox drop his right hand down to his right hip; given the circumstances, Wilson assumed that Cox was reaching for a firearm. Cox kept driving forward when possible, rolling up a few feet each time the traffic moved forward. Wilson believed that Cox was striking the rear bumper of the car in front of him, driven by Sarah Kincaid, and pushing her car forward each time that he pulled ahead. But Wilson testified that he was mistaken on this point; he said that his perceptions at

that moment were impaired because he was concentrating on giving Cox instructions and determining whether Cox had a weapon.

Finally, Kincaid fully stopped her car, requiring Cox to stop. Kincaid stopped because she thought that Wilson wanted her to do so. But Wilson and Kincaid had not communicated at any point and Kincaid kept the engine running; so Wilson had no way of knowing that Kincaid was intentionally blocking Cox and would continue to do so even as traffic moved forward in front of her.

Klaus stopped his vehicle about 10 feet behind Cox. By this point Wilson had drawn his firearm and pointed it at Cox, again ordering Cox to turn off his engine. While Cox was boxed in, Wilson believed he had a brief window of time to get inside Cox's car and take the keys out of the ignition. He decided that prompt action was necessary because he believed that the next stretch of highway posed increasing dangers for the chase (for example, there was a crossover area a mile ahead where Cox could have driven into oncoming traffic), and that Cox could, in the slow-moving traffic, avoid the stop sticks that police had laid out at the next exit. Based on the radio transmissions, Wilson thought that officers providing support for the chase about a half mile to a mile down the road were not coming to assist him.

Wilson said that when he exited his vehicle, it was a car length ahead of Cox in the lane to the right. With his firearm drawn he moved toward Cox, again telling Cox to turn off his engine. Almost immediately, he shot Cox through the open passenger window, striking Cox in the neck. The shooting incident, from the time Cox's vehicle came to a complete stop to the time

that Wilson shot Cox, probably took about a minute.[2] The shot to the neck rendered Cox quadriplegic.

There was no dispute at trial regarding Wilson's knowledge of the police radio traffic before he took over the lead of the pursuit; nor was there any dispute regarding the stop-and-go nature of the traffic once he took the lead, Cox's dangerous driving, or Cox's refusal to comply with Wilson's repeated orders for Cox to turn off his engine. But the eyewitness trial testimony about the moments immediately preceding the shooting was not entirely consistent. Wilson claimed that before he stepped from his vehicle onto the highway, he witnessed Cox roll his car forward and backward twice. When he stepped onto the highway, Cox had backed up to a point completely behind his patrol car. He said that he shot Cox because Cox attempted to drive forward and to the right, toward his patrol car, in a manner that caused him to believe that he was going to be crushed and perhaps killed between the two vehicles. Klaus, however, testified that Wilson stopped his patrol car right next to Cox's car, and that Cox moved his car only once (a foot backward and then a foot forward) after coming to a complete stop behind Kincaid. Kincaid testified that Wilson had not fully exited his vehicle when he shot Cox, and Cox had not

---

[2] The duration of the incident, from the time that Cox's car came to a complete stop to the time of the shooting, is somewhat uncertain. Klaus testified that he watched Cox's stopped car for less than a minute before exiting his car, and that Wilson shot Cox about four seconds later. Wilson testified based on the radio transmissions that the incident took about one minute and 15 seconds. Kincaid testified that the incident took "seven and a half minutes," Aplt. App., Vol. I at 181, but admitted that her perception was affected by the stress of the moment.

moved his vehicle after stopping behind Kincaid with Wilson to his right.

Cox testified that he had no memory of the car chase or the shooting incident except that he recalled a silhouette of a person who came up to his window while he was stopped in traffic, he heard some words, and he hit the vehicle in front of him before losing consciousness.

B. Procedural History

Cox filed suit in the United States District Court for the District of Colorado asserting a single claim under 42 U.S.C. § 1983: namely, that his shooting constituted the use of excessive force in violation of the Fourth Amendment's protection against unreasonable seizure. Wilson asserted the defense of qualified immunity.

There have been two jury trials on Cox's claim. The first jury returned a verdict in favor of Wilson, but the district court vacated the judgment because of misconduct at trial by defense counsel (who has since been replaced) and ordered a new trial. After Cox rested his case in the second trial, Wilson moved under Fed. R. Civ. P. Rule 50(a) for a judgment as a matter of law on his qualified-immunity defense. He renewed this motion at the close of evidence, but the court denied the motion. The second jury also rendered a verdict in favor of Wilson.

Cox raises only one issue on appeal. He contends that the district court improperly failed to instruct the jury that it could consider Wilson's reckless conduct before the shooting in determining whether the shooting violated the Fourth Amendment. In his response to Cox's appeal and in support of his own cross-appeal,

Wilson argues that the district court committed several errors during the trial. But because we affirm the judgment in Wilson's favor, we need not address those matters.

II. Discussion

In an excessive-force case, as in other Fourth Amendment seizure cases, a plaintiff must prove that the officer's actions were "objectively unreasonable," taking into account the "totality of the circumstances." *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1259–60 (10th Cir. 2008) (internal quotation marks omitted). Cox argues that the district court erred in failing to instruct the jury that in determining the reasonableness of Wilson's use of force, it could consider whether Wilson's own reckless conduct unreasonably created the need to use such force.

According to Cox, the district court's mistake was in changing the unreasonable-force jury instruction from what the court had used at the first trial. The court's instructions were almost identical to those it had previously given regarding what Cox needed to prove to establish his claim against Wilson. In both trials the court told the juries that the burden was on Cox "to establish by a preponderance of the evidence each of the following elements" of his excessive-force claim: "*First*: [Wilson] deprived [Cox] of his federal Constitutional right not to be subjected to unreasonable force while being stopped; *Second*: [Wilson] acted under the color of state law; and *Third*: [Wilson's] acts were the proximate cause of damages sustained by [Cox]." Aplt. App., Vol. VII at 1595. The court then instructed the juries on the "Factors To Consider When Determining Whether Plaintiff Has Proven The Elements Of His Claim." *Id.* at 1596. It told the juries that they could consider whether Cox had proved at

least one of the following (each of 9 which would have sufficed to establish a violation of his Fourth Amendment rights): (1) "that deadly force was not necessary to prevent [Cox] from escaping"; (2) "that [Wilson] did not have probable cause to believe that [Cox] posed a significant threat of serious physical injury to [Wilson] or others"; or (3) "that it would have been feasible for [Wilson] to give [Cox] a warning before using deadly force, but [Wilson] did not do so." *Id.* at 1596–97. And the court told the juries that they should "consider all the relevant facts and circumstances [Wilson] reasonably believed to be true at the time of the encounter," and that the inquiry "is always whether, from the perspective of a reasonable officer on the scene, the totality of the circumstances justified the use of force at the time of the seizure." *Id.* at 1597.

But the court did make one change to the factors-to-consider instruction given at the first trial, and that is the basis of Cox's appeal. The second-trial instruction excluded one sentence regarding the jury's reasonableness inquiry. We set forth in regular type the pertinent paragraph from the instructions at the second trial, and italicize the sentence that was included at the first trial but not at the second:

> The reasonableness of Defendant's acts must be judged from the perspective of a reasonable officer on the scene at the time of the seizure, that is, the shooting. One of the factors you should consider is whether Defendant Don Wilson was in danger at the time that he used force. *Defendant Don Wilson's own conduct prior to the shooting can be a part of your determination of reasonableness, but only if his own reckless or deliberate conduct during the seizure unreasonably created the need to use*

> *such force*. The concept of reasonableness makes allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are sometimes tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation.

Aplt. App., Vol. I at 57 (italics), VII at 1597 (regular type). Cox objected to the instruction but was overruled. The court explained that it thought the deleted language was legally incorrect and that Cox's contention that Wilson's conduct before the shooting was reckless was unlikely to overcome qualified immunity. *See* Aplt. App., Vol. VII at 1436 ("It's my view that some subsequent decisions since the first trial call[] into question the continuing viability of that statement and that would be, in my view, the thinnest grounds that the plaintiff would have on the qualified immunity issue.").

We ordinarily review a lower court's refusal to give a particular instruction for abuse of discretion. *See Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1231 (10th Cir. 1999). "That deferential review is superseded, however, by this court's *de novo* review of the instructions given to determine whether, in the absence of the refused instruction, they misstated the applicable law." *Id.*; *see Burke v. Regalado*, 935 F.3d 960, 1009 (10th Cir. 2019) ("We review de novo whether, as a whole, the district court's jury instructions correctly stated the governing law and provided the jury with an ample understanding of the issues and applicable standards." (internal quotation marks omitted)). Wilson argues that we should review the denial of the requested instruction for abuse of discretion, while Cox argues that our

review is de novo. But we need not resolve that dispute because on de novo review we hold that the instruction would have been improper in light of the evidence.

There is some Supreme Court authority supporting the district court's view of the law. In *City & County of San Francisco, California v. Sheehan*, the Court stated that a plaintiff could not "establish a Fourth Amendment violation based merely on bad tactics that result[ed] in a deadly confrontation that could have been avoided." 135 S. Ct. 1765, 1777 (2015) (internal quotation marks omitted). "[S]o long as a reasonable officer could have believed that his conduct was justified, a plaintiff cannot avoid summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless." *Id.* (original brackets and internal quotation marks omitted).

Two years later, *County of Los Angeles, California v. Mendez* rejected the Ninth Circuit's "provocation" rule, which had "permit[ted] an excessive force claim under the Fourth Amendment where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation." 137 S. Ct. 1539, 1546 (2017) (internal quotation marks omitted). "The rule's fundamental flaw," as the unanimous Court explained, was that it "use[d] another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." *Id.* The rule went beyond the "operative question in excessive force cases,"—"whether the totality of the circumstances justifie[d] a particular sort of search or seizure," *id.* (internal quotation marks omitted)—and instead "instruct[ed] courts to look

back in time to see if there was a different Fourth Amendment violation that [was] somehow tied to the eventual use of force," *id.* at 1547.

But *Mendez* made clear that it was not deciding the validity of the proposition of law stated in the sentence omitted from the instruction by the district court in this case. A footnote to the opinion states that the Court was declining to address the view that assessing the reasonableness of the use of force requires "taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it." *Id.* at 1547 n*. And after both *Sheehan* and *Mendez* we held in *Pauly v. White* that "[t]he reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." 874 F.3d 1197, 1219 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 2650 (2018) (internal quotation marks omitted); *see also id.* at 1219 n.7 ("This has been the law in our circuit since 1995. . . . The Supreme Court very recently had an opportunity to resolve this issue [in *Mendez*] but declined to do so . . . .").

Nevertheless, the district court did not commit any error by declining to include the sentence in the instruction. A party is not entitled to a jury instruction just because it correctly states a proposition of law. It must be supported by the evidence at trial. *See Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1297 (10th Cir. 1989) ("Under federal law it is error to give an instruction when there is no evidence to support it. There must be more than a mere scintilla of evidence to support an instruction. Sufficient competent evidence is required." (citations omitted)); *Higgins v.*

Martin Marietta Corp., 752 F.2d 492, 496 (10th Cir. 1985) ("[A] party is entitled to an instruction of [its] theory of the case only if the theory is supported by competent evidence. The evidence introduced at trial must warrant the giving of the instruction." (citations omitted)). In this case, including the sentence omitted by the court would have denied Wilson the qualified immunity to which he was entitled. Before addressing the specifics of this case, we briefly summarize the doctrine of qualified immunity.

Qualified immunity shields public officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pauly*, 874 F.3d at 1214 (internal quotation marks omitted). When a defendant asserts a qualified-immunity defense, the plaintiff bears the burden of showing that (1) the defendant violated a constitutional or statutory right, and (2) this right was clearly established at the time of the defendant's unlawful conduct. *See id.* We have discretion to address these two prongs in either order, and "[w]e may resolve a case on the second prong alone if the plaintiff fails to show a right was clearly established." *Gutierrez v. Cobos*, 841 F.3d 895, 900 (10th Cir. 2016).

The law is clearly established for qualified-immunity purposes only if it was sufficiently clear that, at the time of the public official's conduct, every reasonable official would have understood that the conduct was unlawful. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). To make such a showing in our circuit, "the plaintiff must point to a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts

must have found the law to be as the plaintiff maintains." *Callahan v. Unified Gov't of Wyandotte Cty.*, 806 F.3d 1022, 1027 (10th Cir. 2015) (internal quotation marks omitted). "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (internal quotation marks omitted). The clarity of the law must be viewed "in light of the specific context of the case, not as a broad general proposition." *Pauly*, 874 F.3d at 1222 (internal quotation marks omitted).

Here, qualified immunity did not completely protect Wilson from Cox's claim. Cox was certainly entitled to an instruction on the unreasonable use of force. The jury could have inferred from the testimony of Officer Klaus and of Ms. Kincaid that, contrary to Wilson's testimony, Cox had not made any attempt to drive his vehicle at Wilson when Wilson shot him, that Cox did not pose a threat of imminent danger to Wilson after Wilson exited his vehicle, and that therefore Wilson's use of deadly force against Cox was unreasonable. But the jury found otherwise. And, in light of the doctrine of qualified immunity, it would have been contrary to law for the jury to hold Wilson liable based on his conduct before the time of the shooting. Therefore, it would have been improper to give the jury an instruction that would have allowed it to do so. We explain.

The sentence omitted from the instruction said: "Defendant Don Wilson's own conduct prior to the shooting can be a part of your determination of reasonableness, but only if his own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." Aplt. App., Vol. I at 57. Cox sought the instruction to allow him to base liability on his claim that, even if Wilson was in imminent danger

when he shot Cox, the only reason Wilson was exposed to danger was that he unreasonably exited his police vehicle and approached Cox's pickup.

At trial Cox called as an expert witness a person with excellent credentials who testified that Wilson's recklessness created the danger leading to the shooting. The expert opined that Wilson should not have left his car to approach Cox because of the danger to Wilson once he was on foot on the Interstate and in a vulnerable position between his patrol car and Cox's vehicle. He said that Wilson should have remained in his vehicle and attempted to deescalate the situation, perhaps waiting for support from additional officers. And he said that once Wilson stepped onto the Interstate, he should have moved to a position of safety at the rear of his vehicle.

Perhaps it would have been safer for Wilson to remain in his vehicle. But there were other considerations at play. Cox had ignored repeated warnings from Wilson to turn off his car's engine. Wilson reasonably believed that if Cox could continue to drive on the Interstate, he would present a profound danger to other motorists. Although Cox was temporarily boxed in, there was no reason for Wilson to believe that this situation would persist for any substantial amount of time; Kincaid did not turn off her engine and had not spoken with Wilson or otherwise informed him that she intended to remain stopped in front of Cox indefinitely. If Kincaid moved forward, Cox could have continued his dangerous driving, which, according to both Wilson and Kincaid, he appeared intent on doing. And both Wilson and Kincaid testified that Cox was repeatedly reaching down for something, which they assumed was a firearm. If Cox was to be prevented from further dangerous driving, the most reasonable thing

for Wilson to do may have been to expose himself to danger in order to disable Cox from driving.

More importantly, even if the jury was persuaded by the expert's trial testimony that Wilson had acted unreasonably in leaving his vehicle, qualified immunity protected Wilson from liability on that score. As Wilson frames the issue, the question on appeal is whether there is:

> a controlling case finding a Fourth Amendment violation due to the officer's recklessly causing the need to use deadly force, where after participating in a high speed and dangerous chase of a suspect, the officer exited his vehicle during a temporary stop in traffic to confront the driver with a show of deadly force?

Aplee. Br. at 49. Cox has not presented, nor are we aware of, any opinion by the Supreme Court or this court, or, for that matter, any other court, holding that an officer in similar circumstances acted unreasonably. It would have been error for the district court to instruct the jury that it could find Wilson liable on a ground for which he was protected by qualified immunity.

This court recently reached essentially the same conclusion on an appeal where the issue was the same as in this case—allegedly unreasonable police conduct leading to the use of deadly force. In *Pauly* we reversed the denial of summary judgment in favor of the officers, even though the evidence would support a finding of the following events: Two women called 911 late one evening to report a drunk driver and then began to tailgate him. *See* 874 F.3d at 1203. At one point

both vehicles stopped at an exit ramp and the occupants exchanged unpleasantries. *See id.* The driver felt threatened and drove away (apparently without the women following him), going the short distance to his rural home, where he lived with his brother. *See id.* The three responding officers determined "that there was not enough evidence or probable cause to arrest [the driver], and that no exigent circumstances existed at the time. Nevertheless, the officers decided to try and speak with [the driver] to get his side of the story." *Id.* at 1203–04. The officers located and then approached the driver's home, using their flashlights only intermittently until they neared the front door. *See id*. at 1204. The driver and his brother, fearing intruders related to the prior road-rage incident, asked who was approaching, *see id.*; the officers responded hostilely, yelling "Hey, (expletive), we got you surrounded. Come out or we're coming in," *id*. As a result, the brothers, who had no reason to think the intruders were police officers, armed themselves and shouted that they had guns; one of the officers shot and killed the driver's brother after seeing him point a gun in the officer's direction. See id. at 1205. We held that the officers' reckless conduct—including approaching the suspect's home "while it was dark and raining and, without knocking on the door, ma[king] threatening comments about intruding into the home," *id.* at 1215— understandably caused the suspect and his brother to arm themselves, and therefore unreasonably created the need to use deadly force, *see id.* at 1211, 1213, 1221. We concluded that the threat "made by the brothers, which would normally justify an officer's use of force, was precipitated by the officers' own" reckless actions, and that therefore the use of deadly force was unreasonable. *Id.* at 1221.

We nevertheless held that the officers were entitled to qualified immunity because there was no clearly established law that such recklessness created liability. *Id.* at 1223. We explained:

> The statement . . . that the reasonableness inquiry includes an evaluation of an officer's actions leading up to the use of force, is absolutely relevant in determining whether a police officer acted unreasonably in effecting a seizure, as we illustrated above. But it cannot alone serve as the basis for concluding that an officer's particular use of excessive force was clearly established. . . . Because there is no case close enough on point to make the unlawfulness of [the shooting officer's] actions apparent, we conclude that [the officer] is entitled to qualified immunity.

Id. (internal quotation marks omitted).

Pauly illustrates the strength of the protection provided by qualified immunity. Unlike Wilson's decision to leave his vehicle to try to disable Cox's vehicle, the impropriety of the alleged actions by the officers before the shooting in *Pauly* would be apparent to most laypersons. Yet the *Pauly* officers were protected by qualified immunity because of the absence of clearly established law prohibiting their conduct. If qualified immunity protects the officers in *Pauly* against the claim of unreasonably creating a dangerous situation that led to the use of deadly force, surely Wilson is similarly protected.

Cox argues that Wilson is procedurally barred from raising qualified immunity on appeal because his preverdict Rule 50(a) qualified-immunity motion was not followed by a postverdict Rule 50(b) motion. See

Kelley v. City of Albuquerque, 542 F. 3d 802, 817 (10th Cir. 2008) ("[T]he precise subject matter of a party's Rule 50(a) motion—namely, its entitlement to judgment as a matter of law—cannot be appealed unless that motion is renewed pursuant to Rule 50(b)." (emphasis added) (internal quotation marks omitted)). But Wilson had no occasion or reason to file a Rule 50(b) motion because the jury's verdict was in his favor. The motion-renewal requirement of Rule 50(b) applies only to parties dissatisfied with the verdict—that is, appellants. Now, as an appellee, Wilson can defend the judgment on any ground supported by the record, at least when it is fair to do so. *See Feinberg v. Comm'r of Internal Revenue*, 916 F.3d 1330, 1334 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 49 (2019). There is no unfairness in affirming on the ground of qualified immunity. Wilson properly invoked qualified immunity in the district court and has fully briefed the issue on appeal.

We also reject Cox's apparent assertion at oral argument that qualified immunity is a separate, non-relevant issue, and not an issue on appeal, because the jury was not 19 presented with deciding the issue. To begin with, the argument is untimely. "Arguments that are raised for the first time at oral argument come too late to merit our attention." *United States v. DeRusse*, 859 F.3d 1232, 1240 n.3 (10th Cir. 2017) (brackets and internal quotation marks omitted). Moreover, were we to consider this argument, it would fail because the clearly-established-law component of qualified immunity is not a jury issue. *See Griess v. State of Colo.*, 841 F.2d 1042, 1047 (10th Cir. 1988) ("[W]hether constitutional rights allegedly violated were clearly established for purposes of qualified immunity . . . is a purely legal issue," and therefore "is

appropriate for resolution on appeal." (internal quotation marks omitted)).

III. Conclusion

We **AFFIRM** the district court's judgment in favor of Defendant Wilson

APPENDIX B

United States Court of Appeals
for the Tenth Circuit

Cody William Cox,
Plaintiff-Appellant-Cross-Appellee,

v.

Don Wilson,
Defendant-Appellee-Cross-Appellant.

Nos. 18-1353, 18-1376

Decided: August 19, 2020

Before Tymkovich, Chief Judge, Briscoe, Lucero, Hartz, Holmes, Matheson, Bacharach, Phillips, McHugh, Moritz, Eid, and Carson, Circuit Judges.

ORDER

On May 22, 2020, the court issued its opinion and judgment in these matters. An active judge of the court then called a poll, *sua sponte*, to consider en banc review of the panel decision. Subsequently, the panel *sua sponte* granted panel rehearing to amend its May 22, 2020 opinion for clarification purposes, and circulated its amended opinion to the en banc court.

A majority of the judges in regular active service voted against en banc rehearing, and as a result the poll failed. *See* Fed. R. App. P. 35(a). Judges Lucero and Phillips voted to grant en banc rehearing. Judge Lucero has prepared the attached written dissent from the denial of en banc rehearing, in which Judge Phillips joins.

Pursuant to the panel's *sua sponte* grant of panel rehearing, the original version of the opinion is withdrawn and shall be replaced by the attached amended opinion. Because the amended opinion contains only non-substantive changes that do not affect the outcome of this appeal, it shall be filed *nunc pro tunc* to the date the original opinion was filed.

The mandate shall issue forthwith.

Entered for the Court

CHRISTOPHER M. WOLPERT,
Clerk

18-1353 & 18-1376, Cox v. Wilson

Lucero, J., joined by Phillips, J., dissenting from the denial of rehearing en banc:

Because the panel decision in this case exponentially expands in this circuit the judicially created doctrine of qualified immunity into an all-purpose, no-default, use-at-any-time defense against asserted police misconduct, and because it clearly demonstrates so much of what is wrong with qualified immunity, I requested that my colleagues review the panel decision en banc. From the denial of that request, I respectfully dissent.

Before the panel was an appeal asserting instructional error at trial below, and on cross-appeal, several unrelated evidentiary issues. Instead of expressly ruling on the merits of the issues raised and granting the parties the due process to which they are

entitled, the panel chose to openly entangle the previously denied and dismissed doctrine of qualified immunity into its analysis. It denied the parties a ruling on the merits of their appeal and instead concluded that because police misconduct in a prior case was arguably more egregious than the misconduct at issue in this case—but was nevertheless shielded by qualified immunity—the deputy sheriff in this case is similarly protected by qualified immunity. Specifically, the panel reasons that because the conduct in the prior case was apparently "improp[er]" to "most laypersons" but not in violation of clearly established law, it follows that the officer's conduct in this case is also not a violation of clearly established law. (Op. 18.)

I review the facts: the appellee, Deputy Wilson, pursued a motorist who recklessly drove his vehicle on an icy Interstate 70. Fortunately, the motorist, Cox, drove into a traffic jam that forced him to slow down and allowed Wilson and a second patrol car to box him in. With Cox stopped, Wilson exited his car, approached Cox's vehicle at the passenger window, and—in the panel's words—"[a]lmost immediately" shot Cox in the neck. Cox was unarmed. He is now a quadriplegic.

Suit followed. Deputy Wilson raised qualified immunity in his Answer and, following discovery, moved for summary judgment on the basis of qualified immunity. On the finding that there was a conflict in the evidence on point, the district court denied qualified immunity. Interlocutory appeal was not taken. The case proceeded to trial and ended in a mistrial. Only then did Wilson seek to bring an interlocutory appeal based on the earlier denial of qualified immunity. Because it was untimely, a panel of this court dismissed the appeal. It added that in addition to being

untimely, final judgment had not been entered. The case again proceeded to trial and, following the close of evidence in the second trial, Deputy Wilson sought to raise qualified immunity again—this time in a Rule 50(a) motion for judgment as a matter of law. That motion was denied. A jury verdict was entered favoring Wilson, and an appeal was taken by Cox, presenting a straightforward question: did the district court err in failing to instruct the jury on his theory of the case? Deputy Wilson cross-appealed on three unrelated damages and evidence issues. He did not appeal the issue of qualified immunity but argued in a responsive brief that alternatively, the judgment below could be affirmed on any basis supported by the record, including qualified immunity.[3]

In addressing the issue presented to it by the appellant—whether error was committed in failing to instruct on plaintiff's theory of the case—the panel acknowledges our decision in *Higgins v. Martin Marietta Corp.*, 752 F.2d 492 (10th Cir. 1985), in which we held that "a party is entitled to an instruction of [its] theory of the case only if the theory is supported by competent evidence." *Id.* at 496. This test is satisfied if the requesting party provides "more than a mere scintilla of evidence to support an instruction." *Farrell*

---

[3] Following the second trial, Wilson attempted to appeal the district court's denial of his Rule 50(a) motion in which he raised qualified immunity, but he did not move for a directed verdict on his qualified immunity defense under Rule 50(b). A pre-verdict Rule 50(a) motion "cannot form the basis of [an] appeal." Unitherm Food Sys. v. Swift Eckrich, Inc., 546 U.S. 394, 406 (2006). The panel nevertheless granted qualified immunity notwithstanding this procedural default. This is but one more example of the panel choosing to ignore procedural default and hastening to use the "new and improved" mutated doctrine of qualified immunity

v. Klein Tools, Inc., 866 F.2d 1294, 1297 (10th Cir. 1989). The panel acknowledges that the district court misinterpreted Supreme Court precedent and our own in denying Cox's requested instruction, and it discusses the testimony Cox adduced in support of the instruction from—as the panel put it—an expert with "excellent credentials." (Op. 10-14.) But rather than reach the conclusion compelled by these acknowledgements, the panel resurrects the qualified immunity issue, and from it, fashions something akin to harmless-error review: it concludes the court committed no error at all because "including the sentence omitted by the court would have denied Wilson the qualified immunity to which he was entitled." (Op. 12.)

As has been noted, the text of 42 U.S.C. § 1983 "makes no mention of defenses or immunities." *Baxter v. Bracey*, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting from the denial of certiorari) (quotation and alteration omitted). Qualified immunity is entirely a court-created doctrine. As concerns police officer misconduct, it stems from the Court's 1967 decision, *Pierson v. Ray*, 386 U.S. 547, 556-57 (1967). Following its creation, which intended to prevent frivolous and harassing litigation, *see Pearson v. Callahan*, 555 U.S. 223, 231 (2009), the doctrine has mutated in seemingly unending fashion. The case before us is Exhibit A of that continuing transformation. Much of the problem with the expansion of the doctrine is exacerbated because the Court has failed to give direction on (1) the scope of appellate court power to raise qualified immunity as a basis for disposition of a case when qualified immunity was denied by or not raised before the district court, and (2) the required nexus of particular facts necessary to satisfy the clearly-established element of qualified immunity analysis.

In concluding that Wilson was entitled to qualified immunity, the panel relies solely on the second prong of the qualified immunity inquiry—whether the constitutional right violated "was clearly established at the time of the defendant's unlawful conduct." (Op. 13 (citing *Pauly v. White*, 874 F.3d 1197, 1214 (10th Cir. 2017), cert. denied, 138 S. Ct. 2650 (2018)).) But it ignores that the district court denied qualified immunity to Wilson under this prong because the relevant "factual context [wa]s highly disputed." See *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019) ("Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." (quotation omitted)). And worse, rather than compare the specific facts of the present case with those of prior cases, the panel satisfies itself with comparing the relative perceived egregiousness of police conduct in factually dissimilar cases.

Specifically, the panel relies only on the facts of *Pauly*, a case that did not involve a car chase, vehicular pursuit, or any facts remotely similar to the facts of the instant case. 874 F.3d at 1203-05. Rather, *Pauly* involved a situation in which several officers, on foot, approached the plaintiff's rural home "using their flashlights only intermittently until they neared the front door." (Op. 16.) Fearful that there were intruders, the plaintiff and his brother "asked who was approaching," to which "the officers responded hostilely, yelling[,] 'Hey, (expletive), we got you surrounded. Come out or we're coming in.'" (Op. 16-17 (quotation omitted).) In response, the brothers armed themselves, announced that they had guns, and one of the

officers shot and killed one of the brothers after seeing him point a gun in the officer's direction. (Op. 17.)

These facts bear virtually no resemblance to those of the present case. Nevertheless, the panel relies on *Pauly* to conclude that Deputy Wilson is protected by qualified immunity, stating:

> *Pauly* illustrates the strength of the protection provided by qualified immunity. Unlike Wilson's decision to leave his vehicle to try to disable Cox's vehicle, the impropriety of the alleged actions by the officers before the shooting in *Pauly* would be apparent to most laypersons. Yet the *Pauly* officers were protected by qualified immunity because of the absence of clearly established law prohibiting their conduct. If qualified immunity protects the officers in *Pauly* against the claim of unreasonably creating a dangerous situation that led to the use of deadly force, surely Wilson is similarly protected.

(Op. 18.)[4] Thus, rather than attempt to compare the particular facts of *Pauly* with the particular facts of the present case, the panel compares its *assessment* of the relative impropriety of wholly different misconduct in distinct qualified immunity cases to determine whether the clearly-established prong is satisfied.[5]

---

[4] The quoted language appears in the panel opinion as filed on May 22, 2020.

[5] On August 19, 2020, panel rehearing was granted, and the final sentence in the foregoing quote was deleted. The following words were substituted, nunc pro tunc: "So too, here." This substituted analytical standard, in my judgment, is even more deficient than the standard announced in the deleted sentence. Apparently, trial courts and appellate panels of this circuit need only cite to

No precedent supports this novel, expansive inquiry. The Supreme Court has repeatedly warned lower courts not to assess the clearly-established prong at a high level of generality. See *City of Escondido*, 139 S. Ct. at 503 ("[T]he clearly established right must be defined with specificity. This Court has repeatedly told courts not to define clearly established law at a high level of generality." (quotation and alteration omitted)). "Clearly established" means "the 'contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *DeSpain v. Uphoff*, 264 F.3d 965, 979 (10th Cir. 2001) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). This inquiry must be "particularized" to the facts of the case, *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quotation omitted), and it "must be undertaken in light of the specific context of the case, not as a broad general proposition," *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quotation omitted).

The panel opinion moves far afield of these strictures. At a time when "courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist" for a constitutional violation to be clearly established, *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part), the panel opinion effectively signals to lower courts that they may circumvent issues of factual fit by relying on idiosyncratic assessments of the relative impropriety of officer misconduct. Shifting the focus from "particularized" facts to nebulous notions of comparative impropriety places

---

a previous decision in which qualified immunity has been granted and state, "So too, here." Those words present no reviewable standard whatsoever.

this case squarely into the conflict among our sibling circuits in applying the clearly-established prong. *See id.*; *see also* John C. Jeffries, Jr., What's Wrong with Qualified Immunity?, 62 Fla. L. Rev. 851, 852 (2010) ("[D]etermining whether an officer violated 'clearly established' law has proved to be a mare's nest of complexity and confusion. The circuits vary widely in approach, which is not surprising given the conflicting signals from the Supreme Court.").[6] And it calls for just "the sort of 'freewheeling policy choice[s]'" the Court has "disclaimed the power to make." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) (quoting *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012)).

Further, the panel's most unusual resurrection of the qualified immunity issue to correct a squarely presented trial error similarly invites lower courts to make "freewheeling policy choice[s]" inappropriate under § 1983. *Rehberg*, 566 U.S. at 363. It is a fundamental principle that "[c]ourts do not, or should not, sally forth each day looking for wrongs to right." *Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (quotation omitted). Instead, we generally "decide only questions presented by the parties." Id. (quotation omitted). Though the federal courts of appeals disagree as to whether courts are empowered to raise

---

[6] Illustrating the problem with the reasoning of the panel, it is easy to identify cases in which officers committed arguably less egregious conduct than Wilson and were not protected by qualified immunity. See, e.g., Est. of Ceballos v. Husk, 919 F.3d 1204, 1215-17 (10th Cir. 2019). The panel opinion creates and applies a highly generalized inquiry likely to produce contradictory results in the future.

sua sponte the affirmative defense of qualified immunity on behalf of the government,[7] none have suggested appellate power extends to reversing the trial court's denial of qualified immunity when such reversal has not been appealed—until now. Thus, by resurrecting an issue raised, resolved, and not appealed, the panel takes yet another step down the road of mutating the doctrine into an "absolute shield" against consequences for the violation of constitutional rights. See *Kisela v. Hughes*, 138 S. Ct. 1148, 1155 (2018) (Sotomayor, J., dissenting). As noted, this case is Exhibit A of that metastasis.

For these reasons, the panel's decision is neither "right [n]or just under the law." *Id*. The modern qualified immunity doctrine already sends the "alarming signal to law enforcement officers . . . that they can shoot first and think later." Id. Our panel opinion adds another signal: egregious police misconduct will go unpunished if the court can locate prior, arguably more improper conduct that escaped liability. In other words, the Tenth Circuit now holds that a reasonable officer would *not* "understand that what he is doing violates [a constitutional] right," *Anderson*, 483 U.S. at 640, if "worse" conduct has previously been

---

[7] *Compare Guzmán-Rivera v. Rivera-Cruz*, 98 F.3d 664, 667-68 (1st Cir. 1996); *Bines v. Kulaylat*, 215 F.3d 381, 386 (3d Cir. 2000); *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 226 (4th Cir. 1997); *Kelly v. Foti*, 77 F.3d 819, 823 (5th Cir. 1996); *Summe v. Kenton Cnty. Clerk's Off.*, 604 F.3d 257, 269-70 (6th Cir. 2010); *Narducci v. Moore*, 572 F.3d 313, 323-25 (7th Cir. 2009); *Greer v. Dowling*, 947 F.3d 1297, 1303 (10th Cir. 2020); *Moore v. Morgan*, 922 F.2d 1553, 1557-58 (11th Cir. 1991); and *Robinson v. Pezzat*, 818 F.3d 1, 11 (D.C. Cir. 2016), *with Dean v. Blumenthal*, 577 F.3d 60, 67 n.6 (2d Cir. 2009); *Story v. Foote*, 782 F.3d 968, 969-70 (8th Cir. 2015); and *Graves v. City of Coeur D'Alene*, 339 F.3d 828, 845 n.23 (9th Cir. 2003).

shielded by qualified immunity. This terrible precedent, thus created, is two-fold. One: it allows panels to use qualified immunity, at any stage of litigation, to uphold an otherwise erroneous decision of the district court—notwithstanding a substantial dispute regarding the evidence; notwithstanding the denial of a previous motion not appealed in a timely manner; and notwithstanding the district court denied qualified immunity time and again. Two: it shields police misconduct from liability so long as any other government officer at some point committed—in the panel's mind—more improper conduct and was not held liable. Together, these two pronouncements create a carte blanche which can be scripted and negotiated to counter the public interest and foster the violation of constitutional rights by those charged with protecting them.

Regrettably, this case is one of many illustrating that the profound issues with qualified immunity are recurring and worsening. "Given the importance" of these issues, we can no longer delay confronting them. *Baxter*, 140 S. Ct. at 1865 (Thomas, J., dissenting from the denial of certiorari). Particularly in light of recent—though not novel—unrest, at least one of our sibling circuits has recognized that the relentless transformation of qualified immunity into an absolute shield must stop. See *Est. of Jones by Jones v. City of Martinsburg*, 961 F.3d 661, 673 (4th Cir. 2020), *as amended* (June 10, 2020). But as it stands in the Tenth Circuit, the panel opinion allows courts to finesse ambiguities to avoid confronting the hard issues presented. And that's a denial of due process any way you look at it. By continuing to await addressing deep and troubling qualified immunity issues brought to our attention time and again, we are complicit in this denial.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Judge William J. Martínez

Civil Action No. 15-cv-0128-WJM-NYW

CODY WILLIAM COX,

Plaintiff,

v.

DON WILSON,

Defendant.

Filed: August 5, 2016

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This case arises out of a police use-of-force incident between Plaintiff Cody William Cox ("Plaintiff") and Defendant Don Wilson ("Defendant") that occurred on January 31, 2014. (ECF No. 1 at 1.) As a result of this incident, Plaintiff brings suit against Defendant under 42 U.S.C. § 1983. (ECF No. 1 at 3.)

This matter is before the Court on Defendant's Motion for Summary Judgment (the "Motion," ECF No. 62), filed on December 11, 2015. Plaintiff responded to the Motion on December 31, 2015. (ECF No. 71). On January 14, 2016, Defendant filed his Reply in Support of the Motion for Summary Judgment.

(ECF No. 80.) For the reasons set forth below, the Court denies the Motion.

I. BACKGROUND

A. The Pursuit

The following facts are undisputed, unless attributed to one party or another, or otherwise noted. Deputy Kevin Klaus of the Clear Creek County Sheriff's Office asserts that on Friday, January 31, 2014, he received a report of a silver pickup truck that was involved in a hit-and-run going west on I-70. (ECF No. 62-2 ¶ 2.) Plaintiff was the driver of the pickup, which turned out to be a silver Toyota pickup truck. (*See* ECF Nos. 71 at 1–2, 71-3 at 38.) Klaus pursued the truck in his patrol vehicle with his emergency lights on; however his siren was not working. (*Id.* ¶¶ 5–6.) The road was slick due to a light covering of snow and according to Klaus there were "a lot of cars on the road heading to the mountains for the weekend." (*Id.* ¶ 7.) At approximately mile marker 232.5, Klaus asserts that he first observed the silver pickup spinning out of control and "fishtailing" back and forth as it drove. (*Id.* ¶¶ 8–9.) Klaus continued to pursue the pickup and reported that the vehicle was failing to yield to him. (ECF No. 62-3 at 1.)

Defendant, another deputy sheriff with the Clear Creek County Sheriff's Office, heard Klaus's report and also began pursuing the silver pickup truck. (*Id.*) Defendant caught up with Klaus and the pickup truck near mile marker 230 where they were "nearly stopped" in "stop-and-go" traffic. (ECF No. 62-4 at 8–9.) Defendant turned off his siren and instead made an announcement over his vehicle's public address system, saying, "[d]river of the grey truck, pull over

and stop." (ECF No. 62-3 at 1.) At some point, Defendant pulled alongside Plaintiff's pickup on Plaintiff's right side, but Plaintiff continued forward. (*Id.* at 2.) Defendant pulled alongside Plaintiff a second time and rolled down his window. (*Id.*) Plaintiff rolled down his passenger-side window as well. (*Id.*) When Defendant told Plaintiff to turn off his truck, Plaintiff responded "I will, I will." (*Id.*) However, rather than turn off his truck, Plaintiff accelerated through a gap in traffic. (*Id.*) Defendant pulled alongside Plaintiff a third time and Plaintiff once again said he would turn off the vehicle, but continued through traffic instead.

B. The Shooting Incident

Finally, Defendant pulled alongside Plaintiff for a fourth time near mile marker 228.5. (*See* ECF No. 62-3 at 2.) Plaintiff's vehicle was stopped in the left lane of traffic. (*Id.*) Defendant's patrol vehicle was directly to the right of Plaintiff's and Deputy Klaus's vehicle was directly behind Plaintiff. (*Id.*) Directly in front of Plaintiff's truck was a vehicle being driven by Sarah Nix, an unaffiliated witness to the incident. (ECF No. 62-6 at 1-3.) Each of these four drivers has provided their version of the facts that took place when these four vehicles met at mile marker 228.5. The Court will now recount each of their stories.

1. Defendant

Defendant spoke to Plaintiff through his driver-side window and Plaintiff's passenger-side window, which were aligned. (ECF No. 62-3 at 2.) Defendant again commanded Plaintiff to turn off his truck. (*Id.*) Defendant claims that Plaintiff rammed the front of his truck into Ms. Nix's vehicle twice, rolling back with each impact. (ECF No. 62-4 at 18–19.) Defendant

pulled his vehicle ahead and to the right a few feet, "so that [he] could exit [his] patrol car, without giving [Plaintiff] an opening." (ECF No. 62-3 at 2.) At this point three or three and a half feet separated Plaintiff's truck and Defendant's vehicle. (ECF No. 62-4 at 21.)

Defendant exited his vehicle and approached Plaintiff's passenger door. (ECF No. 62-3 at 2.) As that happened, Defendant says Plaintiff's truck struck Ms. Nix's vehicle a third time. (ECF No. 62-4 at 17–18.) Defendant claims that as he reached for the passenger door handle on Plaintiff's truck, the truck "turned [its] wheels toward" Defendant and "came toward" Defendant. (ECF No. 62-3 at 2.) Defendant took two steps backward and fired his sidearm at Plaintiff. (ECF No. 62-4 at 23.) The bullet from Defendant's firearm struck Plaintiff, who became unresponsive. (ECF No. 62-3 at 3.) After the shot, Plaintiff's truck moved forward and struck Ms. Nix's vehicle again. (ECF No. 62-4 at 22.) Defendant asserts that this was "the lightest of all the strikes." (*Id.*)

2. Plaintiff

Plaintiff contests several of Defendant's factual assertions regarding what took place at the scene of the shooting. Specifically, he denies that Defendant accurately stated the location of Plaintiff's truck relative to the other vehicles. (ECF No. 71 at 8–9.) Plaintiff denies that his vehicle made contact with Ms. Nix's vehicle before the gunshot. (*Id.* at 9.) Plaintiff denies that his hands were on the steering wheel at the time of the gunshot. (*Id.*) Lastly, Plaintiff denies that his truck made any significant movement—at all, or towards defendant—in the moment prior to the

shooting. (*Id.* at 10.) To support these denials, Plaintiff cites to the deposition testimony of Deputy Klaus and Sarah Nix, whose stories are detailed below.

Plaintiff's own deposition testimony is limited by Plaintiff's diminished memory of the events of January 31, 2014. (*See* ECF No 62-11.) Plaintiff has no memory of any police patrol vehicles and remembers very little of his driving on I-70 that day. (*Id.* at 7–8.) Before losing consciousness from the gunshot, Plaintiff remembers being stopped in traffic with a car in front of him. (*Id.* at 9.) Plaintiff does admit that his vehicle moved slightly after stopping at the scene of the shooting. (ECF No. 71 at 8.)

Nevertheless, Plaintiff contends that his truck's wheels were facing straight ahead at the time of the gunshot. (ECF No. 71-1 at 57–62.) He does not recall hitting the vehicle in front of him at any time. (ECF No. 62-11 at 9.)

3. Deputy Klaus

When the vehicles reached the location of the shooting, Deputy Klaus observed Plaintiff's truck back up "about one foot." (ECF No. 62-2 ¶ 26–28.) Deputy Klaus saw Defendant exit his patrol vehicle, and assumed that traffic ahead of the truck was stopped. (*Id.* ¶ 30.) Deputy Klaus exited his patrol vehicle as well and approached Plaintiff's truck from the driver's side. (*Id.*) Deputy Klaus noticed Plaintiff's truck moving back and forth "slightly" but he commented that "[i]t wasn't the tires turned and trying to dodge through right then and there [sic]." (ECF No. 71-1 at 50.) Deputy Klaus heard a loud pop sound, and assumed Defendant had tased the driver. (ECF No. 62-2 ¶ 34.) He reached through the open driver-side window, unlocked the door, pulled Plaintiff out of the

truck, and handcuffed him. (*Id.*) Defendant informed Deputy Klaus that Plaintiff had been shot, so Klaus removed Plaintiff's handcuffs and applied pressure to his wound. (*Id.*)

4. Sarah Nix

Sarah Nix saw and heard Defendant's patrol vehicle behind her, and pulled to the left on the highway. (ECF No. 62-6 at 2.) Ms. Nix stopped her vehicle and noticed Plaintiff stop his vehicle behind her, while Defendant's patrol vehicle was stopped to the right of Plaintiff. (*Id.* at 4.) Ms. Nix heard Defendant over a loudspeaker "yelling . . . 'Turn off your vehicle.'" (*Id.* at 3.) She eventually realized that Defendant was speaking to Plaintiff, and not her, so she began to pull forward. (*Id.* at 4) However, each time she pulled forward, both Plaintiff and Defendant also pulled forward. (*Id.*) Ms. Nix didn't want Defendant to become angry, so she "stay[ed] put" for the rest of the incident. (*Id.* at 4–5.) Ms. Nix estimated that, at this time, Plaintiff's truck was about 6 to 12 inches behind her vehicle. (*Id.* at 6.) She also noted that her vehicle was further to the left on the road than was Plaintiff's truck. (*Id.*)

Ms. Nix noticed Defendant open his door to exit his patrol vehicle. (*Id.* at 7.) Some time after that, within a single second, Ms. Nix heard a pop, she saw Plaintiff slump over in his seat in her rear-view mirror, and Plaintiff's truck hit her vehicle. (Id. at 27–28.) She is not certain which of these events happened first. (Id. at 28.) Ms. Nix described the contact from the vehicles colliding as "a tap." (Id. at 28.) Ms. Nix asserts that this was the first and only time that Plaintiff's truck contacted her vehicle. (Id. at 33.)

II. LEGAL STANDARD

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Henderson v. Inter-Chem Coal Co.,* Inc., 41 F.3d 567, 569 (10th Cir. 1994). Whether there is a genuine dispute as to a material fact depends upon whether the evidence presents a sufficient disagreement to require submission to a jury or, conversely, is so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248–49 (1986); *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132 (10th Cir. 2000).

A fact is "material" if it pertains to an element of a claim or defense; a factual dispute is "genuine" if the evidence is so contradictory that if the matter went to trial, a reasonable jury could return a verdict for either party. *Anderson*, 477 U.S. at 248. The Court must resolve factual ambiguities against the moving party, thus favoring the right to a trial. *Houston v. Nat'l Gen. Ins. Co.*, 817 F.2d 83, 85 (10th Cir. 1987).

III. ANALYSIS

In his Motion, Defendant argues that he is entitled to summary judgment based on the doctrine of qualified immunity. (ECF No. 62 at 1.) When a defendant asserts qualified immunity at the summary judgment stage, "the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established." *Morris v. Noe*, 672 F.3d 1185, 1191 (10th Cir. 2012). If Plaintiff cannot meet this burden, qualified immunity will apply and Defendant will be shielded from liability on Plaintiff's § 1983 claim.

Plaintiff contends that Defendant used excessive force when he shot Plaintiff, in violation of Plaintiff's Fourth Amendment right against unreasonable seizure. (ECF No. 71 at 1.) Plaintiff further argues that, at the time of the shooting, clearly established law indicated that Defendant's use of deadly force was constitutionally unreasonable. (*Id.* at 2.) The Court will address each of these arguments, in turn.

B. Constitutional Violation

Claims of excessive force by law enforcement officers arise under the Fourth Amendment and are analyzed under the Fourth Amendment's "objective reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 388 (1989). "The question is whether the officer['s] actions are 'objectively reasonable' in light of the facts and circumstances confronting [the officer], without regard to [the officer's] underlying intent or motivation." *Id.* at 397. Reasonableness is evaluated under a totality of the circumstances approach, which requires that the Court consider and balance three factors: (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether he is actively resisting arrest or attempting to evade arrest by flight." *Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1313 (10th Cir. 2009) (quoting *Graham*, 490 U.S. at 396). When the allegedly excessive force is "deadly force"[1] then the force is "justified only if a reasonable officer in the officer's position would have had probable cause to believe that there was a threat of serious

[1] The Court considers a gunshot to Plaintiff's body to be "deadly force." Deadly force is such force that creates substantial risk of causing death or serious bodily harm. *Thomson*, 584 F.3d at 1313.

physical harm to himself or others." *Cordova v. Aragon*, 569 F.3d 1183, 1192 (10th Cir. 2009) (emphasis added).

1. Defense of Self

Defendant first argues that his use of deadly force was reasonable because Plaintiff's use of his vehicle presented an imminent threat of serious physical harm to the officer himself. (*See* ECF No. 62-1 at 22–23.) An officer may generally use deadly force if threatened by a weapon, which may include a vehicle attempting to run over the officer. *Thomas v. Durasanti*, 607 F.3d 655, 664 (10th Cir. 2010). Defendant asserts that Plaintiff's truck moved towards him immediately prior to the gunshot, and thus he reasonably believed that a use of deadly force was justified to prevent the serious physical harm of being pinned between Plaintiff's truck and his own patrol vehicle. (ECF No. 62-1 at 29–30.)

In assessing the reasonableness of Defendant's belief, the Court notes that several key facts are disputed between the parties, specifically regarding what took place at the final location of the shooting at mile marker 228.5. The Court must consider "whether the evidence, viewed in the light most favorable to the party asserting the injury, shows that the alleged wrongdoer violated a constitutional right." *Hays v. Ellis*, 331 F.Supp. 2d 1303, 1307 (D. Colo. 2004.) Viewing the evidence in the light most favorable to Plaintiff, a reasonable jury could conclude that, at the time of the shooting, Plaintiff's truck was stationary or engaged in slight rocking movements (ECF Nos. 62-11 at 9, 71-1 at 50), the truck's wheels were facing directly forward (ECF No. 71-1 at 57–62), and the front of the truck was within 6 inches of Ms. Nix's vehicle

(ECF No. 62-6 at 6). In addition, a reasonable jury could conclude that Defendant was standing near the passenger-side door of Plaintiff's truck and not directly in front of or behind the truck. (ECF No. 62-3 at 2.) On these facts, Defendant would not appear to be endangered by any movements of Plaintiff's vehicle.

Defendant cites to *Thomas v. Durasanti*, 607 F.3d 655, 664 (10th Cir. 2010), a Tenth Circuit decision in which the court found no Fourth Amendment violation by a police officer who fired his weapon at individuals inside a moving vehicle. However, in that case, the police officer defendant "undoubtedly was in the [vehicle's] path" when his first shots were fired.[2] favorable to Plaintiff, Defendant was not undoubtedly in the vehicle's path, since Plaintiff's truck was not moving in the direction of Defendant. Since a reasonable jury could find that Plaintiff's vehicle was not moving towards Defendant at the time of the shooting, the Court cannot say as a matter of law that a reasonable officer in Defendant's position would have had probable cause to believe that there was a threat of serious physical harm to himself.

Additionally, in conducting a reasonableness analysis regarding excessive force, the Court must also consider "whether [Defendant's] own reckless or deliberate conduct . . . unreasonably created the need to use force." *Thomas*, 607 F.3d at 664. The question,

---

[2] The officer in *Thomas* also fired additional shots when not in the path of the vehicle which were deemed to be reasonable by the Tenth Circuit. *Thomas*, 607 F.3d at 666. However, this was because the officer was struck by the vehicle between his first and second sequence of gunshots, and the Court found his misperception to be reasonable given this "disorienting experience." Id.

here, is whether Defendant's conduct in exiting his vehicle in the middle of a highway, within feet of multiple vehicles, was reckless in a way that created the need to use deadly force. Plaintiff provides an affidavit of Lou Reiter, a former police officer for 20 years. (ECF No. 71-5 at 1.) According to Reiter, Defendant's attempt to stop Plaintiff from driving erratically was a "high-risk stop." (*Id.* at 2.) Reiter asserts that, during high-risk stops officers are trained not to approach the person being stopped until that vehicle is not operational. (*Id.*) If the vehicle remains operational, the officer is trained to wait for adequate backup and to treat the situation as a "barricaded subject" incident. (*Id.* at 2–3.) Reiter says that Defendant's actions in exiting his vehicle were "reckless" and could have "cause[d] him to . . . resort to the use of unreasonable force." (*Id.* at 3.) Because a reasonable jury could accept that view of Defendant's conduct, a question remains as to whether Defendant unreasonably created the need to use force.

Defendant also argues that even if Plaintiff's vehicle was not moving towards Defendant, Plaintiff could still be justified due to his mistaken belief that the truck was moving towards him. *Saucier*, 533 U.S. at 205 ("If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.") Of course, Defendant is not entitled to any mistaken belief, only reasonable ones. Here, Defendant's potential mistaken belief that Plaintiff was driving towards him would be unreasonable taking the facts in the light most favorable to Plaintiff. A reasonable jury could find that Plaintiff's vehicle was essentially stopped in traffic, his wheels were facing forward, and that he never struck Ms. Nix's vehicle until after the gunshot. Deputy Klaus

admits that he did not hear Plaintiff's "engine revving." (ECF No. 71-1 at 50.) On these facts, it would be unreasonable for Defendant to mistakenly believe that Plaintiff rammed the car in front of him, the wheels of Plaintiff's truck turned to the right, and Plaintiff's truck accelerated towards him.

Therefore, to the extent Defendant claims that he was acting in order to defend himself, the Court cannot conclude as a matter of law that Defendant acted in an objectively reasonable manner.

2. Defense of Others

In his Motion, Defendant argues that a reasonable officer in his position would have had probable cause to believe that there was a threat of serious physical harm to others: i.e., the other drivers on I-70. (ECF No. 62-1 at 27–28.) In viewing the facts in a light most favorable to Plaintiff, Plaintiff's vehicle was not moving significantly prior to the shooting. Furthermore, there was little space, if any, for Plaintiff's truck to escape from the box created by the guardrail and Defendant's, Klaus's, and Nix's vehicles. Also, certain facts indicate that the confined conditions of the road were not going to be alleviated any time soon. Deputy Klaus asserts that when Defendant exited his vehicle, it indicated to him that traffic was not moving in front of Plaintiff's truck. (ECF No. 62-2 ¶ 30.) A jury could reasonably infer that Defendant would not have exited his vehicle if he thought it was possible that Plaintiff had the ability to drive away. In fact, Defendant himself stated as much when he asserted that he positioned his patrol vehicle so that he could exit the car "without giving the driver of the truck an opening." (ECF No. 62-3 at 2.) Thus a reasonable jury could

find that Plaintiff could not have escaped or accelerated enough to cause serious physical harm to other drivers.

Defendant cites two Eleventh Circuit cases—which are not binding on this Court—to support his position that Defendant acted reasonably to defend others. First, Defendant cites *Robinson v. Arrugueta*, 415 F.3d 1252 (11th Cir. 2005) for the proposition that a suspect's slow driving does not preclude a finding that an officer was reasonable in using deadly force. In that case, a driver was moving at one or two miles per hour when he was shot by an officer. *Id.* at 1254. However, in that case, the plaintiff was driving directly towards an officer who shot to defend himself from serious harm. *Id.* Those are not the facts of the case at hand, when viewed in a light most favorable to Plaintiff. Second, Defendant cites *Pace v. Capobianco*, 283 F.3d 1275 (11th Cir. 2002) for the proposition that an officer may be reasonable in using deadly force even when a suspect's vehicle had come to a stop. However, in that case, the court specified that the suspect's vehicle came to a stop for "at most, a very few seconds" and that the officer fired shots "within a moment" of the vehicle stopping. *Id.* at 1278. In the case at hand, given the evidence in the record, a reasonable jury could find that Plaintiff was stopped in traffic or moved only minimally for more than a few seconds.[3]

[3] A more relevant Eleventh Circuit case would be Morton v. Kirkwood, 707 F.3d 1276 (11th Cir. 2013). In that case, Officer Kirkwood shot a driver, Mr. Morton, and alleged that Morton had accelerated towards him when he was standing in front of the car. Id. at 1282. However, the court found that Kirkwood was not en-

Defendant also attempts to rely on Plaintiff's reckless driving before arriving at the location of the shooting, as evidence that the use of deadly force was justified. However, in his deposition, Defendant asserts that he "really hadn't been behind [Plaintiff] long enough to determine he was intoxicated. I didn't see all his driving." (ECF No. 62-4 at 25.) He continues, "all I knew was I was dealing with a person who desperately wanted to get away from law enforcement." (*Id.*) In viewing the facts in a light most favorable to Plaintiff, Plaintiff was not evading law enforcement once he was stopped in traffic at mile marker 228.5. Furthermore, Plaintiff's earlier evasive driving is not sufficient on its own to permit a use of deadly force. The Court reiterates that "deadly force is justified only if a reasonable officer in the officer's position would have had probable cause to believe that there was a threat of serious physical harm to himself or others." *Cordova*, 569 F.3d at 1192 (emphasis added).

In *Cordova*, the Tenth Circuit addressed the distinction between reckless driving and presenting a threat of serious physical harm to others. In that case, Mr. Cordova repeatedly refused to stop for patrol cars with lights and sirens activated, twice drove off the road to avoid spike strips, ran through two red lights, and began to drive in the wrong direction on the highway, I-76. Cordova, 569 F.3d at 1186. At that point, Mr. Cordova was fatally shot by an officer. *Id.* at 1187. Nevertheless, the Tenth Circuit held that "when an officer employs such a level of force that death is nearly certain, he must do so based on more than the

---

titled to qualified immunity based on the facts as alleged by Morton, who asserted that his car was stationary, and his hands were off the steering wheel. *Id.* at 1279, 1282.

general dangers posed by reckless driving." *Id.* at 1190. In that case, the Court found that a legitimate dispute of fact existed as to whether there were any other motorists in the immediate area who would have been put in risk of serious physical danger from Mr. Cordova's actions.[4] Thus, despite Mr. Cordova's reckless driving, the Tenth Circuit held that it could not say that the defendant officer acted reasonably, in shooting Mr. Cordova, given the existing disputes of fact in the record. *Id.* at 1191-92.

Mr. Cordova was arguably *more* reckless in his driving than Plaintiff in the case at hand. Therefore, reckless driving on its own was not legally sufficient to justify the use of potentially deadly force by Defendant against Plaintiff.

Lastly, in performing its reasonableness assessment, the Court will consider whether the type of deadly force used by Defendant was justified in this situation. The Tenth Circuit has held that the Supreme Court "strongly suggests that the reasonableness balancing must take into account that there is a spectrum of 'deadly force'". *Cordova*, 569 F.3d at 1189 (citing *Scott v. Harris*, 550 U.S. 372 (2007)). "[J]ust because a situation justifies ramming [a vehicle] does not mean it will justify shooting a suspect in the head." *Id.* In the case at hand, due to the close quarters and slow speed of the traffic jam, Plaintiff's driving posed a relatively low risk to those sitting in vehicles around him. A reasonable jury could conclude that shooting Plaintiff in these circumstances was entirely disproportionate to the risk to others created by

[4] In Cordova, the issue as to whether the defendant officer was in immediate danger himself was not raised on appeal. Cordova, 569 F.3d at 1187.

a low-speed traffic accident. Ramming Plaintiff's vehicle to push him off the road and ensure that he could not continue driving could have served Defendant's intentions of "protecting others" without so certainly risking significant injury to Plaintiff. Furthermore, if ramming is preferable to shooting in certain situations, it also follows that non-deadly force is preferable to deadly-force if it would adequately protect the interests of safety. Given that seconds after Defendant's gunshot, Deputy Klaus was able to reach into Plaintiff's vehicle, open the door, and pull him out, a reasonable jury could find that shooting Plaintiff was not justified in this situation.

Thus, to the extent that Defendant claims he acted in a manner calculated to defend third parties from harm, the Court cannot conclude that as a matter of law the Defendant acted in an objectively reasonable manner. Under a set of facts which a reasonable jury could find to be true, Defendant did not act in an objectively reasonable manner and, therefore, violated Plaintiff's Fourth Amendment Right against unreasonable seizure.

B. Clearly Established Constitutional Right

The question, here, is whether it was clearly established on January 31, 2014, that Defendant's actions (based on a view of the facts most favorable to Plaintiff) violated the Fourth Amendment. "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court of Tenth Circuit decision on point . . . ." *Zia Trust Co. ex rel. Causey v. Montoya*, 597 F.3d 1150, 1155 (10th Cir. 2010). However, the "Supreme Court has warned that 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.'" *Casey v. City of*

Fed. Heights, 509 F.3d 1278, 1284 (10th Cir. 2007) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). According to the Tenth Circuit, the Hope decision "shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional." *Casey*, 509 F.3d at 1284. *See also Saucier v. Katz*, 533 U.S. 194, 202 (2001) ("If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.") The Tenth Circuit has accordingly adopted a sliding scale test to determine when law is clearly established. *Casey*, 509 F.3d at 1284. "The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to establish the violation." *Id.*

Although none of the cases cited by the Court in the prior section pertain to the exact same factual situation as Defendant faced on January 31, 2014, the Court still concludes that Supreme Court and Tenth Circuit precedent establish that Defendant's actions—viewed in a light most favorable to Plaintiff—violated Plaintiff's Fourth Amendment rights. *Graham*, *Cordova*, *Saucier*, *Thomson*, *Thomas*, *Scott*, and even *Robinson*, *Pace*, and *Morton* are all decisions from before January 31, 2014. Given that precedent, Defendant was on notice that it was unlawful for him to use deadly force against Plaintiff, when he did, if the facts of the situation were as Plaintiff asserts.

A court decision with "identical facts" is not required to "establish clearly that it is unreasonable to use deadly force when the force is totally unnecessary to restrain a suspect or to protect officers, the public,

or the suspect himself." *Weigel v. Broad*, 544 F.3d 1143, 1154 (10th Cir. 2008). Under a certain view of the facts which a reasonable jury could accept, Plaintiff's truck was stopped in traffic, the police had the ability to remove Plaintiff from the truck or to impede the progress of his truck without a firearm, the truck never moved toward Defendant after he exited his patrol vehicle, and the truck was "bound in" such that it could not pose a serious risk of physical harm to Defendant or others. Given those facts a reasonable jury could conclude that it was totally unnecessary to use deadly force to restraint the suspect or to protect officers and the public.

Thus, under at least one view of the facts that a reasonable jury could adopt, Defendant violated a clearly established right. There may be other interpretations that a jury could accept, some of which might entitle Defendant to qualified immunity and others which would not. The Court's task at this summary judgment phase is only to determine whether there is any reasonable interpretation of the evidence that would deprive Defendant of the defense of qualified immunity. Here, such an interpretation exists, and so the Court may not rule as a matter of law before trial that Defendant is immune from suit. Summary judgment on qualified immunity grounds is therefore inappropriate.

IV. CONCLUSION

For the reasons set forth above, Defendant's Motion for Summary Judgment (ECF No. 62) is DENIED.

Dated this 5th day of August, 2016.

BY THE COURT:

William J. Martínez
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-0128-WJM-NYW

CODY WILLIAM COX,

Plaintiff,

v.

DON WILSON, in his individual capacity

Defendant.

Filed: November 30, 2018

REPORTER'S TRANSCRIPT OF JURY TRIAL – DAY 7, VOLUME VII
BEFORE THE HONORABLE WILLIAM J. MARTINEZ
UNITED STATES DISTRICT JUDGE

---

* * *

THE COURT: All right. So, you're referencing back to your arguments at the first Rule 50(a) and your summary judgment motion in response with respect to qualified immunity and you're standing on that?

MR. SCHERER: Yes, Your Honor.

THE COURT: Okay. All right. Thank you. All right. I'm prepared to rule on the defendant's motion.

This matter is before me on defendant's oral motion, which was initially before me at mid-trial, but judgment as a matter of law under Federal Rule of Procedure 50(a). A jury trial on this case commenced on Monday, August 13th, 2018. Plaintiff rested his case on Thursday, August 16th. Defendant made his Rule 50(a) motion at the time on matters of liability and qualified immunity, and also as to past medical losses.

Concerning past medical losses, I granted the defendant's motion given defendant's lack of evidence on those matters. I reserved ruling as to the liability and qualified immunity issues. For the reasons that follow, I deny the remaining portion of the defendant's motion:

In considering defendant's Rule 50(a) motion, the Court is required to consider all the evidence presented at trial, must review the record as a whole, and must draw all reasonable inferences in favor of the nonmoving party. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions and not those of a judge." That from *Reeves v. Sanderson*, 530 United States 133 at 150, a 2000 opinion.

The Court may grant the motion only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position. *Bristol v. Board of County Commissioners of County of Clear Creek* of all the counties -- 281 F.3d 1148, 1161, a Tenth Circuit decision from 2002.

Defendant has moved for judgment as a matter of law on plaintiff's sole claim for use of excessive force during arrest in violation of the Fourth Amendment. Plaintiff brought this claim under 42 United States Code Section 1983. Plaintiff has the burden of establishing each essential elements of -- each essential element of this claim by a preponderance of the evidence. The elements of plaintiff's claim include, first, that defendant deprived the plaintiff of his Fourth Amendment right not to be subjected to unreasonable force during apprehension or arrest; second, that defendant was acting under the color of state law; and, third, that the defendant's acts were the proximate cause of damages suffered -- or sustained, rather, by the plaintiff.

The only element on which defendant moves for judgment is the first element, whether unreasonable force was used under the circumstances. Claims based on the use of excessive force during arrests are governed by the objective reasonableness standard of the Fourth Amendment, following *Graham v. Connor*, 490 United States -- U.S. 386 at pages 394 to 395, a 1989 U.S. Supreme Court Decision.

To prevail, plaintiff must put forth sufficient evidence to show that defendant Wilson's use of force was objectively unreasonable. "The question is whether the officer's actions are objectively reasonable in light of the facts and circumstances confronting the officer without regard to the officer's underlying intent or motivation." That is a quote from the *Graham* decision, 490 U.S. at 397.

Under Tenth Circuit precedent, the reasonableness of defendant's use of force is evaluated under a totality of the circumstances approach. Factors to be considered and balanced include the severity of the

crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he was actively resisting arrest. This is from *Thompson v. Salt Lake County*, 583 F.3d 1304, at 1313, Tenth Circuit decision from 2009.

In addition, because defendant Wilson used deadly force by shooting plaintiff, objective reasonableness depends on whether there was probable cause to believe that there was a threat of serious physical harm to the defendant, himself, or to others at the time he used deadly force.

This is from *Tenorio v. Pitzer*, 802 F.3d 1160 at page 1164, Tenth Circuit decision from 2015.

Taking all of this into account, the determination of reasonableness depends on the particular facts and circumstances in this case. *Thompson*, 583 F.3d at 1313.

The Tenth Circuit has ascribed this determination as "the fact bound morass of reasonableness." That's a great quote. *Cordova v. Aragon*, 569 F.3d 1183 -- 1183 at 1188, Tenth Circuit, 2009.

The factors which enter into this determination are "only aids in make the ultimate determination, which is whether from the perspective of a reasonable officer on the scene, the totality of the circumstances justify the use of force." *Tenorio*, 802 F.3d at 1164.

Viewing the facts in the light most favorable to the plaintiff, the Court finds that the plaintiff has introduced sufficient evidence to show that the use of force against him was unreasonable under all the circumstances. First, a reasonable jury could rely on the testimony of Ms. Kincaid to conclude that plaintiff's vehicle was either stopped or barely moving within inches behind her own vehicle and facing forward in

the lane and not pointed to the left or the right at the time the defendant decided to use deadly force.

Ms. Kincaid also testified that she does not remember plaintiff's car backing up or moving towards defendant Wilson, and that plaintiff's vehicle was trapped between her vehicle, the guardrail, and defendant Wilson's vehicle.

Ms. Kincaid testified that she remembered plaintiff's vehicle hitting her own at about the same time when she heard defendant Wilson's shot and saw plaintiff slump in his vehicle, but she did not remember plaintiff's vehicle hitting her at any other time -- or at any time before.

She also testified that she could not say whether she saw the plaintiff make any attempt to direct his vehicle at the defendant. And Ms. Kincaid never testified that plaintiff's behavior caused her to fear for her safety. From Ms. Kincaid's testimony, a reasonable jury could conclude that the plaintiff was unable to move his vehicle from its position, that he was not attempting to flee at the time Deputy Wilson discharged his sidearm, and that at the time of the shooting, plaintiff did not move his vehicle in a way that put Deputy Wilson or others in imminent danger.

Second, a reasonable jury could similarly rely on the testimony of Lieutenant Gremillion and the photographs and diagrams from the scene admitted into evidence. This evidence and testimony tended to show that plaintiff's vehicle was directed straight forward in the lane and that the front wheels were not turned in either direction, but were parallel to the direction of travel. A reasonable jury could conclude from this evidence that plaintiff did not move his vehicle in a

manner that defendant Wilson could have reasonably perceived as a threat to himself or others.

Third, Deputy Klaus testified that, once plaintiff was pinned in, he did not move his vehicle in a threatening way. Deputy Klaus also testified that he had drawn his taser at the scene rather than his sidearm, and that after defendant shot plaintiff, Klaus assumed that Wilson had used a taser.

Deputy Klaus also testified that the moment -- that the moment the shot was fired, he did not notice plaintiff's vehicle make any movement that in his view would put him in immediate danger of serious bodily injury. From this testimony, a reasonable juror could infer that Deputy Klaus viewed the use of non-deadly force, namely, a taser, rather than a firearm, to be the appropriate response in this circumstance and, thus, conclude that the use of a deadly force was objectively unreasonable.

As to the Rule 50 motion as renewed after the close of the defendant's evidence, additional evidence adduced in the defendant's case in chief, could further support a jury conclusion that the defendant's use of deadly force was not objectively reasonable. In particular, Mr. Wilson's testimony presented a version of events that is arguably inconsistent with his own prior statements and incompatible with the versions of events presented by Deputy Klaus and Ms. Kincaid, respectively.

The most notable examples of incompatibilities are two-fold. The first is Mr. Wilson's testimony that plaintiff was repeatedly making contact with Ms. Kincaid's rear bumper and pushing her forward, in contrast to Ms. Kincaid's testimony of being hit once and

sustaining nearly imperceptible damage to her rear bumper.

The second is Mr. Wilson's testimony that plaintiff, after he was boxed in, was able to back up so far that his front bumper was behind the rear bumper of Mr. Wilson's own vehicle or, in other words, that plaintiff had enough space behind him to back up and create a car length gap between his vehicle and Ms. Kincaid's vehicle. This is in contrast to Deputy Klaus' testimony that he stopped his truck only a few feet behind plaintiff's vehicle and he did not move his truck again until after -- hours after the incident.

Under Deputy Klaus' version, plaintiff could not have backed up more than a few feet and certainly not far enough so that any alleged right-turn maneuver could have pinned Mr. Wilson between the front passenger side panel of plaintiff's truck and the rear driver's side wheelwell of Mr. Wilson's truck. From these consistencies and incompatibilities, the jury could conclude at a minimum that Mr. Wilson did not testify truthfully. If the jury so concludes, it would be well within the realm of reasonable inference that Mr. Wilson testified untruthfully because the actual facts did not justify an objectively reasonable use of deadly force.

I now turn to qualified immunity. "Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing, one, that the official violated a statutory constitutional right, and, two, that the right was clearly established at the time of the challenged conduct." That from *Ashcroft v. Al-kidd*, A-l hyphen k-i-d-d, 563 United States 731 at 735, a 2011 decision from the Supreme Court.

Assuming the jury credits evidence such as that I already discussed and concludes that Mr. Wilson shot plaintiff without any reasonable fear of his own or other safety, then the first part of the qualified immunity test is satisfied.

As for whether the law was clearly established on January 31, 2014, I reaffirm my analysis in my summary judgment order at ECF 100. However, in light of Mr. Wilson's specific arguments made at this trial, I note that this case cannot be properly analogized to other so-called car chase cases, such as *Borsseau*, B-o-r-s-s-e-a-u, v. *Haugen*, H-a-u-g-e-n, 543 United States 194, 2004 decision from the Supreme Court, *Scott v. Harris*, 550 United States 372, 2007 decision from the Supreme Court, or *Mullenix v. Luna*, 136 S. Ct. 305, a 2015 decision. In all those cases, the Supreme Court held on the record presented that the lawfulness or unlawfulness of any potentially deadly measures used to stop a fleeing motorist had not been clearly established. However, in all those cases, the relevant factual context was beyond dispute or viewed in the light most favorable to the motorist.

Here, the factual context is highly disputed. Given the facts in the light most favorable to the plaintiff, as the Court must for purposes of Rule 50, a jury could decide that the plaintiff posed no imminent threat at the time he was shot and that no reasonable police officer in the same circumstances could have perceived an imminent threat. If the jury so concludes, the clearly established law prong does not require even greater specificity, such as a case about a boxed-in motorist posing only a threat or a boxed-in motorist in jammed ski traffic on I-70 posing no immediate threat. If the jury disbelieves the defendant

and decides that no reasonable officer could have perceived the sufficient threat under these circumstances, defendant cannot argue that he was not fairly warned that unreasonable discharge of his firearm is just as unconstitutional against a boxed-in motorist as would be against anyone else.

Finally, the Court must reject the defendant's argument that only the Supreme Court can create clearly established law. This argument is based on nothing more than passing comments in recent Supreme Court decisions. The Tenth Circuit has long held that its opinions can create clearly established law. Until the Tenth Circuit overrules itself on that point, or the Supreme Court overrules the Tenth Circuit, I am bound to follow the Tenth Circuit. Consequently, the ability to create clearly established law is not vested solely in the Supreme Court.

Having considered all relevant evidence both direct and circumstantial, and having applied the foregoing principles and standards of an analysis to the existing evidentiary record, the Court finds and concludes as follows:

One, that there is a legally sufficient evidentiary basis for a reasonable jury to find that the plaintiff has prevailed on his Fourth Amendment excessive force claim brought pursuant to 14 United States Code Section 1983 and, No. 2, that the defendant is not entitled to judgment as a matter of law on this claim.

Therefore, it is ordered that the defendant's mid-trial oral motion for entry of judgment as a matter of law made under Rule 50(a)(1), as renewed by the defendant at the close of all the evidence, is granted with respect to plaintiff's claim for past medical expenses

but is denied in all other respects. All right. Are there any other motions?