PUBLISH

UNITED STATES COURT OF APPEAL

FOR THE TENTH CIRCUIT

DANIEL T. PAULY, as personal representative of the estate of Samuel Pauly, deceased; Daniel B. Pauly, Plaintiffs-Appellees, v. RAY WHITE; MICHAEL MARISCAL; KEVIN TRUESDALE, Defendants-Appellants, and STATE OF NEW MEXICO DEPARTMENT OF PUBLIC SAFETY, Defendant.	No. 14-2035

Appeal from the United States District Court for the District of New Mexico (D.C. No. 1:12-CV-01311-KG-JHR)

Mark D. Jarmie (Mark D. Standridge, on the brief), of Jarmie & Associates, Las Cruces, New Mexico, for Defendants-Appellants.

Lee R. Hunt, Hunt & Marshall, Santa Fe, New Mexico (Pierre Levy, O'Friel and Levy, P.C., Santa Fe, New Mexico, with him on the brief), for Plaintiffs-Appellees.

Before **PHILLIPS**, **SEYMOUR**, and **MORITZ**, Circuit Judges.

SEYMOUR, Circuit Judge.

On a dark and rainy night in October 2011, Samuel Pauly was shot to death through the window of his rural New Mexico home by one of three state police officers who were investigating an earlier road rage incident on Interstate 25 involving his brother. On behalf of Samuel Pauly's estate, his father filed a civil rights action against the three officers, the State of New Mexico Department of Public Safety, and two state officials, claiming defendants violated his son's Fourth Amendment right against the use of excessive force.[1] After depositions were taken, the officers moved for summary judgment, asserting qualified immunity. The district court denied their motions, they appealed, and we

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[1] The father also asserted state law claims for negligent training (Count Two), wrongful death under the New Mexico Tort Claims Act (Count Three), and violation of New Mexico Constitution, art. II, § 10 (Count Four). Samuel Pauly's brother, Daniel Pauly, asserted a claim for loss of consortium (Count Five). The parties stipulated to dismissal of Count Two. Only the excessive force claim is at issue in this appeal.

affirmed. *Pauly v. White* (*Pauly I*), 814 F.3d 1060, 1084 (10th Cir. 2016). The Supreme Court granted certiorari, vacated our judgment, and remanded the case to us for further consideration. *White v. Pauly* (*Pauly II*), 137 S. Ct. 548 (2017). We now reverse.

I

Background

In reviewing an interlocutory appeal from the denial of qualified immunity, "we 'take, as given, the facts that the district court assumed when it denied summary judgment.'" *Morris v. Noe*, 672 F.3d 1185, 1189 (10th Cir. 2012) (quoting *Johnson v. Jones*, 515 U.S. 304, 319 (1995)). To be sure, "[w]e may review whether the set of facts identified by the district court is sufficient to establish a violation of a clearly established constitutional right, but we may not consider whether the district court correctly identified the set of facts that the summary judgment record is sufficient to prove." *Id.* (internal quotation marks omitted). When we recite the facts of the case, "we view the evidence in the light most favorable to the non-moving party." *Weigel v. Broad*, 544 F.3d 1143, 1147 (10th Cir. 2008) (internal quotation marks omitted). Accordingly, the following facts are taken directly from the material facts section in the district court orders denying qualified immunity,[2] where the court noted that its

[2] The district court's recitation of the facts is identical in the order denying qualified immunity to Officers Mariscal and Truesdale and the separate order denying qualified immunity to Officer

"recitation of material facts and reasonable references reflect the Plaintiffs' version of the facts as gleaned from the evidence of record and excludes facts, contested or otherwise, which are not properly before this Court in the motions for summary judgment." Aplt. App. at 693. As we explain below, *infra* at 16-18, 20-23, given the Court's determination in *Pauly II*, 137 S. Ct. at 552, we set out the facts here more fully than we did in *Pauly I*.

A. Facts

The incidents underlying this action started the evening of October 4, 2011, when Daniel Pauly became involved in a road rage incident with two females on the interstate highway going north from Santa Fe, New Mexico. One of the women called 911 to report a "drunk driver," claiming the driver was "swerving all crazy" and turning his lights off and on. Aplt. App. at 694. The women then started to follow Daniel on Interstate 25, apparently tailgating him.

Daniel pulled his truck over at the Glorieta exit, as did the female driver of the car. Daniel felt threatened by the women and asked them why they were following him with their bright lights on. During this confrontation one of the women claimed Daniel was "throwing up gang signs." *Id.* He then left the off-ramp and drove a short distance to the house where he lived

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White. We therefore cite primarily to the latter order when setting out the facts.

with his brother, Samuel. The house is located in a rural wooded area on a hill behind another house.

At some point between 9:00 and 10:00 p.m., a state police dispatcher notified Officer Truesdale about the 911 call. Officer Truesdale proceeded to the Glorieta off-ramp to speak to the women about the incident. Officers Mariscal and White also headed to the off-ramp to assist Officer Truesdale. Daniel was gone when Officer Truesdale arrived on scene. The women told Officer Truesdale that Daniel was driving recklessly. They described his vehicle as a gray Toyota pickup truck and provided dispatch with his license plate number. Dispatch notified Officer Truesdale that the Toyota pickup truck was registered to an address on Firehouse Road near the Glorieta off-ramp.

The women then went on their way and, at that point, "any threat to [them] was over." *Id.* at 676. Officers White and Mariscal arrived to join Officer Truesdale. The officers all agreed that there was not enough evidence or probable cause to arrest Daniel, and that no exigent circumstances existed at the time. Nevertheless, the officers decided to try and speak with Daniel to get his side of the story, "to make sure nothing else happened," and to find out if he was intoxicated. *Id.* at 677. Officers Truesdale and Mariscal decided they should take separate patrol units to the Firehouse Road address in Glorieta to see if they could locate Daniel's pickup truck. Officer White stayed at the off-ramp in case Daniel returned. It was dark and raining by that time.

Officers Mariscal and Truesdale proceeded to the Firehouse Road address and parked along the road in front of the main house. This occurred at 11:14 p.m. Both vehicles had their headlights on and one vehicle had its takedown lights on, but neither vehicle had activated its flashing lights. The officers did not see Daniel's truck at the main house, but they noticed a second house behind it with its interior lights and porch lights on. They decided to approach the second house in an attempt to locate Daniel's pickup truck. As they walked towards that house, the officers did not activate their security lights.

To maintain officer safety, Officers Mariscal and Truesdale approached the second house in a manner such that neither brother knew the officers were at the property. The officers did not use their flashlights at first, and then only used them intermittently. Officer Truesdale turned on his flashlight as he got closer to the front door of the brothers' house. Through the front windows, the officers could see two males moving inside the house. When they located Daniel's Toyota pickup truck, they contacted Officer White to so advise him. Officer White then left to join them.

At 11:16 p.m., Officer White arrived on the scene. He radioed dispatch to inform them that all units were at the residence, and he confirmed with dispatch that the suspect vehicle was there. At 11:17, Officer White

can be seen on Officer Truesdale's COBAN video[3] as "he beg[an] to walk down the road a few steps before turning around and heading out of sight up the driveway leading to a residence." *Id.* at 164. Officer White testified that the reason he changed directions was because he "began to hear Officer Mariscal and Officer Truesdale announcing, 'New Mexico State Police,' from the rear of th[e] property." *Id.* at 216.

From the Pauly brothers' perspective, the officers' approach to their residence was confusing and terrifying. The brothers could see "through the front window two blue LED flashlights, five or seven feet apart, at chest level, coming towards the house." *Id.* at 678. Daniel could not tell who was holding the flashlight approaching the house because of the dark and the rain, but he feared it could be intruders related to the prior road rage altercation. "[I]t did not enter Daniel Pauly's mind that the figures could have been police officers." *Id.* The brothers hollered several times, "Who are you?" and, "What do you want?" *Id.* In response, the officers laughed and said: "Hey, (expletive), we got you surrounded. Come out or we're coming in." *Id.* Officer Truesdale also shouted once, "Open the door, State Police, open the door," while Officer Mariscal said, "Open the door, open the door." *Id.* at 678-79. But Daniel did not hear anyone say "State Police" until after the entire altercation was over. *Id.*

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[3] Each police cruiser had a dashboard video camera, which is referred to as a COBAN video, named after COBAN Technologies, the manufacturer.

Fearing for their lives and the safety of their dogs, the brothers decided to call the police to report the unknown intruders. Before Daniel could call 911, however, he heard someone yell: "We're coming in. We're coming in." *Id.* at 679. Believing that an invasion of their home was imminent, Samuel retrieved a loaded handgun for himself as well as a shotgun and ammunition for Daniel. Daniel told his brother he would fire some warning shots while Samuel went back to the front of the house. One of the brothers then hollered, "We have guns," *id.* at 679, and the officers subsequently saw an individual run to the back of the house. Officer Truesdale proceeded to position himself towards the rear of the house and shouted, "Open the door, come outside," *id.*, while Officer White drew his weapon and took cover behind a stone wall fifty feet away from the front of the house and Officer Mariscal took cover behind one of the brothers' trucks.

Because of the prior threatening statements made by Officers Truesdale and Mariscal, Daniel did not feel comfortable stepping out of the front door to fire warning shots. But a few seconds after the officers heard "We have guns," *id.* at 680, Daniel stepped partially out of the back door and fired two warning shots while screaming loudly to scare anyone off. Officer White thought Officer Truesdale had been shot after hearing the two shotgun blasts.[4] A few seconds after Daniel

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[4] Officer White testified in his deposition that after he heard the shots at the back of the house, "I believed Officer Truesdale had been shot at that point, being that I believed he was at the rear of the residence." Aplt. App. at 223. He also admitted,

fired the warning shots, Officers Mariscal and White observed Samuel open the front window and point a handgun in Officer White's direction. Officer Mariscal testified he immediately shot at Samuel but missed. "Four to five seconds after Samuel Pauly pointed his handgun at Officer White, Officer White shot Samuel" from his covered position fifty feet away. *Id.* at 681. The entire incident took less than five minutes.

B. Procedural History

Daniel T. Pauly (Daniel and Samuel's father), as the personal representative of the Estate of Samuel Pauly, and Daniel B. Pauly on behalf of himself (hereinafter "plaintiffs"), filed suit against Officers Mariscal, Truesdale, and White, the State of New Mexico Department of Public Safety ("NMDPS"), and two state officials. Plaintiffs alleged an excessive force claim under 42 U.S.C. § 1983 as well as several state law claims. They sought compensatory damages, punitive damages, pre- and post-judgment interest, costs, and attorneys' fees. Relevant here is plaintiffs' § 1983 claim against all three officers for violating Samuel Pauly's Fourth Amendment right to be free from excessive force.

All three officers moved for summary judgment and raised the defense of qualified immunity with respect to the § 1983 excessive force claim. Defendants analyzed the excessive force claim by reviewing the

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however, that "I did not hear anything that would suggest a person had been hit." *Id.*

actions of each deputy individually, not their actions as a whole. They all argued they were entitled to qualified immunity.

Specifically, Officer White asserted that when Samuel pointed the gun in his direction, deadly force was justified under the totality of the circumstances because any police officer would have reasonably assumed his life was in danger whether or not Samuel intended to fire. He contended it was not feasible for him to warn Samuel to drop his weapon.

Officer Truesdale argued it was undisputed that he did not fire his weapon at Samuel Pauly and therefore he could only be liable if his pre-seizure conduct "created the need for deadly force in this incident through his own reckless, deliberate conduct" that "was immediately connected to Officer White's use of force in self-defense." Aplt. App. at 359. He then argued that his actions leading up to the use of force were reasonable and that even if he made mistakes in how he approached the house, none of his conduct preceding the use of force by Officer White was reckless or deliberate. He further claimed his actions were not the but-for or proximate cause of Samuel's death because the brothers' own actions were "independent and unexpected intervening events" amounting to a superseding cause of death that defeated any liability on his part. *Id.* at 363-64.

Officer Mariscal argued that when he saw Samuel point the gun at Officer White, "he was clearly justified in using deadly force in defense of Officer White's life."

Id. at 392-93. Like Officer Truesdale, Officer Mariscal contended that his actions leading up to the use of force were not reckless or deliberate, and that his pre-seizure conduct was not the but-for or proximate cause of Samuel's death.

The district court issued two orders, denying summary judgment on all claims. In its first order, the court denied Officer White qualified immunity, concluding that "the record contains genuine disputes of material fact regarding whether the Officers' conduct prior to the shooting of Samuel Pauly was at the very least reckless and unreasonably precipitated Officer White's need to shoot Samuel Pauly." *Id.* at 684. Based on the record, the court also determined that

> it is disputed whether (1) the Officers adequately identified themselves, either verbally or by using a flashlight; (2) the brothers could, nonetheless, see the Officers considering the ambient light and other light sources; and (3) it was feasible for Officer White to warn Samuel Pauly before shooting him.
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> Furthermore, viewing the evidence in the light most favorable to Plaintiffs, a reasonable jury could find the following: there were no exigent circumstances requiring the Officers to go to Daniel Pauly's house at 11:00 p.m.; Officers Truesdale and Mariscal purposefully approached the house in a surreptitious manner; despite the porch light and light from the house, the rain and darkness made it difficult for the brothers to see who was outside their house; the fact that the brothers' house is

> located in a rural wooded area would have heightened the brothers' concern about intruders; the Officers provided inadequate police identification by yelling out "State Police" once; the Officers' use of a hostile tone in stating, "we got you surrounded. Come out or we're coming in" was threatening; statements by Officers Truesdale and Mariscal of "open the door" and other statements of "we're coming in" were, likewise, threatening; it would have been reasonable for the Officers to conclude that Daniel Pauly could believe that persons coming up to his house at 11:00 p.m. were connected to the road rage incident which had occurred a couple of hours previously; that under these circumstances, the occupants of the house would feel a need to defend themselves and their property with the possible use of firearms; and the incident occurred in less than five minutes.

Id. at 684-85. The court made virtually the same determinations in its separate order denying qualified immunity to Officers Truesdale and Mariscal. *Id.* at 703-04.

All three officers appealed the denial of their qualified immunity, and we affirmed. *Pauly I*, 814 F.3d at 1084. We analyzed Officers Mariscal and Truesdale together and Officer White by himself because the "facts and circumstances" warranted it. *Id*. at 1071. The main reason we separated the qualified immunity inquiries is because we viewed Officer White's role in the altercation as completely disconnected from the roles of Officers Mariscal and Truesdale. For instance, in the

background section, we stated that Officer White "arrived just as one of the brothers said: 'We have guns.'" *Id*. at 1066. Later, when analyzing the reasonableness of Officer White's conduct, we stated the following:

> Officer White did not participate in the events leading up to the armed confrontation, nor was he there to hear the other officers ordering the brothers to "Come out or we're coming in." Aplt. App. at 678. Almost immediately upon Officer White's arrival, one of the brothers shouted "We have guns." The alleged reckless conduct of Officers Mariscal and Truesdale prior to this point cannot be attributed to Officer White, and accordingly, our analysis focuses only on the reasonableness of his own conduct.

Id. at 1076.

In regard to Officers Mariscal and Truesdale, we started by analyzing their pre-seizure conduct to determine whether they had "caused" Samuel Pauly to be subjected to a constitutional deprivation. *Id.* at 1072. Relying on *Trask v. Franco*, 446 F.3d 1036 (10th Cir. 2006), we stated that "Officers Mariscal and Truesdale may be held liable if their conduct immediately preceding the shooting was the "but-for" cause of Samuel Pauly's death, and if Samuel Pauly's act of pointing a gun at the officers was not an intervening act that superseded the officers' liability." *Id.* We concluded that summary judgment was not appropriate regarding Officers Mariscal's and Truesdale's claimed entitlement to qualified immunity because "disputed facts

remain[ed] concerning whether the officers properly identified themselves and whether the brothers knew Officers Mariscal and Truesdale were intruders or state police." *Id.* at 1074. In regard to whether Officers Mariscal and Truesdale had violated clearly established law, we relied on *Trask* again and held that it had been clearly established since 2006 that an officer would be held liable for any conduct that is the proximate cause of a constitutional deprivation. *Id.* at 1075-76.

Turning to Officer White, we stated that the case "present[ed] a unique set of facts and circumstances, particularly in the case of Officer White who arrived late on the scene and heard only 'We have guns,' aplt. app. at 680, before taking cover behind a stone wall fifty feet away from the Paulys' residence." *Id.* at 1077. We started by reiterating the Supreme Court's instruction that in excessive force cases, courts should determine an officer's reasonableness by "balancing 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Id.* (quoting *Scott v. Harris*, 550 U.S. 372, 383 (2007)). In doing so, we looked to the three non-exclusive factors articulated in *Graham v. Connor*, 490 U.S. 386, 396 (1989), as well as the four factors listed in *Estate of Larsen v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008), and determined that a reasonable jury could find that Officer White's conduct was objectively unreasonable and violated the Fourth Amendment. *Pauly I*, 814 F.3d at 1082.

We next turned to whether the law was clearly established at the time of Officer White's possible violation. We noted that "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 1083 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). We relied on *Graham*, 490 U.S. at 396, *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985), and their Tenth Circuit progeny for the general proposition that the reasonableness of an officer's use of force depends, in part, on "whether the officer[ ] [was] in danger at the precise moment that [he] used force," *Pauly I*, 814 F.3d at 1083 (quoting *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997)), and that "if [a] suspect threatens [an] officer with a weapon . . . deadly force may be used if necessary to prevent escape, and *if, where feasible*, some warning has been given," *id*. (quoting *Garner*, 471 U.S. at 11-12).

Recognizing that the Supreme Court has cautioned lower courts not to define clearly established law too generally, *see, e.g.*, *Mullenix v. Luna*, 136 S. Ct. 305 (2015), we stated the following:

> Notably, in *Brosseau* [*v. Haugen*], 543 U.S. [194,] 199, 125 S. Ct. 596 [(2004) (per curiam)], a case decided in 2004, the Court reversed the Ninth Circuit's denial of qualified immunity, holding that using the "general" test for excessive force cases from *Garner*, 471 U.S. at 85, 105 S. Ct. 1694, was "mistaken." The Court explained that the Ninth Circuit

erred in finding "fair warning in the general tests set out in *Graham* and *Garner,*" because "*Graham* and *Garner*, following the lead of the Fourth Amendment's text, are cast at a high level of generality." *Id.* at 199, 125 S. Ct. 596. Rather, the Court explained that the relevant inquiry was whether it was clearly established the officer's conduct was prohibited by the Fourth Amendment in the specific "situation [Brosseau] confronted." *Id.* at 199-200, 125 S. Ct. 596. Most significantly, the Court cited *Hope* [*v. Pelzer*], 536 U.S. [730,] 738, 122 S. Ct. 2508 [(2002)], for the proposition that "of course, in an obvious case, [the *Garner* and *Graham*] standards can 'clearly establish' the answer, even without a body of relevant case law." *Id.* at 199, 125 S. Ct. 596. Nothing in *Mullenix* [*v. Luna*, 136 S. Ct. 305 (2015)] overruled *Hope* on this point.

Building on the Court's decision in *Hope*, our decision in *Casey* [*v. City of Federal Heights*,] decided almost three years after *Brosseau*, explained that "[t]he *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." 509 F.3d [1278,] 1284 [(10th Cir. 2007)] (internal quotation marks omitted). We explained that "[w]e therefore adopted a sliding scale to determine when law is clearly established," *id.*, stating that "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less

specificity is required from prior case law to clearly establish the violation." *Id.* (quoting *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004)).

Taking the facts as the district court determined them in the light most favorable to plaintiff estate, we are presented with this situation: an officer outside someone's home in the dark of night with no probable cause to arrest anyone and behind the cover of a wall 50 feet away from a possible threat, with no warning shot a man pointing his gun out of his well-lighted window at an unknown person in his yard while the man's brother fired protective shots in the air from behind the house. Given his cover, the distance from the window, and the darkness, a reasonable jury could find that Officer White was not in immediate fear for his safety or the safety of others. Any objectively reasonable officer in this position would well know that a homeowner has the right to protect his home against intruders and that the officer has no right to immediately use deadly force in these circumstances. Based on our sliding scale test established in *Casey*, 509 F.3d at 1284, we do not agree with the dissent that more specificity is required to put an objectively reasonable officer on fair notice.

Accordingly, accepting as true plaintiff estate's version of the facts, a reasonable officer in Officer White's position should have understood, based on clearly established law, that (1) he was not entitled to use deadly force

> unless he was in danger at the exact moment of the threat of force and (2) he was required, under the circumstances here, to warn Mr. Pauly to drop his weapon.

Pauly I, 814 F.3d at 1083-84.

Judge Moritz dissented. First, she believed that Officer White's actions were objectively reasonable: "In my view, no objectively reasonable officer in Officer White's circumstances and with White's knowledge of these circumstances could have been expected to hold his fire. *Id.* at 1088 (Moritz, J., dissenting). And, even assuming Officer White's use of deadly force was objectively unreasonable, she disagreed with our conclusion that the law was clearly established, arguing there was not a case that put the question "beyond debate." *Id.* at 1090 (quoting *Mullenix*, 136 S. Ct. at 311).

After concluding that Officer White should be entitled to qualified immunity, she stated the following in regard to Officers Mariscal and Truesdale:

> Because I would conclude that Officer White didn't violate Samuel Pauly's Fourth Amendment right to be free from the use of excessive force, and, alternatively, didn't violate clearly established law governing the use of deadly force, I would also conclude that Officers Truesdale and Mariscal are entitled to qualified immunity. *See, e.g.*, *Hinkle v. City of Clarksburg*, 81 F.3d 416, 420-21 (4th Cir. 1996) (explaining jury's finding that shooting officer didn't use excessive force absolved non-shooting officers of liability); *McLenagan* [*v.*

> *Karnes*], 27 F.3d [1002,] 1008 [(4th Cir. 1994)] (explaining that even if non-shooting officer's action or failure to act contributed to use of force, issue of liability was mooted by finding that shooting officer didn't use constitutionally excessive force).

Id. at 1091.

After we issued our opinion, the officers filed a petition for rehearing en banc, which was denied. *Pauly v. White*, 817 F.3d 715 (10th Cir. 2016). In a dissent from denial, Judge Hartz noted that he was "unaware of any clearly established law that suggests . . . that an officer . . . who faces an occupant pointing a firearm in his direction must refrain from firing his weapon but, rather, must identify himself and shout a warning while pinned down, kneeling behind a rock wall." *Id.* at 718. The officers then petitioned the Supreme Court for certiorari.

The Court granted their petition, vacated our judgment, and remanded the case for further proceedings consistent with its opinion. *Pauly II*, 137 S. Ct. at 553. The Court focused entirely on our analysis of whether Officer White violated clearly established law. *Id*. at 552. It noted that "[q]ualified immunity attaches when an official's conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known,' " and while this rule "do[es] not require a case directly on point," it does require that "existing precedent must have placed the statutory or constitutional question beyond debate." *Id*. at 551 (alteration in original) (quoting *Mullenix*,

136 S. Ct. at 308). Accordingly, the Court criticized our reliance on *Garner* and *Graham*, which "lay out excessive-force principles at only a general level" and "do not by themselves create clearly established law outside 'an obvious case.'" *Pauly II*, 137 S. Ct. at 552 (quoting *Brosseau*, 543 U.S. at 199).

Our error, the Court concluded, was that we "failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment." *Id*. at 552. The Court stated the following in regard to the facts of this case:

> Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here.

Id.

As mentioned above, the Court's holding only addressed whether Officer White violated clearly established law; it did not address our opinion in regard to Officers Mariscal and Truesdale, nor did it address whether Officer White's use of deadly force was objectively reasonable. *Id.* Notably, the Court mentioned an argument advanced by Mr. Pauly as an alternative ground for affirmance:

> [R]espondents contend Officer White arrived on the scene only two minutes after Officers Truesdale and Mariscal and more than three minutes before Daniel's shots were fired. On the assumption that the conduct of Officers Truesdale and Mariscal did not adequately alert the Paulys that they were police officers, respondents suggest that a reasonable jury could infer that White witnessed the other officers' deficient performance and should have realized that corrective action was necessary before using deadly force.

Id. The Court declined to reach Mr. Pauly's argument because it appeared that neither we nor the district court had addressed it. *Id.*

In a short concurrence, Justice Ginsburg summarized her understanding of the Court's opinion:

> I join the Court's opinion on the understanding that it does not foreclose the denial of summary judgment to Officers Truesdale and Mariscal. See 814 F.3d 1060, 1068, 1073, 1074 (C.A.10 2016) (Court of Appeals emphasized, repeatedly, that fact disputes exist on question whether Truesdale and Mariscal "adequately identified themselves" as police officers before shouting "Come out or we're coming in" (internal quotation marks omitted)). Further, as to Officer White, the Court, as I comprehend its opinion, leaves open the propriety of denying summary judgment based on fact disputes over when Officer White arrived at the scene, what he may have witnessed, and whether he had adequate time

> to identify himself and order Samuel Pauly to drop his weapon before Officer White shot Pauly. Compare *id.*, at 1080, with *ante*, at 552-53. See also Civ. No. 12-1311 (D NM, Feb. 5, 2014), pp. 7, and n. 5, 9, App. to Pet. for Cert. 75-76, and n. 5, 77 (suggesting that Officer White may have been on the scene when Officers Truesdale and Mariscal threatened to invade the Pauly home).

Id. at 553 (Ginsburg, J., concurring).

III

Plaintiffs' New Argument

After reading plaintiffs' brief in opposition to the officers' petition for certiorari and plaintiffs' supplemental brief to us after the Supreme Court vacated our judgment, we are convinced that we misstated the facts in *Pauly I*. Originally, we had the following view of Officer White's role in the altercation: "Officer White did not participate in the events leading up to the armed confrontation, nor was he there to hear the other officers ordering the brothers to 'Come out or we're coming in.' Almost immediately upon Officer White's arrival, one of the brothers shouted 'We have guns.'" *Pauly I*, 814 F.3d at 1076 (internal citations omitted).

But this was not an accurate portrayal of the events that unfolded on that rainy night in rural New Mexico almost six years ago. Unfortunately, we were misled by defendant's briefs on appeal. For instance,

Officer White's opening brief stated, "Officer White did not arrive at the Paulys' house until just before one of the Pauly brothers yelled out 'We have guns.'" Aplt. Br. at 9. From the beginning, defendants framed the case as one where Officer White entered the situation without participation in, or knowledge of, the alleged reckless conduct of the officers that escalated into a gunfight, and plaintiffs responded accordingly. Our review of the record on remand shows otherwise. It turns out that if the facts are viewed in the light most favorable to plaintiffs, Officer White's reckless or deliberate conduct unreasonably created a need for him to shoot Samuel Pauly.

The officers claim that the "Paulys should not be allowed to raise [a] new theory[] on appeal that [they] never raised in the district court." Aplt. Supp. Br. at 9. We reject this contention. First, plaintiffs alleged from the beginning that all three officers' actions precipitated the eventual need to use deadly force, asserting in the complaint that "Defendants White, Mariscal, and Truesdale's decision to storm the Pauly residence and to create a dangerous and hostile situation was unreasonable." Tr. Doc. 1-3 at 7. Second, plaintiffs listed as an additional statement of material fact in its brief in opposition to Officer White's motion for summary judgment that "Officer White arrived on the scene two minutes before the shooting," Aplt. App. at 554, and also asserted that Officer White took part in yelling at and threatening the brothers, *id.* at 556 ("Officers White and Mariscal were yelling 'Open the door' at the front of the house and Officer Truesdale was

yelling 'Come outside' at the rear of the house. The *officers* yelled to the Pauly brothers to 'Come out or we are coming in!' or 'If you don't come out, we'll come in.'" (emphasis added) (internal citations omitted)). Third, the district court based its denial of summary judgment on the fact that Officer White took part in the alleged reckless events leading up to Officer White's use of deadly force: "Accepting Plaintiffs' version of the facts, a reasonable person in Officer White's position would have understood that the reckless actions of the Officers, including his own reckless actions, unreasonably precipitated his need to shoot Samuel Pauly. . . ." *Id.* at 687. Fourth, even assuming the argument was not sufficiently made below, "[w]e have long said that we may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented to us on appeal." *Jordan v. U.S. Dep't. of Justice*, 668 F.3d 1188, 1200 (10th Cir. 2011) (quoting *Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011)). Finally, and most importantly, we were misled by the erroneous assertions about the record that defendants made to us on appeal.

The record supports the claim that Officer White may have recklessly participated in the events leading to Samuel Pauly's death. For instance, Officer Truesdale's COBAN recording, and the corresponding transcript which was reproduced in the McFaul Report, *see* Aplt. App. at 164, indicates that Officer Truesdale's camera was activated at 11:14 p.m. Officer Truesdale also stated in his deposition that he turned on the

recorder "[w]hen [he] exited [his] vehicle" and proceeded toward the residence. *Id.* at 249. Officer Truesdale's in-car microphone picked up Officer White's call stating that "all units are at the residence" at 11:16 p.m., indicating that Officer White arrived on the scene at that time. *Id.* at 164. At 11:17 p.m., "Officer White c[a]me[ ] into the camera's view on Firehouse road [and] he beg[an] to walk down the road a few steps before turning around and heading out of sight up the driveway leading to a residence." *Id.* at 164. When he was asked why he changed directions and started moving toward the house, Officer White stated, "I began to hear Officer Mariscal and Officer Truesdale announcing, 'New Mexico State Police,' from the rear of this property. So I began to proceed to that location." *Id.* at 216. Thus, Officer White heard the other two officers mere seconds past 11:17 p.m. and proceeded to join them.

The next audio that was picked up on the COBAN recording was at 11:18:07, when Officer Truesdale shouted something inaudible, but "at 11:18:12 [h]e yell[ed] 'State Police'" and at "11:18:18 [h]e yell[ed] 'Open the door.' Immediately after Officer Truesdale's statement Officer Mariscal's voice can be heard saying 'He's running.'" *Id.* at 164. This account was corroborated by Officer Truesdale during his deposition:

> Q: How many times did you try to communicate with the people inside the residence?
>
> A: Approximately three times.

Q: Okay. Approximately three times. What did you say those three times?

A: "State Police, come out."

Q: Did you say the same thing three times?

A: "State Police, come out. State Police, come out."

Q: Okay.

A: "Come out, or we're coming in."

* * *

Q: How long were you at the side of the truck, shouting to the people inside the house?

A: A short time. It was a few moments. I don't remember the exact time.

Q: A few moments before what?

A: Before I saw somebody run down the center of the house.

Q: All right. And when you saw somebody run down the center of the house, what did you do?

A: Officer Mariscal told me, "He's running." I said, "I know," and I ran out this direction, back towards the back of the house."

Id. at 254.

Officer Truesdale later said that the brothers did not announce they had guns until sometime after all the action that was picked up by the COBAN recording between 11:18:07 and 11:18:18:

> Q: Okay. When you heard somebody – so, as far as people inside the house, your testimony is, one, you heard somebody say, "Who's out there?" initially, before you had said anything. When they say that is then when – your testimony is you say, "State Police," and then – you said that a few times, and then at some point Officer Mariscal says, "Come out, or we're coming in," and then you make a similar statement, "Come out, or we're coming in." And then somebody in response to those statements says, "Don't come in. We have guns." Is that right?
>
> A: Yes.

Id. at 256.

It appears from Officer White's deposition testimony that he was standing next to Officer Mariscal and heard all of this when it occurred, showing that he was present at the scene when Officer Truesdale threatened to illegally enter the Pauly brothers' house if they did not come outside:

> Q: So you approach, and based on Exhibit 10, the place where you have kind of the last part of the line is even with Officer Mariscal. All right. Was that intentional, that you kind of stopped beside him?
>
> A: Was it intentional that night that I stopped next to him?
>
> Q: Right.

A: I guess it – I think it would – it just happened.

Q: All right. And I don't mean that in any way, other than, it would sort of make sense, if you're approaching to a residence and you see another officer there, that you're going to kind of go next to him.

A: Yeah.

Q: How far apart were you and Officer Mariscal at that point in time?

A: I don't know the exact distance. This is just where I felt that he was next to me. I didn't necessarily make any eye-to-eye contact with him or anything.

Q: Did you see him, though?

A: I saw that he was – I saw his initial location, and then I proceeded to – to go next to where I believed him to be.

* * *

Q: Could you see inside the residence?

A: I could.

Q: What could you see?

A: *I could see what appeared to me as the living room, and I saw what appeared to be at least two different males walking within the living room window.*

Id. at 219 (emphasis added). This testimony shows that Officer White was standing next to Officer Mariscal

and watched the two brothers "walking" inside the house. Although we do not know the exact time this occurred, we know that it was before the COBAN recording picked up Officer Mariscal saying that one of the brothers was "running" inside the house.

As noted above in Officer Truesdale's deposition testimony, only after Officer Mariscal stated that one of the brothers was running did a brother yell out, "We have guns." *Id.* at 256. The next audio picked up by the COBAN recording was the first gun shot, which occurred more than one minute later. "At 11:19:42 first shot is heard, 11:19:43 second shot, 11:19:47 third shot, dispatch is then heard repeating an officer's call out of shots fired. 11:19:52 fourth shot is heard. No other shots are heard." *Id.* at 164.

Thus, contrary to our determination in *Pauly I*, 814 F.3d at 1076, we are now persuaded a reasonable jury could find that Officer White participated in the events leading up to the armed confrontation and heard the other officers threaten the brothers by saying, "Come out or we're coming in." Aplt. App. at 678. A reasonable jury could thus conclude that Officer White acted recklessly by precipitating the need to use deadly force.

IV

Discussion

We address the officers' appeal from the district court's denial of their motions for summary judgment

in light of the Supreme Court's decision in this case and in light of a reasonable probability that Officer White took part in the events that led to his use of deadly force. The officers each contend there are no genuine issues of material fact that would defeat their claim for qualified immunity.

Title "42 U.S.C. § 1983 allows an injured person to seek damages against an individual who has violated his or her federal rights while acting under color of state law." *Cillo v. City of Greenwood Village*, 739 F.3d 451, 459 (10th Cir. 2013). "Individual defendants named in a § 1983 action may raise a defense of qualified immunity," *id.* at 460, which "protects 'government officials performing discretionary functions' and shields them 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,'" *Swanson v. Town of Mountain View*, 577 F.3d 1196, 1199 (10th Cir. 2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established." *Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009) (citing *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)). "If the plaintiff[s] satisfy[ ] this two-part test, 'the defendant bears the usual burden of a party moving for summary judgment to show that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law.'" *Trask*, 446

F.3d at 1043 (quoting *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004)).

"Although we frequently conduct separate qualified immunity analyses for different defendants, we have not always done so at the summary judgment stage of excessive force cases." *Estate of Booker v. Gomez*, 745 F.3d 405, 421 (10th Cir. 2014). Indeed, when appropriate we will consider the officers' conduct in the aggregate. *See, e.g.*, *Lundstrom v. Romero*, 616 F.3d 1108, 1126-27 (10th Cir. 2010); *Fisher v. City of Las Cruces*, 584 F.3d 888, 895-902 (10th Cir. 2009); *York v. City of Las Cruces*, 523 F.3d 1205, 1210-11 (10th Cir. 2008); *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008); *Allen*, 119 F.3d at 840-41. But, we have also analyzed the conduct of each officer individually in excessive force cases at the summary judgment stage. *See, e.g.*, *Casey*, 509 F.3d at 1282-87; *Walker v. City of Orem*, 451 F.3d 1139, 1159-61 (10th Cir. 2006); *Currier v. Doran*, 242 F.3d 905, 919-25 (10th Cir. 2001). As we explained above, in *Pauly I* we analyzed Officers Mariscal and Truesdale together while analyzing Officer White separately because we thought the facts warranted it. 814 F.3d at 1071. Although we now recognize that a reasonable jury could find Officer White's pre-seizure conduct to be just as reckless as Officers Mariscal and Truesdale, we still believe the facts warrant a separate qualified immunity analysis because Officer White is the only officer who actually shot Samuel Pauly.

A. Officer White

1. The Reasonableness of Officer White's Conduct

"[*A*]*ll* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham*, 490 U.S. at 395. We review these excessive force claims under a standard of objective reasonableness, "judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight." *Id.* at 396. "In determining the reasonableness of the manner in which a seizure is effected, '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Scott*, 550 U.S. at 383 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). This balancing test "requires careful attention to the facts and circumstances of each particular case, including *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 is actively resisting arrest or attempting to evade arrest by flight.*" *Graham*, 490 U.S. at 396 (emphasis added). And our balancing must always account "for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 397. Ultimately, "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." *Estate of Larsen*, 511 F.3d at 1260.

Turning to this case, we look first to Officer White, as he is the one who actually "seized" Samuel Pauly by shooting him. Viewing the facts in the light most favorable to plaintiffs, the district court determined that the brothers were in their home when Officers Mariscal and Truesdale – and Officer White shortly thereafter – approached their house while it was dark and raining and, without knocking on the door, made threatening comments about intruding into the home. In response, the brothers shouted "We have guns," hoping to scare off their perceived home invaders, and all three officers took cover. In particular, Officer White took cover behind a rock wall approximately fifty feet away from the house. Samuel Pauly opened the window of his home and pointed his gun aimlessly into the dark in the direction of Officer White. Within five seconds of Samuel pointing his gun out of the window, Officer White shot Samuel in the heart without first identifying himself or warning Samuel to put down his weapon. To analyze the reasonableness of Officer White's actions, we turn to the ubiquitous three factor test from *Graham v. Connor*.

a. The First *Graham* Factor

The first *Graham* factor, "the severity of the crime at issue," 490 U.S. at 396, weighs in favor of plaintiffs.

The district court noted that once police arrived at the Glorieta off-ramp in response to a call concerning road rage, "the Officers did not believe any exigent circumstances existed," and they "did not have enough evidence or probable cause to make an arrest." Aplt. App. at 677. It is unclear from the record what, if any, crime was committed during the road rage incident. At best, the incident might be viewed as a minor crime such as reckless driving or driving while intoxicated.[5]

b. The Second *Graham* Factor

The second *Graham* factor, "whether the suspect pose[ed] an immediate threat to the safety of the officers or others," 490 U.S. at 396, is undoubtedly the "most important" and fact intensive factor in determining the objective reasonableness of an officer's use of force, *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010). Thus, like many of our excessive force cases, our analysis will focus mostly on it. *See, e.g.*, *Estate of Larsen*, 511 F.3d at 1260-61; *Jiron v. City of Lakewood*, 392 F.3d 410, 418 (10th Cir. 2004); *Zuchel v. Spinharney*, 890 F.2d 273, 275 (10th Cir. 1989).

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[5] Under New Mexico law, reckless driving and driving while intoxicated (first offense) are misdemeanor offenses. *State v. Trevizo*, 257 P.3d 978, 982 (N.M. Ct. App. 2011) (citing N.M. Stat. Ann. § 66-8-113(B) (1978) (reckless driving); § 66-8-102(E) (DWI) (holding that one-year statute of limitations for petty misdemeanors applied to the defendant's DWI and reckless driving charges).

i. The Estate of Larsen Test

In this case, Officer White used deadly force, and the use of deadly force is only justified if the officer had "probable cause to believe that there was a *threat of serious physical harm to* [*himself*] *or others*," *Estate of Larsen*, 511 F.3d at 1260 (quoting *Jiron*, 392 F.3d at 415). Accordingly, in evaluating the degree of threat facing an officer, we look to a four component test first highlighted in *Estate of Larsen*:

> (1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect.

Id. We apply each in turn.

1) The First *Larsen* Component

The first *Larsen* component, "whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands," *id.*, clearly supports plaintiffs. Officer White did not identify himself or order Samuel Pauly to drop his weapon. In excessive force cases, "if the suspect threatens the officer with a weapon . . . deadly force may be used if necessary to prevent escape, and *if, where feasible*, some warning has been given." *Garner*, 471 U.S. at 11-12 (emphasis added); *see also Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003) (fact issue as to whether warning

was feasible before deadly shot fired). Plaintiffs' expert witness, Glenn A. Walp, testified that in his professional opinion it was feasible for Officer White to give the suspect a warning during the five-second interval between when Samuel aimed the gun and Officer White fired his weapon, and that Officer White's failure to do so was unreasonable. *See* Aplt. App. at 286. ("[B]etween the time when he saw the pointing of the weapon and what we will use for the sake of argument here today, five seconds, I feel that there was an extensive amount of time to at least yell something to the effect . . . of 'State Police, drop your weapon.' ").[6]

2) The Second *Larsen* Component

The second *Larsen* component, "whether any hostile motions were made with the weapon towards the officers," 511 F.3d at 1260, weighs in favor of Officer White because the record reflects that Samuel Pauly pointed a handgun at Officer White, or at least in his direction. Officer White relies on some of our decisions for the proposition that use of deadly force is always reasonable where someone aims a gun at an officer. Aplt. Br. at 14 (citing *Thomson v. Salt Lake Cty.*, 584 F.3d 1304, 1317-18 (10th Cir. 2009); *Wilson v. Meeks*, 52 F.3d 1547, 1553-54 (10th Cir. 1995), *abrogated on other grounds by Saucier*, 533 U.S. at 205). But the facts in those cases were entirely different from the facts here. In both cases, the officers were in close proximity to the

[6] In *Tenorio v. Pitzer*, 802 F.3d 1160, 1163 (10th Cir. 2015), for instance, within "*two or three seconds*" the officer "yelled, 'Sir, put the knife down! Put the knife down, please! Put the knife down!' " before he shot the decedent.

suspect, and in *Wilson* one of the officers ordered the suspect to show his hands before he shot him. 52 F.3d at 1549. Neither of these facts is present in this case – Officer White was some fifty feet away and he did not order Samuel Pauly to show his hands before shooting him. Moreover, none of our cases have created a per se rule of objective reasonableness where a person points a gun at a police officer. *See Allen*, 119 F.3d 837 (denying qualified immunity to police officers who shot *armed man* because fact issues remained as to whether the officers' actions unreasonably precipitated the need to use deadly force); *see also Sledd v. Lindsay*, 102 F.3d 282, 288 (7th Cir. 1996) (denying qualified immunity to police officers who shot *armed man* because there were fact questions as to whether officers announced their presence and whether a reasonable officer would have thought the plaintiff posed such a risk under all the circumstances that the immediate use of deadly force was justified); *Yates v. City of Cleveland*, 941 F.2d 444, 445, 449 (6th Cir. 1991) (denying qualified immunity to police officer who shot *armed man* because act of entering private residence late at night without identifying himself was enough to show he had unreasonably created the encounter that led to the use of force).

Moreover, and importantly, the district court determined that a genuine fact issue remains as to whether Samuel Pauly even fired his weapon. Although Officers White and Mariscal claim that Samuel fired the handgun, the district court noted the following:

> A revolver later found on the living room floor under the front window where Samuel Pauly was shot had one casing forward of the firing pin while the other four chambers were loaded. No bullet casing was recovered from the handgun, so there is no forensic proof that Samuel Pauly fired the handgun that night.

Aplt. App. at 681 n.8. Significantly, "Officer Mariscal strongly believes that he fired a shot at Samuel Pauly after Samuel Pauly fired the handgun," and the district court found that "Officer Mariscal was missing one cartridge from his magazine." *Id.* at 681 n.9 Thus, the court concluded the following: "since only four shots were fired that night, if Officer Mariscal fired the third shot as he claims and Officer White fired the fourth shot, then Samuel Pauly could not have fired upon Officer White." *Id.*

Officer White stated in his deposition that when he was kneeling behind the rock wall, he saw Samuel Pauly shoot a "silver gun" directly towards his face. Aplt. App. at 223-24 ("I observed the male, with his right hand, extend his hand in a parallel position to the ground, pointing the gun toward my direction . . . [and] I observed the muzzle flash, and I heard the bang of the gun."). Nevertheless, "[b]ased on [the] physical evidence, a jury could reasonably decide to reject [Officer White's] testimony." *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999) (holding fact issue precluded summary judgment on excessive force claim against officer). Indeed, "[c]onsidering the physical evidence together with the inconsistencies in the officer's testimony, a

jury will have to make credibility judgments, and credibility determinations should not be made on summary judgment." *Id.* Moreover, "since the victim of deadly force is unable to testify, courts should be cautious on summary judgment to 'ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story – the person shot dead – is unable to testify.'" *Id.* (quoting *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)). As the Ninth Circuit noted in *Scott*, 39 F.3d at 915, "the court may not simply accept what may be a self-serving account by the police officer." Rather, "[i]t must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational fact-finder that the officer acted unreasonably." *Id.* Thus, if the evidence is viewed in the light most favorable to Plaintiffs, Samuel Pauly did not fire his weapon at Officer White, but only pointed it in his direction while Officer White was fifty feet away and behind both physical cover and the cover of night.

3) The Third *Larsen* Component

The third *Larsen* component, "the distance separating the officers and the suspect," 511 F.3d at 1260, clearly supports plaintiffs because not only was Officer White fifty feet away from Samuel Pauly, he was also sequestered behind a rock wall. And Samuel was aiming his gun through the open window of a lighted house toward a target obscured by the dark and rain.

As Officer White described it when he was asked to explain what he did after he heard "We have guns," he said he ran and took cover behind a rock wall *before* Samuel opened the window and stuck his gun out.

> Q. And, I'm sorry, I think you just said this, but the position that you took, you know, you ran down on the other side of the rock wall. Tell me again. Were you standing? Were you crouched? What position were you in?
>
> A. I was kneeling.
>
> Q. So you're kneeling, one knee up and one knee down?
>
> A. Both knees down.
>
> Q. So both of your knees were on the ground, and where – were you looking towards the residence?
>
> A. I was.
>
> * * *
>
> Q. So you kneeled down, both knees on the ground and looking over the top of the rock wall. Is that right?
>
> A. Correct.
>
> Q. Did you have your duty weapon drawn?
>
> A. I did.
>
> * * *
>
> Q. *Nobody was in the window at that point? Is that correct?*

A. *That's correct.*

Q. *Was the window up?*

A. *As in closed? It was closed.*

Q. Yes. So the window – both windows were closed at the point that you run down to the position in Exhibit 2?

A. Correct.

Q. *You have your weapon drawn. Where is it pointing at that time?*

A. *It's pointing in the direction of the house.*

Q. *Was it resting on the wall?*

A. *It was.*

Aplt. App. at 222 (emphasis added). Officer White's own description of his position at the time Samuel Pauly opened the window and pointed his gun out clearly supports the district court's description of him as "behind a stone wall located 50 feet from the front of the house." *Id.* at 680.

4) The Fourth *Larsen* Component

We consider the fourth *Larsen* component, "the manifest intentions of the suspect," 511 F.3d at 1260, to also weigh in favor of plaintiffs. All three officers claim that they announced their presence numerous times, but there is only one instance of audio evidence of their announcements, which comes from Officer Truesdale's COBAN recording, in which Officer

Mariscal shouted "State Police" and "Open the Door." Aplt. App. at 164. Thus, we agree with the district court in its determination that "a reasonable jury could find" that "the Officers provided inadequate police identification by yelling out 'State Police' once," and "it would have been reasonable for the Officers to conclude that Daniel Pauly could believe that persons coming up to his house at 11:00 p.m. were connected to the road rage incident which had occurred a couple of hours previously." *Id.* at 685. Accordingly, if we view the evidence in the light most favorable to plaintiffs, the manifest intention of the brothers was to protect their home from ostensible home invaders.

In fact, under the version of events that plaintiffs present, it was no surprise that the brothers armed themselves to protect their home, because it was their constitutional right to do so:

> [T]he inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. *The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute.* Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family . . . would fail constitutional muster.

District of Columbia v. Heller, 554 U.S. 570, 628-29 (2008) (emphasis added) (footnote, citation, and quotation marks omitted). Moreover, in *State v. Boyett*, 185 P.3d 355, 358 (N.M. 2008), the Supreme Court of New Mexico reiterated that the "[d]efense of habitation has long been recognized in New Mexico," and that "[i]t gives a person the right to use lethal force against an intruder when such force is necessary to prevent the commission of a felony in his or her home." Thus, viewing the facts in the light most favorable to plaintiffs, the manifest intention of the brothers was to protect their home after inadequate identification from the officers, which was their legal right under both the United States Constitution and New Mexico state law.

ii. The Reckless Conduct of the Officers in Effecting the Seizure

Our precedent recognizes 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.'"[7] *Jiron*,

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[7] This has been the law in our circuit since 1995. *See Sevier*, 60 F.3d at 699; *see also Allen*, 119 F.3d at 840. But the concept that pre-seizure conduct should be used in evaluating the reasonableness of an officer's actions is not universally held among other circuits. *See, e.g.*, *Schulz v. Long*, 44 F.3d 643 (8th Cir. 1995) (holding that evidence of pre-seizure conduct was irrelevant to reasonableness); *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) (same); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) (same); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (same). The

392 F.3d at 415 (quoting *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995)). We will "consider an officer's conduct prior to the suspect's threat of force if the conduct is 'immediately connected' to the suspect's threat of force." *Allen*, 119 F.3d at 840 (quoting *Romero v. Bd. of Cty. Comm'rs*, 60 F.3d 702, 705 n.5 (10th Cir. 1995)); *cf. Garner*, 471 U.S. at 8 ("[I]t is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out."). The officer's conduct prior to a suspect threatening force "is only actionable if it rises to the level of recklessness." *Thomson*, 584 F.3d at 1320. Thus, "[m]ere negligen[ce]" will not suffice. *Sevier*, 60 F.3d at 699 n.7.

Supreme Court very recently had an opportunity to resolve this issue but declined to do so:

> [Respondents] argue that the judgment below should be affirmed under *Graham* itself. *Graham* commands that an officer's use of force be assessed for reasonableness under the "totality of the circumstances." 490 U.S., at 396, 109 S. Ct. 1865 (internal quotation marks omitted). On respondents' view, that means taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it. Brief for Respondents 42-43. We did not grant certiorari on that question, and the decision below did not address it. Accordingly, we decline to address it here. See, *e.g.*, *McLane Co. v. EEOC*, ___ U.S. ___, ___, 137 S.Ct. 1159, 1170, 197 L.Ed.2d 500 (2017) ("[W]e are a court of review, not of first view" (internal quotation marks omitted)).

County of Los Angeles v. Mendez, ___ U.S. ___, 137 S. Ct. 1539, 1547 n.* (2017). Thus, at least for now, *Sevier* and *Allen* remain good law in this circuit.

Our seminal case on this issue, *Allen v. City of Muskogee*, 119 F.3d 837 (10th Cir. 1997), is instructive. In *Allen*, Mr. Allen left his home with ammunition and several guns after an altercation with his family. *Id.* at 839. The altercation was reported to the Wagoner County Sheriff's Department, which in turn sent a teletype message to the Muskogee Police Department ("MPD") describing Mr. Allen and his car, and warning that he was armed and had an outstanding decade-old warrant for impersonating an officer. *Id.* A 911 call from Mr. Allen's sister's house warned that Mr. Allen was threatening suicide. *Id.* When Lt. Smith arrived at the scene, he cleared bystanders from the area and found Mr. Allen sitting in the driver's seat of his vehicle. *Id.* Mr. Allen had one foot out the door and a gun in his right hand, which was resting on the center console. Seeing this, Lt. Smith told Mr. Allen to drop his gun several times. *Id.*

Officers McDonald and Farmer arrived at the scene shortly after Lt. Smith, and Officer McDonald joined Lt. Smith at the driver side door. *Id.* Lt. Smith reached into the vehicle, attempting to seize the gun, while Officer McDonald held Mr. Allen's left arm. *Id.* At this point, Officer Farmer attempted to open the passenger side door and Mr. Allen pointed the gun at him, forcing Officer Farmer to duck and move behind the car. *Id.* Mr. Allen then directed the gun towards Lt. Smith and Officer McDonald and shots were exchanged. *Id.* Lt. Smith and Officer McDonald fired a total of twelve shots – four of which struck Mr. Allen.

Id. The entire encounter, from Lt. Smith's arrival to Mr. Allen's death, took ninety seconds. *Id.*

Mr. Allen's family brought a § 1983 claim against the officers involved and the City of Muskogee. The defendants moved for summary judgment and set forth a statement of facts in their brief, which the plaintiff did not dispute. *Id.* Ruling that there was no genuine issue of material fact and that defendants were entitled to judgment as a matter of law, the district court granted summary judgment in favor of defendants on plaintiff's § 1983 claim.

We reversed as to the individual officers. *Id.* at 845. We recognized that "[t]he excessive force inquiry includes not only the officers' actions at the moment that the threat was presented, but also may include their actions in the moments leading up to the suspect's threat of force." *Id.* at 840 (citing *Sevier*, 60 F.3d at 699). We noted that "[w]e will thus consider an officer's conduct prior to the suspect's threat of force if the conduct is 'immediately connected' to the suspect's threat of force," *id.* (quoting *Romero*, 60 F.3d at 705 n.5), and pointed out that there was deposition testimony that Lt. Smith "ran 'screaming' up to Mr. Allen's car and immediately began shouting at Mr. Allen to get out of his car." *Id.* at 841. Since the altercation took place in a ninety-second window, we concluded that the officers' preceding actions were so "immediately connected" to Mr. Allen's threat of force that they should have been included in the reasonableness inquiry. Accordingly, we held that a reasonable jury could

conclude that the officers' actions were reckless and precipitated the need to use deadly force. *Id.*

Similarly, in this case, the alleged reckless actions of all three officers were so immediately connected to the Pauly brothers arming themselves that such conduct should be included in the reasonableness inquiry. Thus, if we view the evidence in the light most favorable to plaintiffs, the threat made by the brothers, which would normally justify an officer's use of force, was precipitated by the officers' own actions and that Officer White's use of force was therefore unreasonable.

iii. Whether Officer White Reasonably Feared for the Safety of the Other Officers

Finally, although Officer White claims he thought Officer Truesdale was hit by the two shotgun blasts he heard from behind the house, he admitted in his deposition that "I did not hear anything that would suggest [Officer Truesdale] had been hit." *Id.* at 223. Significantly, "the law is clear that [Officer White's] belief must be reasonable." *Attocknie v. Smith*, 798 F.3d 1252, 1257 (10th Cir. 2015). In our view, there is at least a fact question for the jury as to whether it was objectively reasonable for Officer White to immediately assume that one of his fellow officers was shot after hearing two shots from the back of the house but nothing more to indicate that anyone had been hit. *Cf. Attocknie*, 798 F.3d at 1257 (affirming denial of qualified immunity to officer and rejecting officer's claim he saw

suspect run into house, noting "that a jury might reasonably refuse to credit his belief as reasonable" because a jury "could well find that [the officer] is not telling the truth about seeing someone running, or at least that he was not reasonable in inferring that the person he saw was [the suspect], especially given other evidence that [the suspect] was not seen by anyone else at the time and was not found there after the shooting.") Thus, there are multiple issues of fact that must be resolved in order to determine "whether [Samuel Pauly] pose[d] an immediate threat to the safety of the officers or others." *Graham*, 490 U.S. at 396. Accordingly, the second *Graham* factor does not weigh conclusively in favor of Officer White.

c. The Third *Graham* Factor

The third *Graham* factor, "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight," 490 U.S. at 396, also weighs in favor of plaintiffs. As the district court determined, after the officers arrived at the Glorieta off-ramp, spoke with the women about the incident, and then allowed the women to leave, "any threat to the females was over." Aplt. App. at 676. More importantly, the court recognized that "the Officers did not believe any exigent circumstances existed," and that at that point, they "*did not have enough evidence or probable cause to make an arrest*." *Id.* at 677 (emphasis added). Thus, when the officers, including White, went to the brothers' residence, they were not there to make an arrest because no grounds existed to do so. This is especially true for Samuel

Pauly, who had been in his home playing video games before Daniel arrived that night. Accordingly, the brothers could not have been "attempting to evade arrest by flight," *Graham*, 490 U.S. at 396. This factor supports plaintiffs.

Based on the record in the present case, viewed in the light most favorable to plaintiffs, Officer White did not have probable cause to believe there was an *immediate* threat of serious harm to himself or to Officer Mariscal. This is especially true considering Officer White may have participated in the reckless conduct that lead to his perceived need to shoot Samuel Pauly. Thus, Officer White's use of deadly force was not objectively reasonable and violated Samuel Pauly's constitutional right to be free from excessive force.

2. Clearly Established

Having held that the evidence is sufficient to raise a fact issue regarding the excessive force claim, we turn to whether the law was clearly established at the time of the violation because "immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Pauly II*, 137 S. Ct. at 551 (quoting *Mullenix*, 136 S. Ct. at 308). "For a right to be clearly established there must be Tenth Circuit or Supreme Court precedent close enough on point to make the unlawfulness of the officers' actions apparent." *Mascorro v. Billings*, 656 F.3d 1198, 1208 (10th Cir. 2011); *see also Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) ("A Government official's conduct violates clearly

established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987))); *Hope*, 536 U.S. at 739 ("For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." (internal quotation marks omitted)). The Supreme Court has noted that "[w]e do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Mullenix*, 136 S. Ct. at 308 (quoting *al-Kidd*, 563 U.S. at 741). Indeed, "the dispositive question is 'whether the violative nature of *particular* conduct is clearly established,'" *id.* (quoting *al-Kidd*, 563 U.S. at 742) (emphasis added), and "[the] inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition,'" *id.* (quoting *Brosseau v. Haugen*, 543 U.S. at 198).

The district court relied on *Allen*, 119 F.3d at 841, in concluding that Officer White had violated clearly established law. It stated that "[s]ince 1997, it has been clearly established in the Tenth Circuit 'that an officer is responsible for his or her reckless conduct that precipitates the need to use force.'" Aplt. App. at 687 (quoting *Murphy v. Bitsoih*, 320 F.Supp. 2d 1174, 1193 (D.N.M. 2004)). But this statement suffers from the same lack of specificity as does the general propositions from *Graham* and *Garner* that "use of force is

contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness," which, by itself, "is not enough." *Saucier*, 533 U.S. at 202; *see also Pauly II*, 137 S. Ct. at 552 ("The panel majority misunderstood the 'clearly established' analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment."). The statement in *Allen*, 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," *Pauly II*, 137 S. Ct. at 552. Accordingly, *Allen* is of little help in this case because the facts are completely different.

Because there is no case "close enough on point to make the unlawfulness of [Officer White's] actions apparent," *Pauly I*, 814 F.3d at 1091 (Moritz, J., Dissenting) (alteration in original) (quoting *Mascorro*, 656 F.3d at 1208), we conclude that Officer White is entitled to qualified immunity.

B. Officers Mariscal and Truesdale

42 U.S.C. § 1983 not only imposes liability on those who actually deprive a person of their rights under the Constitution, but also imposes liability on those who "cause" a person to be subjected to a deprivation. "The requisite causal connection is satisfied if the

defendant[s] set in motion a series of events that the defendant[s] knew or reasonably should have known would cause others to deprive the plaintiff of [his] constitutional rights." *Trask*, 446 F.3d at 1046 (quoting *Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir. 1990)). This is plaintiffs' theory of liability for Officers Mariscal and Truesdale, that their reckless conduct leading up to the shooting caused Officer White to use constitutionally excessive force. But, as we explained above, Officer White is entitled to qualified immunity because his alleged use of excessive force was not clearly established in the circumstances of this case. It therefore cannot serve as the basis of liability for Officers Mariscal and Truesdale. *Cf. Mendez*, 137 S. Ct. at 1549 (stating that officers' violation of knock and announce rule, which appellate court held was a constitutional violation but not a clearly established one, could not serve as basis for liability on theory that it was proximate cause of subsequent use of force). And neither Officer Mariscal nor Truesdale committed a constitutional violation in his own right. Thus, there is no basis for holding either of them liable under § 1983.

Accordingly, we REVERSE the district court's denial of summary judgment to Officers Mariscal, Truesdale, and White, and REMAND with instructions to enter judgment in favor of each officer.

No. 14-2035, *Daniel T. Pauly, et al. v. Ray White, et al.*

MORITZ, J., concurring.

I agree with the majority that White is entitled to qualified immunity because the contours of the constitutional right at issue aren't clearly established. *See* Maj. Op. 40-42. But unlike the majority, I would decline to address the constitutional question. *Compare id.* at 1214-22, *with Kerns v. Bader*, 663 F.3d 1173, 1180 (10th Cir. 2011) (stating that "courts should proceed directly to, 'should address only,' and should deny relief exclusively based on" plaintiff's failure to show that the law is clearly established where, e.g., "the . . . constitutional violation question 'is so factbound that the decision provides little guidance for future cases'" (first quoting *Camreta v. Greene*, 563 U.S. 692, 707 (2011); then quoting *Pearson v. Callahan*, 555 U.S. 223, 237 (2009))). Moreover, although I agree with the majority's ultimate conclusion that all three defendants are entitled to summary judgment, *see* Maj. Op. 43, I question whether the analytical approach the majority applies in reaching that conclusion is consistent with our case law.

My questions arise, in large part, from the procedural posture of this appeal. We typically lack jurisdiction to review the denial of a motion for summary judgment. *Cox v. Glanz*, 800 F.3d 1231, 1242 (10th Cir. 2015). But "denial of qualified immunity to a public official . . . is immediately appealable under the collateral order doctrine to the extent it involves abstract issues of law." *Fancher v. Barrientos*, 723 F.3d 1191,

1198 (10th Cir. 2013). "Specifically, we have jurisdiction 'to review "(1) whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation, [and] (2) whether that law was clearly established at the time of the alleged violation."'" *Cox*, 800 F.3d at 1242 (quoting *Roosevelt-Hennix v. Prickett*, 717 F.3d 751, 753 (10th Cir. 2013)).

Critically, in exercising that limited jurisdiction, we generally aren't at liberty to undertake our own de novo review of the record evidence. Instead, "[t]he district court's factual findings and reasonable assumptions comprise 'the universe of facts upon which we base our legal review of whether defendants are entitled to qualified immunity.'" *Id.* (quoting *Fogarty v. Gallegos*, 523 F.3d 1147, 1154 (10th Cir. 2008)); *see also Lewis v. Tripp*, 604 F.3d 1221, 1225 (10th Cir. 2010) ("[I]f a district court concludes that a reasonable jury could find certain specified facts in favor of the plaintiff, . . . we usually must take them as true – and do so even if our own *de novo* review of the record might suggest otherwise as a matter of law.").

In short, "'whether or not the pretrial record sets forth a "genuine" issue of fact for trial' is *not* an abstract legal question that we may review" on interlocutory appeal. *Cox*, 800 F.3d at 1242 (quoting *Johnson v. Jones*, 515 U.S. 304, 320 (1995)); *see also Morris v. Noe*, 672 F.3d 1185, 1189 (10th Cir. 2012). Indeed, the question of whether a genuine issue of material fact exists is largely irrelevant to the qualified-immunity analysis. Instead, that question arises if – and only if – the plaintiff first demonstrates the defendant's alleged

conduct violated clearly established law. *See Nelson v. McMullen*, 207 F.3d 1202, 1206 (10th Cir. 2000) ("If, and only if, the plaintiff [shows a violation of clearly established law] does a defendant then bear the . . . burden of . . . showing 'that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law.'" (quoting *Albright v. Rodriguez*, 51 F.3d 1531, 1535 (10th Cir. 1995))). Until a plaintiff makes that showing, "a federal court's factual analysis relative to the qualified-immunity question" asks only "whether [the] plaintiff's factual allegations are sufficiently grounded in the record such that they may permissibly comprise the universe of facts that will serve as the foundation for answering the *legal* question before the court." *Cox*, 800 F.3d at 1243 (quoting *Thomson v. Salt Lake Cty.*, 584 F.3d 1304, 1326 (10th Cir. 2009) (Holmes, J., concurring)); *see also id.* ("[T]he objective" at that point "is *not* to determine whether a plaintiff survives summary judgment because plaintiff's evidence raises material issues that warrant resolution by a jury." (alteration in original) (quoting *Thomson*, 584 F.3d at 1326 (Holmes, J., concurring))).

The majority correctly articulates these standards. *See* Maj. Op. 2-3 (noting that we must accept as true those facts that district court found and relied on in denying summary judgment; acknowledging that we can't "consider whether the district court correctly identified the set of facts that the summary judgment record is sufficient to prove" (quoting *Morris*, 672 F.3d at 1189)); *id.* at 24 (stating that question of whether

genuine dispute of material fact exists doesn't arise unless and until plaintiff first demonstrates that defendant violated clearly established constitutional right). But I'm not convinced that after articulating these standards, the majority applies them.

For instance, I question whether the facts the majority relies on in evaluating the constitutional question are part of the "the universe of facts" as the district court found it to exist, or whether instead the majority has gleaned at least some of those facts from its own independent review of the record. *Compare Cox*, 800 F.3d at 1242 (explaining that we must decide the constitutional question based on "[t]he district court's factual findings and reasonable assumptions," as opposed to our own de novo review of the record), *with, e.g.*, Maj. Op. 18 ("Our review of the record on remand shows otherwise.").[1]

Likewise, I question whether the majority exceeds the bounds of this court's jurisdiction by taking a position on what facts a reasonable jury might find or whether any genuine disputes of material fact might exist. *Compare Cox*, 800 F.3d at 1242 ("'[W]hether or not the pretrial record sets forth a "genuine" issue of fact for trial' is *not* an abstract legal question that we may review [on interlocutory appeal]." (quoting *Jones*,

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[1] True, when a "district court fails to make its factual assumptions explicit, we must 'undertake a cumbersome review of the record' to ferret out facts that the district court 'likely assumed.'" *Fogarty*, 523 F.3d at 1154 (10th Cir. 2008) (quoting *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996)). But the majority doesn't suggest that's what happened here.

515 U.S. at 320)), *with* Maj. Op. at 23 ("[A] reasonable jury could find that . . . White participated in the events leading up to the armed confrontation and heard the other officers threaten the brothers by saying, 'Come out or we're coming in.' " (quoting Aplt. App. at 678)), *id.* at 1221 ("In our view, there is at least a fact question for the jury as to whether it was objectively reasonable for . . . White to immediately assume that one of his fellow officers was shot after hearing two shots from the back of the house but nothing more to indicate that anyone had been hit."), and *id.* at 1221 ("Thus, there are multiple issues of fact that must be resolved in order to determine 'whether [Samuel Pauly] pose[d] an immediate threat to the safety of the officers or others.' " (alterations in original) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989))).

Finally, even assuming this court *may* take a position on whether such fact questions exist, I question whether it's appropriate to do so in determining, for purposes of the qualified immunity analysis, whether the plaintiffs have demonstrated a constitutional violation. *See, e.g.*, *id.* at 40 ("Having held that the evidence is sufficient to raise a fact issue regarding the excessive force claim, we turn to whether the law was clearly established at the time of the violation. . . .").

Before the burden shifts to a defendant to demonstrate that no genuine issues of material fact exist, a plaintiff must first show both (1) a violation of (2) clearly established law. *See Nelson*, 207 F.3d at 1206. And here, the majority concludes that the plaintiffs fail to clear the second of these two hurdles. That is, the plaintiffs

fail to demonstrate that the law is clearly established. *See* Maj. Op. 40-42. Accordingly, the defendants are entitled to qualified immunity and the burden never shifts to them to show that no genuine issues of material fact exist. *See Nelson*, 207 F.3d at 1206; *Cox*, 800 F.3d at 1243 (explaining that the court's objective isn't to "determine whether a plaintiff survives summary judgment because plaintiff's evidence raises material issues that warrant resolution by a jury" (quoting *Thomson*, 584 F.3d at 1326 (Holmes, J., concurring))); *United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 940 n.6 (10th Cir. 2008) ("[T]he task of district courts, and consequently appellate courts, is different in reviewing motions for summary judgment under traditional standards and qualified immunity principles," and "courts should exercise care not to confuse the two analytic frameworks."). As a result, I see no need to resolve whether such fact questions exist.

Nevertheless, despite my reservations about the majority's analytical approach, I agree with its ultimate conclusion: even assuming that (1) all the facts the majority relies on belong to the "universe of facts upon which we base our legal review of whether defendants are entitled to qualified immunity," *Cox*, 800 F.3d at 1242 (quoting *Fogarty*, 523 F.3d at 1154), and (2) under those facts, White violated Samuel Pauly's constitutional right to be free from excessive force, no existing precedent "place[s] the . . . constitutional question beyond debate," Maj. Op. 40 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)). Accordingly, White is entitled to qualified immunity. *Id.* at 42. And

because White is entitled to qualified immunity, his conduct "cannot serve as the basis of liability for" Mariscal and Truesdale. *Id.* Thus, all three defendants are entitled to summary judgment and we must reverse and remand with directions to enter judgment in their favor. *Id.* at 43.

Per Curiam

SUPREME COURT OF THE UNITED STATES

RAY WHITE, ET AL. *v*. DANIEL T. PAULY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SAMUEL PAULY, DECEASED ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 16-67. Decided January 9, 2017

PER CURIAM.

This case addresses the situation of an officer who – having arrived late at an ongoing police action and having witnessed shots being fired by one of several individuals in a house surrounded by other officers – shoots and kills an armed occupant of the house without first giving a warning.

According to the District Court and the Court of Appeals, the record, when viewed in the light most favorable to respondents, shows the following. Respondent Daniel Pauly was involved in a road-rage incident on a highway near Santa Fe, New Mexico. 814 F. 3d 1060, 1064-1065 (CA10 2016). It was in the evening, and it was raining. The two women involved called 911 to report Daniel as a "'drunk driver'" who was "'swerving all crazy.'" *Id.*, at 1065. The women then followed Daniel down the highway, close behind him and with their bright lights on. Daniel, feeling threatened, pulled his truck over at an off-ramp to confront them. After a brief, nonviolent encounter, Daniel drove a

short distance to a secluded house where he lived with his brother, Samuel Pauly.

Sometime between 9 p.m. and 10 p.m., Officer Kevin Truesdale was dispatched to respond to the women's 911 call. Truesdale, arriving after Daniel had already left the scene, interviewed the two women at the off-ramp. The women told Truesdale that Daniel had been driving recklessly and gave his license plate number to Truesdale. The state police dispatcher identified the plate as being registered to the Pauly brothers' address.

After the women left, Officer Truesdale was joined at the off-ramp by Officers Ray White and Michael Mariscal. The three agreed there was insufficient probable cause to arrest Daniel. Still, the officers decided to speak with Daniel to (1) get his side of the story, (2) "'make sure nothing else happened,'" and (3) find out if he was intoxicated. *Id.*, at 1065. The officers split up. White stayed at the off-ramp in case Daniel returned. Truesdale and Mariscal drove in separate patrol cars to the Pauly brothers' address, less than a half mile away. Record 215. Neither officer turned on his flashing lights.

When Officers Mariscal and Truesdale arrived at the address they had received from the dispatcher, they found two different houses, the first with no lights on inside and a second one behind it on a hill. *Id.*, at 217, 246. Lights were on in the second one. The officers parked their cars near the first house. They examined

a vehicle parked near that house but did not find Daniel's truck. *Id.*, at 310.

Officers Mariscal and Truesdale noticed the lights on in the second house and approached it in a covert manner to maintain officer safety. Both used their flashlights in an intermittent manner. Truesdale alone turned on his flashlight once they got close to the house's front door. Upon reaching the house, the officers found Daniel's pickup truck and spotted two men moving around inside the residence. Truesdale and Mariscal radioed White, who left the off-ramp to join them.

At approximately 11 p.m., the Pauly brothers became aware of the officers' presence and yelled out "'Who are you?'" and "'What do you want?'" 814 F. 3d, at 1066. In response, Officers Mariscal and Truesdale laughed and responded: "'Hey, (expletive), we got you surrounded. Come out or we're coming in.'" *Ibid.* Truesdale shouted once: "'Open the door, State Police, open the door." *Ibid.* Mariscal also yelled: "'Open the door, open the door.'" *Ibid.*

The Pauly brothers heard someone yelling, "'We're coming in. We're coming in.'" *Ibid.* Neither Samuel nor Daniel heard the officers identify themselves as state police. Record 81-82. The brothers armed themselves, Samuel with a handgun and Daniel with a shotgun. One of the brothers yelled at the police officers that "'We have guns.'" 814 F. 3d, at 1066. The officers saw someone run to the back of the house, so Officer

Truesdale positioned himself behind the house and shouted "'Open the door, come outside.'" *Ibid.*

Officer White had parked at the first house and was walking up to its front door when he heard shouting from the second house. He half-jogged, half-walked to the Paulys' house, arriving "just as one of the brothers said: 'We have guns.'" *Ibid.*; see also Civ. No. 12-1311 (D NM, Feb. 5, 2014), App. to Pet. for Cert. 75-78. When White heard that statement, he drew his gun and took cover behind a stone wall 50 feet from the front of the house. Officer Mariscal took cover behind a pickup truck.

Just "a few seconds" after the "We have guns" statement, Daniel stepped part way out of the back door and fired two shotgun blasts while screaming loudly. 814 F. 3d, at 1066-1067. A few seconds after those shots, Samuel opened the front window and pointed a handgun in Officer White's direction. Officer Mariscal fired immediately at Samuel but missed. "'Four to five seconds'" later, White shot and killed Samuel. *Id.*, at 1067.

The District Court denied the officers' motions for summary judgment, and the facts are viewed in the light most favorable to the Paulys. *Mullenix v. Luna*, 577 U. S. ___, ___, n. (2015) (*per curiam*) (slip op., at 2, n.). Because this case concerns the defense of qualified immunity, however, the Court considers only the facts that were knowable to the defendant officers. *Kingsley v. Hendrickson*, 576 U. S. ___, ___ (2015) (slip op., at 9).

Samuel's estate and Daniel filed suit against, *inter alia*, Officers Mariscal, Truesdale, and White. One of the claims was that the officers were liable under Rev. Stat. § 1979, 42 U. S. C. § 1983, for violating Samuel's Fourth Amendment right to be free from excessive force. All three officers moved for summary judgment on qualified immunity grounds. White in particular argued that the Pauly brothers could not show that White's use of force violated the Fourth Amendment and, regardless, that Samuel's Fourth Amendment right to be free from deadly force under the circumstances of this case was not clearly established.

The District Court denied qualified immunity. A divided panel of the Court of Appeals for the Tenth Circuit affirmed. As to Officers Mariscal and Truesdale, the court held that "[a]ccepting as true plaintiffs' version of the facts, a reasonable person in the officers' position should have understood their conduct would cause Samuel and Daniel Pauly to defend their home and could result in the commission of deadly force against Samuel Pauly by Officer White." 814 F. 3d, at 1076. The panel majority analyzed Officer White's claim separately from the other officers because "Officer White did not participate in the events leading up to the armed confrontation, nor was he there to hear the other officers ordering the brothers to 'Come out or we're coming in.'" *Ibid.* Despite the fact that "Officer White . . . arrived late on the scene and heard only 'We have guns' . . . before taking cover behind a stone wall," the majority held that a jury could have concluded that White's use of deadly force was not reasonable. *Id.*, at

1077, 1082. The majority also decided that this rule – that a reasonable officer in White's position would believe that a warning was required despite the threat of serious harm – was clearly established at the time of Samuel's death. The Court of Appeals' ruling relied on general statements from this Court's case law that (1) "the reasonableness of an officer's use of force depends, in part, on whether the officer was in danger at the precise moment that he used force" and (2) "if the suspect threatens the officer with a weapon[,] deadly force may be used if necessary to prevent escape, and if[,] where feasible, some warning has been given." *Id.*, at 1083 (citing, *inter alia, Tennessee v. Garner*, 471 U. S. 1 (1985), and *Graham v. Connor*, 490 U. S. 386 (1989); emphasis deleted; internal quotation marks and alterations omitted). The court concluded that a reasonable officer in White's position would have known that, since the Paulys could not have shot him unless he moved from his position behind a stone wall, he could not have used deadly force without first warning Samuel Pauly to drop his weapon.

Judge Moritz dissented, contending that the "majority impermissibly second-guesses" Officer White's quick choice to use deadly force. 814 F. 3d, at 1084. Judge Moritz explained that the majority also erred by defining the clearly established law at too high a level of generality, in contravention of this Court's precedent.

The officers petitioned for rehearing en banc, which 6 of the 12 judges on the Court of Appeals voted to grant. In a dissent from denial of rehearing, Judge

Hartz noted that he was "unaware of any clearly established law that suggests . . . that an officer . . . who faces an occupant pointing a firearm in his direction must refrain from firing his weapon but, rather, must identify himself and shout a warning while pinned down, kneeling behind a rock wall." 817 F. 3d 715, 718 (CA10 2016). Judge Hartz expressed his hope that "the Supreme Court can clarify the governing law." *Id.*, at 719.

The officers petitioned for certiorari. The petition is now granted, and the judgment is vacated: Officer White did not violate clearly established law on the record described by the Court of Appeals panel.

Qualified immunity attaches when an official's conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 577 U. S., at ___-___ (slip op., at 4-5). While this Court's case law "do[es] not require a case directly on point" for a right to be clearly established, "'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Id.*, at ___ (slip op., at 5). In other words, immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Ibid.*

In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases. See, *e.g.*, *City and County of San Francisco v. Sheehan*, 575 U. S. ___, ___ n. 3 (2015) (slip op., at 10, n.3) (collecting cases). The Court has found this necessary both because qualified immunity is

important to "'society as a whole,'" *ibid.*, and because as "an immunity from suit," qualified immunity "'is effectively lost if a case is erroneously permitted to go to trial,'" *Pearson v. Callahan*, 555 U. S. 223, 231 (2009).

Today, it is again necessary to reiterate the longstanding principle that "clearly established law" should not be defined "at a high level of generality." *Ashcroft v. al-Kidd*, 563 U. S. 731, 742 (2011). As this Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. *Anderson v. Creighton*, 483 U. S. 635, 640 (1987). Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.*, at 639.

The panel majority misunderstood the "clearly established" analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment. Instead, the majority relied on *Graham, Garner*, and their Court of Appeals progeny, which – as noted above – lay out excessive-force principles at only a general level. Of course, "general statements of the law are not inherently incapable of giving fair and clear warning' to officers, *United States v. Lanier*, 520 U. S. 259, 271 (1997), but "in the light of pre-existing law the unlawfulness must be apparent," *Anderson v. Creighton*, *supra*, at 640. For that reason, we have held that *Garner* and *Graham* do not by themselves create clearly established law outside "an obvious case." *Brosseau v. Haugen*, 543 U. S. 194, 199 (2004) (*per*

curiam); see also *Plumhoff v. Rickard*, 572 U. S. ___, ___, (2014) (slip op., at 13) (emphasizing that *Garner* and *Graham* "are 'cast at a high level of generality' ").

This is not a case where it is obvious that there was a violation of clearly established law under *Garner* and *Graham*. Of note, the majority did not conclude that White's conduct – such as his failure to shout a warning – constituted a run-of-the-mill Fourth Amendment violation. Indeed, it recognized that "this case presents a unique set of facts and circumstances" in light of White's late arrival on the scene. 814 F. 3d, at 1077. This alone should have been an important indication to the majority that White's conduct did not violate a "clearly established" right. Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here.

On the record described by the Court of Appeals, Officer White did not violate clearly established law. The Court notes, however, that respondents contend Officer White arrived on the scene only two minutes after Officers Truesdale and Mariscal and more than three minutes before Daniel's shots were fired. On the assumption that the conduct of Officers Truesdale and Mariscal did not adequately alert the Paulys that they were police officers, respondents suggest that a

reasonable jury could infer that White witnessed the other officers' deficient performance and should have realized that corrective action was necessary before using deadly force. Brief in Opposition 11, 22, n. 5. This Court expresses no position on this potential alternative ground for affirmance, as it appears that neither the District Court nor the Court of Appeals panel addressed it. The Court also expresses no opinion on the question whether this ground was properly preserved or whether – in light of this Court's holding today – Officers Truesdale and Mariscal are entitled to qualified immunity.

For the foregoing reasons, the petition for certiorari is granted; the judgment of the Court of Appeals is vacated; and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

GINSBURG, J., concurring

SUPREME COURT OF THE UNITED STATES

RAY WHITE, ET AL. v. DANIEL T. PAULY,
AS PERSONAL REPRESENTATIVE OF THE ESTATE
OF SAMUEL PAULY, DECEASED ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 16-67. Decided January 9,2017

JUSTICE GINSBURG, concurring.

I join the Court's opinion on the understanding that it does not foreclose the denial of summary judgment to Officers Truesdale and Mariscal. See 814 F. 3d 1060, 1068, 1073, 1074 (CA10 2016) (Court of Appeals emphasized, repeatedly, that fact disputes exist on question whether Truesdale and Mariscal "adequately identified themselves" as police officers before shouting "Come out or we're coming in" (internal quotation marks omitted)). Further, as to Officer White, the Court, as I comprehend its opinion, leaves open the propriety of denying summary judgment based on fact disputes over when Officer White arrived at the scene, what he may have witnessed, and whether he had adequate time to identify himself and order Samuel Pauly to drop his weapon before Officer White shot Pauly. Compare *id.*, at 1080, with *ante*, at 8. See also Civ. No. 12-1311 (D NM, Feb. 5, 2014), pp. 7, and n. 5, 9, App. to Pet. for Cert. 75-76, and n. 5, 77 (suggesting that Officer White may have been on the scene when Officers Truesdale and Mariscal threatened to invade the Pauly home).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DANIEL T. PAULY, as Personal Representative of the ESTATE OF SAMUEL PAULY, deceased, and DANIEL B. PAULY, Individually,

Plaintiffs,

vs.

Civ. No. 12-1311 KG/WPL

STATE OF NEW MEXICO DEPARTMENT OF PUBLIC SAFETY, RAY WHITE, MICHAEL MARISCAL, and KEVIN TRUESDALE

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Feb. 10, 2014)

This matter comes before the Court upon Defendant Kevin Truesdale's First Motion for Summary Judgment and Memorandum in Support Thereof (Officer Truesdale's Motion for Summary Judgment), filed November 13, 2013. (Doc. 90). Defendant Kevin Truesdale (Officer Truesdale) moves for summary judgment on the 42 U.S.C. § 1983 claim, the New Mexico Tort Claims Act (NMTCA) claim, and the New Mexico State Constitution claim. In addition, Officer Truesdale raises a qualified immunity defense with respect to the Section 1983 claim. Plaintiffs filed a response

to Officer Truesdale's Motion for Summary Judgment on December 23, 2013, and Officer Truesdale filed a reply on January 24, 2014. (Docs. 113 and 128).

This matter also comes before the Court upon Defendant Michael Mariscal's First Motion for Summary Judgment and Memorandum in Support Thereof (Officer Mariscal's Motion for Summary Judgment), filed November 13, 2013. (Doc. 91). Like Officer Truesdale, Defendant Michael Mariscal (Officer Mariscal) moves for summary judgment on the Section 1983 claim, the NMTCA claim, and the New Mexico State Constitution claim. Moreover, Officer Mariscal raises a qualified immunity defense with respect to the Section 1983 claim. Plaintiffs filed a response to Officer Mariscal's Motion for Summary Judgment on December 23, 2013, and Officer Mariscal filed a reply on January 24, 2014. (Docs. 110 and 130).

Having reviewed Officer Truesdale's Motion for Summary Judgment, Officer Mariscal's Motion for Summary Judgment, the accompanying briefs, and the evidence of record, the Court denies both motions for summary judgment for the following reasons.

A. The Second Amended Complaint for Damages for Deprivation of Civil Rights, Wrongful Death and Common Law Torts (Doc. 46)

This wrongful death lawsuit arises from an incident in which Defendant Ray White, a New Mexico State Police Officer, shot and killed Samuel Pauly at the house he shared with his brother, Plaintiff Daniel

B. Pauly (Daniel Pauly). Daniel Pauly was at the house at the time of the shooting. In addition, Officers Mariscal and Truesdale, also New Mexico State Police Officers, were at the brothers' house when the shooting occurred.

Plaintiffs' lawsuit is based on Section 1983, the NMTCA, and the New Mexico State Constitution. In Count One, Plaintiffs bring a Section 1983 claim against Officers White, Truesdale, and Mariscal for allegedly violating Samuel Pauly's Fourth Amendment right to be free from excessive force.[1] In Count Three, Plaintiffs bring an NMTCA battery claim against Officers White, Truesdale, and Mariscal, and a corresponding NMTCA *respondeat superior* claim against Defendant State of New Mexico Department of Public Safety (NMDPS). In Count Four, Plaintiffs contend that the NMDPS violated article II, section 10 of the New Mexico State Constitution through Officers White, Truesdale, and Mariscal's alleged unreasonable seizure of Samuel Pauly. Finally, Plaintiffs bring a loss of consortium claim in Count Five.

B. Summary Judgment Standard of Review

Summary judgment is appropriate if there is no genuine dispute as to a material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).[2] When applying this standard, the

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[1] The parties stipulated to dismissing Count Two. (Doc. 117).

[2] Rule 56 was amended effective December 1, 2010, but the standard for granting summary judgment remains unchanged.

Court examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Applied Genetics Intl, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Only then does the burden shift to the non-movant to come forward with evidence showing that there is a genuine issue of material fact. *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). An issue of material fact is genuine if a reasonable jury could return a verdict for the non-movant. *Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996) (citation omitted). The non-moving party may not avoid summary judgment by resting upon the mere allegations or denials of his or her pleadings. *Bacchus Indus., Inc.*, 939 F.2d at 891.

Summary judgment motions involving a qualified immunity defense are determined somewhat differently than other summary judgment motions. *See Romero v. Fay*, 45 F.3d 1472, 1475 (10th Cir. 1995). "When a defendant raises the qualified immunity defense on summary judgment, the burden shifts to the plaintiff to meet a strict two-part test." *Nelson v. McMullen*, 207 F.3d 1202, 1206 (10th Cir. 2000). This is a heavy burden for the plaintiff. *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001) (citing *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995)). First, the plaintiff must demonstrate that the defendant's actions violated a constitutional or statutory right.

Second, the plaintiff must show that the "right was clearly established such that a reasonable person in the defendant's position would have known that his conduct violated that right." *Maestas v. Lujan*, 351 F.3d 1001, 1007 (10th Cir. 2003). The Tenth Circuit Court of Appeals instructs that

> [i]f the plaintiff does not satisfy either portion of the two-pronged test, the Court must grant the defendant qualified immunity. If the plaintiff indeed demonstrates that the official violated a clearly established constitutional or statutory right, then the burden shifts back to the defendant, who must prove that "no genuine issues of material fact" exist and that the defendant "is entitled to judgment as a matter of law." In the end, therefore, the defendant still bears the normal summary judgment burden of showing that no material facts remain in dispute that would defeat the qualified immunity defense. When the record shows an unresolved dispute of historical fact relevant to this immunity analysis, a motion for summary judgment based on qualified immunity should be "properly denied."

Olsen v. Layton Hills Mall, 312 F.3d 1304, 1312 (10th Cir. 2002) (citations omitted).

C. Material Facts and Reasonable Inferences Viewed in the Light Most Favorable to Plaintiffs

In determining the material facts and reasonable inferences to be viewed in the light most favorable to Plaintiffs, the Court reviewed Officer Truesdale's

Statement of Undisputed Material Facts, Officer Mariseal's Statement of Undisputed Material Facts, Plaintiffs' Additional Statement of Material Facts,[3] the parties' responses to the statements of undisputed material facts, and the evidence of record. Unless otherwise noted, the following recitation of material facts and reasonable references reflects the Plaintiffs' version of the facts as gleaned from the evidence of record and excludes facts, contested or otherwise, which are not properly before this Court in the motions for summary judgment.

On the evening of October 4, 2011, Daniel Pauly and two females became involved in a road rage incident on the interstate highway going north from Santa Fe, New Mexico towards Las Vegas, New Mexico. (Doc. 82-1) at 6 (depo. at 121). One of the females called 911 and reported a "drunk driver" who was "swerving all crazy" and turning his Toyota pickup truck's lights off and on. (Doc. 82-1) at 23. After Daniel Pauly passed the females, they apparently tailgated Daniel Pauly. (Doc. 82-1) at 5 (depo. at 117-120).

Daniel Pauly, therefore, stopped at the Glorieta off-ramp as did the females who were following him. (Doc. 82-1) at 9 (depo. at 133). Daniel Pauly asked the females why they were following him and why they had the car's brights on. *Id.* One of the females reported that Daniel Pauly was "throwing up gang signs"

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[3] Plaintiffs' Additional Statement of Material Facts is found in Plaintiffs' Opposition to Defendant Raymond White's First Motion for Summary Judgment. (Doc. 111) at 14-25.

during this encounter. (Doc. 82-1) at 24. Daniel Pauly, however, felt personally threatened by the females' driving behavior. (Doc. 82-1) at 9 (depo. at 134). Daniel Pauly then drove a short distance from the off-ramp to his house where his brother, Samuel Pauly, was playing a video game on the couch.[4] (Doc. 82-1) at 10 (depo. at 145). The house is located in a wooded rural area to the rear of another house on a hill. (Doc. 82-1) at 21.

The New Mexico State Police dispatcher contacted Officer Truesdale between 9:00 p.m. and 10:00 p.m. that evening regarding the 911 call from the females. (Doc. 82-3) at 3. Officer Truesdale arrived at the Glorieta off-ramp to speak to the two females after Daniel Pauly had driven to his house. *See id.* Officers White and Mariscal were *en route* to provide Officer Truesdale with back-up assistance. *Id.* The females informed Officer Truesdale about Daniel Pauly's alleged reckless and dangerous driving. *Id.* The females also described Daniel Pauly's vehicle as a gray Toyota pickup truck and gave dispatch a license plate number. *Id.* The dispatcher informed Officer Truesdale that the Toyota pickup truck was registered to an address on Firehouse Road, Glorieta, New Mexico. *Id.*

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[4] Officers Truesdale and Mariscal note that Samuel Pauly had smoked marijuana and drank half a beer that evening. (Doc. 87-1) at 2 (depo. at 101); (Doc. 87-1) at 5 (depo. at 148). Officers Truesdale and Mariscal also note that Daniel Pauly drank two beers at a club in Albuquerque and drank half a beer at the house. (Doc. 87-1) at 5-6 (depo. at 148-49). The Court will not consider this evidence in deciding the Motion for Summary Judgment because it is irrelevant to the issues now before the Court.

Once the two females went on their way, any threat to the females was over. (Doc. 82-2) at 5 (depo. at 208). Officers Mariscal and White subsequently joined Officer Truesdale at the Glorieta off-ramp. Although it was raining, the Officers were not wearing raincoats over their uniforms. (Doc. 82-1) at 13 (depo. at 179); (Doc. 84-3) at 4 (depo. at 134). It was also a dark night.[5] (Doc. 82-3) at 17 (depo. at 100).

Officer Truesdale decided to speak with Daniel Pauly to determine if he was intoxicated, "to make sure nothing else happened," and to get Daniel Pauly's version of the incident. (Doc. 82-2) at 6 (depo. at 218). At that point, the Officers did not believe any exigent circumstances existed. *Id.* at 7 (depo. at 213); (Doc. 82-4) at 9-10 (depo. at 20-21). The Officers also did not have enough evidence or probable cause to make an arrest. (Doc. 82-3) at 5; (Doc. 82-3) at 14 (depo. at 91).

The Officers then determined that Officers Truesdale and Mariscal should go, in separate patrol units, to see if they could locate Daniel Pauly's pickup truck at the Firehouse Road address while Officer White should stay at the off-ramp in case Daniel Pauly came back that way. (Doc. 82-3) at 14 (depo. at 92). Officers Truesdale and Mariscal drove a short distance to the Firehouse Road address and parked their vehicles in front of the main house along the road. *See* (Doc. 82-4)

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[5] Officers White and Truesdale dispute this fact and claim that, despite the rain, the moon was out and they could see fairly well in the dark. (Doc. 84-2) at 5 (depo. at 117); (Doc. 85-2) at 4 (depo. at 227). Officers White and Truesdale do not describe how full the moon was that night.

at 11 (depo. at 109). The vehicles had their headlights on and one vehicle had takedown lights on; none of the vehicles had flashing lights on. (Doc. 82-4) at 11 (depo. at 109-10). Officers Truesdale and Mariscal did not see Daniel Pauly's pickup truck at the main house. *See* (Doc. 82-2) at 9 (depo. at 230).

Officers Truesdale and Mariscal, however, saw a porch light and lights on in another house behind the main house, so they decided to walk up to that second house, Daniel and Samuel Pauly's house, to see if Daniel Pauly's pickup truck was there. (Doc. 82-2) at 9 (depo. at 232); (Doc. 82-3) at 6. The Officers did not activate any security lights as they walked up to the brothers' house. (Doc. 82-3) at 18 (depo. at 115).

Officers Truesdale and Mariscal approached the brothers' house in such a way that the brothers did not know that the Officers were there. (Doc. 82-2) at 12 (depo. at 224). The Officers chose this kind of approach in an attempt to maintain officer safety. *Id.* at 14 (depo. at 233). Officers Truesdale and Mariscal, therefore, did not initially use their flashlights and then used the flashlights periodically. *Id.* at 13 (depo. at 226); (Doc. 82-3) at 15 (depo. at 101). After Officer Truesdale got close to the front of the house and began approaching the front door, he turned his flashlight on. (Doc. 85-3) at 3 (depo. at 249-50, 252). The Officers could see through the front window two males moving back and forth in the house. (Doc. 88-3) at 1 (depo. at 152). As the Officers got closer to the second house, they also saw Daniel Pauly's pickup truck and advised Officer White that they located the pickup truck. (Doc. 82-5) at 12.

Officer White then proceeded to the Firehouse Road address. *Id.*

At around 11:00 p.m., the brothers saw through the front window two blue LED flashlights, five or seven feet apart at chest level, coming towards the house. (Doc. 82-1) at 11 (depo. at 170-71); (Doc. 82-3) at 4. Daniel Pauly could not see who held the flashlights, especially with the rain coming in sideways. (Doc. 82-1) at 11 (depo. at 171); (Doc. 87-2) at 3 (depo. at 208). Daniel Pauly thought the figures were intruders possibly related to the road rage incident; it did not enter Daniel Pauly's mind that the figures could have been police officers. (Doc. 82-1) at 11-12 (depo. at 171, 173); (Doc. 87-2) at 4 (depo. at 220). Both brothers then yelled out several times, "Who are you?" and, "What do you want?" (Doc. 82-1) at 13 (depo. at 179-80). In response to those inquiries, the brothers heard a laugh and, "Hey, (expletive), we got you surrounded. Come out or we're coming in."[6] *Id.* at 13 (depo. at 180). Moreover, Officer Truesdale yelled out once, "Open the door, State Police, open the door." (Doc. 87-2) at 2 (depo. at 185-86); Truesdale Coban recording, Supp. #19. Daniel Pauly, however, did not hear anyone call out "State Police" until after Officer White shot Samuel Pauly.[7] (Doc.

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[6] The Officers did not actually intend to go inside; they were trying to get the brothers to come out of the house. (Doc. 82-4) at 2 (depo. at 162).

[7] The Officers dispute that Daniel Pauly did not know that State Police Officers were outside the house until after Officer White shot Samuel Pauly. The Officers claim that they shouted out "State Police" numerous times throughout the incident. *See, e.g.*, (Doc. 82-3) at 5-8. Officer Mariscal also claims that he illuminated

82-1) at 14 (depo. at 181). Officer Mariscal also announced, "Open the door, open the door." (Doc. 82-3) at 5.

Daniel Pauly felt scared and that his life, his brother's life, and the lives of their dogs were being threatened by unknown people outside the house. (Doc. 82-1) at 16 (depo. at 205); (Doc. 82-1) at 17 (depo. at 222). The brothers then decided to call the police. (Doc. 82-1) at 17 (depo. at 222). Before they could do so, Daniel Pauly heard, "We're coming in. We're coming in." *Id.*

At that point, Samuel Pauly retrieved a shotgun and box of shells for Daniel Pauly so that the brothers could get ready for a home invasion. *Id.* at 17 (depo. at 222-23). Samuel Pauly also obtained a loaded handgun. (Doc. 82-3) at 4. Daniel Pauly then stated to Samuel Pauly that he was going to fire a couple of warning shots. (Doc. 82-1) at 17 (depo. at 223). Samuel Pauly went back to the front room. *Id.* Next, one of the brothers yelled out from inside of the house, "We have guns." (Doc. 85-4) at 2 (depo. 276). Officers Mariscal and Truesdale subsequently saw someone, presumably Daniel Pauly, run towards the back of the house. (Doc. 82-2) at 23 (depo. at 272). Officer Truesdale, therefore, went to the far back corner of the house to see what was happening on the other side of the house. *Id.* at 21

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himself with a flashlight and that "the individuals" in the house shined flashlights in the direction of himself and Officer Truesdale. *Id.* at 7-8. However, Officer Truesdale, Officer White, and Daniel Pauly did not testify to seeing Officer Mariscal shine a flashlight on himself nor did Daniel Pauly testify to using a flashlight. *See* (Doc. 84-3) at 2 (depo. at 127).

(depo. at 274). Officer Truesdale then stated, "Open the door, come outside." (Doc. 82-3) at 5.

While Officers Truesdale and Mariscal were trying to get the brothers to come out of the house and before one of the brothers yelled out, "We have guns," Officer White arrived at the Firehouse Road address and walked up towards the brothers' house, using his flashlight periodically. *Id.*; (Doc. 84-2) at 4 (depo. at 116). Officer White could also see two males walking in the front living room. (Doc. 82-4) at 12 (depo. at 123). In addition, Officer White heard a male from inside of the house say, "We have guns." (Doc. 82-3) at 6. When Officer White reached the front of the house, Officer Mariscal was still in the front of the house while Officer Truesdale was already at the rear of the brothers' house. (Doc. 82-3) at 5.

After hearing, "We have guns," Officer White took cover behind a stone wall located 50 feet from the front of the house and drew his duty weapon while Officer Mariscal took cover behind a Ford pickup truck and unholstered his duty weapon. (Doc. 82-4) at 13 (depo. at 132); (Doc. 84-3) at 4 (depo. at 135); (Doc. 84-5) at 3 (depo. at 191); (Doc. 88-3) at 5 (depo. at 173-74). A matter of seconds after one of the brothers yelled, "We have guns," Daniel Pauly stepped partially out of the back of the house and fired two warning shots up into a tree while screaming to scare people off. (Doc. 82-1) at 17 (depo. at 224); (Doc. 82-1) at 19 (depo. at 226); (Doc. 84-5) at 6 (depo. at 209). Daniel Pauly did not feel comfortable going out the front door after he initially heard someone say that the brothers were surrounded and

"come out or we're coming in." (Doc. 82-1) at 18 (depo. at 204). Having heard the two rifle shots, Officer White believed that Officer Truesdale had been shot.[8] (Doc. 84-3) at 5 (depo. at 137).

Officers Mariscal and White then saw Samuel Pauly open the front window and hold his arm out with a handgun, pointing it at Officer White.[9] (Doc. 82-4) at 3 (depo. at 185); (Doc. 82-4) at 4 (depo. at 190-91); (Doc. 82-4) at 14 (depo. at 171); (Doc. 88-4) at 3 (depo. at 193). Officer Mariscal then shot towards Samuel Pauly, but missed Samuel Pauly.[10] Four to five seconds after

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[8] Officer White claims that after he heard the first two shotgun blasts he yelled out, "State Police, hands up, hands up, hands up." (Doc. 82-5) at 13. Officer Mariscal's audio recording of the gunfire, however, does not include this statement. DVD: Mariscal, NMSP.

[9] Officers Mariscal and White assert that not only did Samuel Pauly point the handgun at Officer White, but that Samuel Pauly actually fired the handgun. (Doc. 82-4) at 4 (depo. at 190-91); (Doc. 82-4) at 14 (depo. at 171-72). A revolver later found on the living room floor under the front window where Samuel Pauly was shot had one casing forward of the firing pin while the other four chambers were loaded. (Doc. 82-5) at 21. Investigators did not recovery a bullet from the handgun, so there is no forensic proof that Samuel Pauly fired the handgun that night. *See id.* at 20. However, from Officer Truesdale's position, "[t]he first two shots were louder than the third, and the third shot was quieter then [sic] the fourth" indicating that the third shot came from the house, i.e., that Samuel Pauly fired that third shot. *Id.* at 17.

[10] Officer Mariscal strongly believes that he fired a shot at Samuel Pauly after Samuel Pauly fired the handgun. (Doc. 82-4) at 6 (depo. at 210-211); (Doc. 82-5) at 15; (Doc. 88-4) at 3 (depo. at 195). Officer Mariscal normally carries a total of 16 cartridges in his duty weapon. (Doc. 82-4) at 5 (depo. at 130-31). After the shooting, Officer Mariscal was missing one cartridge from his magazine. (Doc. 82-5) at 19. One could, therefore, infer from this

Samuel Pauly pointed his handgun at Officer White, Officer White shot Samuel Pauly. (Doc. 84-5) at 3 (depo. at 191). The entire incident, from the time Officers Truesdale and Mariscal arrived at the Firehouse Road address to the time of the shootings, took less than five minutes. (Doc. 113) at 28.

D. Discussion

Officers Truesdale and Mariscal argue that they are entitled to summary judgment on the Fourth Amendment excessive force claim because their conduct was objectively reasonable under the totality of the circumstances. Officers Truesdale and Mariscal also argue that they are entitled to qualified immunity on the Fourth Amendment excessive force claim. Next, Officers Truesdale and Mariscal argue that the undisputed facts show that they did not violate Samuel Pauly's rights under article II, section 10 of the New Mexico State Constitution nor did they commit a battery on Samuel Pauly. Finally, Officers Truesdale and Mariscal argue that the NMDPS cannot be held vicariously liable for the alleged battery they committed or for their alleged violations of the New Mexico State Constitution. Plaintiffs contend that these arguments are without merit.

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evidence that Officer Mariscal fired one shot. Since only four shots were fired that night, if Officer Mariscal fired the third shot as he claims and Officer White fired the fourth shot, then Samuel Pauly could not have fired upon Officer White.

1. Count One: the Section 1983 Fourth Amendment Excessive Force Claim

a. Whether Officers Truesdale and Mariscal are Entitled to Summary Judgment on Count One

Officers Truesdale and Mariscal argue first that they are entitled to summary judgment on Count One because the undisputed material facts show that their conduct at Daniel and Samuel Pauly's house was objectively reasonable under the totality of the circumstances and, therefore, lawful under the Fourth Amendment. Plaintiffs argue, however, that there are genuine issues of material fact and that when the facts are viewed in the light most favorable to Plaintiffs a reasonable jury could find that Officers Truesdale and Mariscal's conduct was reckless and unreasonably created the need for Officer White to shoot Samuel Pauly. Plaintiffs, therefore, assert that a reasonable jury could find that Officers Truesdale and Mariscal's objectively unreasonable conduct violated Samuel Pauly's Fourth Amendment right to be free from excessive force. Thus, Plaintiffs contend that Officers Truesdale and Mariscal are not entitled to summary judgment on Count One.[11]

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[11] Plaintiffs note that Officers Truesdale and Mariscal do not address Plaintiffs' Fourth Amendment claim based on Officers Truesdale and Mariscal's alleged unreasonable seizure of Samuel Pauly prior to his shooting death. The Court, however, has determined that Plaintiffs have not pled a Fourth Amendment unreasonable seizure claim. *See* (Doc. 123).

The issue in Fourth Amendment excessive force cases is whether, under the totality of the circumstances, an officer's use of force was objectively reasonable. *Thomson v. Salt Lake County*, 584 F.3d 1304, 1313 (10th Cir. 2009). Reasonableness of the use of force is judged from the viewpoint of a reasonable officer at the scene of the incident and not from hindsight. *Id.* As always, courts "recognize that officer may have 'to make split-second judgments in uncertain and dangerous circumstances.'" *Id.* (quoting *Phillips v. James*, 422 F.3d 1075, 1080 (10th Cir. 2004) (internal quotation marks omitted)).

The objective reasonableness of officers' use of deadly force further depends on "whether their 'own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.' The conduct of the officers before a suspect threatens force is relevant only if it is 'immediately connected' to the threat of force." *Id.* at 1320 (citations omitted). Moreover, an officer's conduct prior to a suspect threatening force "is only actionable if it rises to the level of recklessness" or deliberateness, i.e., the officer's actions cannot constitute mere negligence. *Id.* In addition, if it was feasible for the officer to warn a suspect not to use force, the failure to issue such a warning could create an unreasonable need to use deadly force. *Id.* at 1321. Determining whether an officer's reckless or deliberate conduct unreasonably created a need to use force "is simply a specific application of the totality of the circumstances approach inherent in the Fourth Amendment's reasonableness standard." *Id.* at 1320 (internal

quotation marks omitted) (citing *Cram*, 252 F.3d at 1132).

This District Court has held that the reckless endangerment doctrine described above also applies to a non-shooting officer's conduct prior to the shooting death of a suspect by another officer. *See Diaz v. Salazar*, 924 F.Supp. 1088, 1097 (D.N.M. 1996). The Tenth Circuit Court of Appeals, however, has not applied the reckless endangerment doctrine to the conduct of non-shooting officers. Instead, in a 2013 decision, the Tenth Circuit focused on whether the non-shooting officer[12] "caused" the suspect to be deprived of his Fourth and Fourteenth Amendment rights when another officer shot and killed that suspect. *See James*, 511 Fed. Appx. at 746. The Tenth Circuit stated that "'[t]he requisite causal connection is satisfied if the defendant[s] set in motion a series of events that the defendant[s] knew or reasonably should have known would cause others to deprive the plaintiff of [his] constitutional rights.'" *Id.* (quoting *Trask v. Franco*, 446 F.3d 1036, 1046 (10th Cir. 2006)). The Tenth Circuit further stated that to prevail on a Section 1983 claim, a plaintiff must show that the non-shooting officer's actions "were both the but-for and the proximate cause" of the suspect's death. *Id.* (citing *Trask*, 446 F.3d at 1046). However, if a superseding or intervening event, like the suspect's own actions, caused the suspect's death, then an officer cannot have proximately caused the death and the officer

[12] In that case, the "non-shooting" officer had fired at the suspect but missed hitting him. *James v. Chavez*, 511 Fed. Appx. 742, 745 (10th Cir. 2013).

is, thus, not liable for that death under Section 1983. *Id.* at 747 (citing *Trask*, 446 F.3d at 1046).

Although neither Plaintiffs nor Officers Truesdale and Mariscal directly analyze Officers Truesdale and Mariscal's actions under the above causation analysis, Plaintiffs' argument concerning the reckless endangerment doctrine raises causation issues similar to those which the Tenth Circuit addressed. Plaintiffs contend, in essence, that (1) Officers Truesdale and Mariscal's actions set in motion a series of events which they reasonably should have known would create a dangerous situation that would cause an Officer, like Officer White, to have a need to use deadly force on an occupant of the house, in this case, Samuel Pauly; and (2) Officers Truesdale and Mariscal's conduct was the but-for and proximate cause of Samuel Pauly's death. It is clearly undisputed that but for Officers Truesdale and Mariscal's decision to walk up to the brothers' house, Officer White would not have shot Samuel Pauly. The evidence of record, however, contains genuine issues of material fact regarding whether Officers Truesdale and Mariscal's conduct prior to the shooting of Samuel Pauly proximately caused Officer White's need to shoot Samuel Pauly. For example, it is disputed whether (1) Officers Truesdale, Mariscal, and White adequately identified themselves, either verbally or by using a flashlight; and (2) the brothers could, nonetheless, see Officers Truesdale, Mariscal, and White considering the ambient light and other light sources. The outcome of these factual issues is material to whether the brothers knew that State Police Officers

were outside their house prior to Officer White shooting Samuel Pauly. If a jury finds that the brothers knew that State Police Officers were outside their house, but the brothers, nonetheless, armed themselves and Samuel Pauly pointed a handgun at Officer White, then a reasonable jury could find that the brothers' hostile actions were superseding or intervening causes of Samuel Pauly's death. In that scenario, Officers Truesdale and Mariscal could not be held liable for Samuel Pauly's death, i.e., Officers Truesdale and Mariscal could not have proximately caused Samuel Pauly's death. On the other hand, if a jury finds that the brothers did not know who was outside their house, then a reasonable jury could determine that Officer Truesdale and Officer Mariscal proximately caused Samuel Pauly's death by failing to adequately identify themselves as well as Officer White.

Furthermore, viewing the evidence in the light most favorable to Plaintiffs, a reasonable jury could find the following: there were no exigent circumstances requiring Officers Truesdale, Mariscal, and White to go to Daniel Pauly's house at 11:00 p.m.; Officer Truesdale and Mariscal purposefully approached the house in a surreptitious manner; despite the porch light and light from the house, the rain and darkness made it difficult for the brothers to see who was outside their house; the fact that the brothers' house is located in a rural wooded area would have heightened the brothers' concern about intruders; Officer Truesdale provided inadequate police identification by yelling out "State Police" once; the Officers' use of a hostile tone in

stating, "we got you surrounded. Come out or we're coming in" was threatening; statements by Officers Truesdale and Mariscal of "open the door" and other statements of "we're coming in" were, likewise, threatening; it would have been reasonable for Officer Truesdale, Mariscal, and White to conclude that Daniel Pauly could believe that persons coming up to his house at 11:00 p.m. were connected to the road rage incident which had occurred a couple of hours previously; that under these circumstances, the occupants of the house would feel a need to defend themselves and their property with the possible use of firearms; and the incident occurred in less than five minutes. Under these circumstances, a reasonable jury could find that Officers Truesdale and Mariscal's actions set in motion a series of events which they reasonably should have known would create a dangerous situation that would cause Officer White's need to shoot Samuel Pauly. Additionally, a reasonable jury could find that but for Officers Truesdale and Mariscal's decision to walk up to the brothers' house, Officer White would not have shot Samuel Pauly. A reasonable jury could also find that Samuel Pauly's actions did not constitute a superseding cause of his death, i.e., that Samuel Pauly did not know that he was pointing a hand gun at a State Police Officer. Thus, a reasonable jury could find that Officers Truesdale and Mariscal's conduct proximately caused Samuel Pauly's death. In sum, a reasonable jury could find that Officers Truesdale and Mariscal's conduct caused Samuel Pauly to be deprived of his Fourth Amendment right to be free from excessive force. Clearly, there are genuine issues of material

fact which foreclose the Court from granting summary judgment on Count One.

b. Qualified Immunity

Officers Truesdale and Mariscal also argue that they are entitled to qualified immunity on Count One. To resolve the first part of the qualified immunity test, the Court must decide if the alleged facts, when viewed "in the light most favorable to the party asserting the injury, . . . show the officer's conduct violated a constitutional right[.]" *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (citation omitted). As shown above, Plaintiffs have produced sufficient evidence to demonstrate that Officers Truesdale and Mariscal violated Samuel Pauly's Fourth Amendment right to be free from excessive force. Hence, Plaintiffs meet the first step in defeating qualified immunity.

To resolve the second part of the qualified immunity test, Plaintiffs must show that Samuel Pauly's Fourth Amendment right to be free from excessive force was clearly established at the time of the shooting. "In determining whether the right was 'clearly established,' the court assesses the objective legal reasonableness of the action at the time of the alleged violation and asks whether 'the right [was] sufficiently clear that a reasonable officer would understand that what he is doing violates that right.'" *Cram*, 252 F.3d at 1128 (quoting *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). "[I]n order for the law to be clearly established, there must be 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." *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992). A plaintiff, however, "is not required to show that the very conduct in question has previously been held unlawful." *Sh. A. ex rel. J. A. v. Tucumcari Mun. Schools*, 321 F.3d 1285, 1287 (10th Cir. 2003).

Since at least 2006, it has been clearly established in the Tenth Circuit that the requisite causal connection for establishing a Section 1983 violation "is satisfied if the defendant[s] set in motion a series of events that the defendant[s] knew or reasonably should have known would cause others to deprive the plaintiff of [his] constitutional rights." *Trask*, 446 F.3d at 1046. It has also been clearly established, since at least 2006, that for an officer to be liable under Section 1983, the officer's conduct must be both a but-for and proximate cause of the plaintiff's constitutional harm, and that a superseding cause relieves an officer of Section 1983 liability. *Id.* Accepting Plaintiffs' version of the facts, a reasonable person in Officers Truesdale and Mariscal's positions would understand that his actions would set in motion a series of events which he reasonably should have known would create a dangerous situation that would cause Officer White's need to use deadly force on Samuel Pauly. Furthermore, such a reasonable person in Officers Truesdale and Mariscal's positions would understand that his actions were both the but-for and proximate cause of Officer White's need to shoot Samuel Pauly. Accordingly, a reasonable person

in Officers Truesdale and Mariscal's positions would understand that his actions violated Samuel Pauly's Fourth Amendment right to be free from excessive force. Thus, Plaintiffs meet the second step in defeating qualified immunity.

Having met the test to defeat qualified immunity, the burden shifts back to Officers Truesdale and Mariscal to prove that there is no genuine issue of material fact that would defeat the qualified immunity defense. As discussed above, genuine issues of material fact exist which concern whether Officers Truesdale and Mariscal's conduct prior to the shooting of Samuel Pauly proximately caused Officer White's need to shoot Samuel Pauly. Moreover, viewing the facts in the light most favorable to Plaintiffs, a reasonable jury could determine that (1) Officers Truesdale and Mariscal's actions set in motion a series of events which they reasonably should have known would create a dangerous situation that would cause Officer White's need to shoot Samuel Pauly; and (2) Officers Truesdale and Mariscal's actions were the but-for and proximate cause of Officer White's need to shoot Samuel Pauly. Having failed to carry their burden of proving that there are no genuine issues of material fact that would defeat their qualified immunity defense, Officers Truesdale and Mariscal cannot claim that qualified immunity entitles them to summary judgment on Count One.

2. Count Four: the New Mexico State Constitution Claim[13]

Next, Officers Truesdale and Mariscal argue that they are entitled to summary judgment on the New Mexico State Constitution claim because the undisputed material facts show that their conduct was objectively reasonable under the totality of the circumstances. Count Four, however, does not state an excessive force claim under the New Mexico State Constitution. Rather, Count Four states a New Mexico State Constitution claim for unreasonable seizure. Consequently, the Court cannot grant summary judgment on Count Four. *See Elliott Industries Ltd. Partnership v. BP America Production Co.*, 407 F.3d 1091, 1121 (10th Cir. 2005) ("Obviously, under Rule 56(a) a party cannot move for summary judgment on a nonexistent, non-pleaded claim.").

3. Count Three: the NMTCA Battery Claim

Officers Truesdale and Mariscal argue that they are entitled to summary judgment on the NMTCA battery claim because the undisputed material facts demonstrate that their conduct was objectively reasonable under the totality of the circumstances. In New Mexico, a person commits the tort of battery by "causing an offensive touching. . . ." *Selmeczski v. N.M. Dept.*

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[13] The Court will discuss Count Four before addressing Count Three because that is the order in which Officers Truesdale and Mariscal discuss those Counts in their motions for summary judgment.

of Corrections, 2006-NMCA-024 ¶ 29, 139 N.M. 122. *See also Schear v. Board of County Com'rs of Bernalillo County*, 1984-NMSC-079 ¶ 9, 101 N.M. 671 (under NMTCA, a law enforcement officer need not inflict tort to be liable for that tort; a law enforcement officer need only proximately cause the tort). Since there are genuine questions of material fact pertaining to whether Officers Truesdale and Mariscal's actions proximately caused Officer White to use deadly force on Samuel Pauly, the Court cannot grant summary judgment on Count Three.

4. NMDPS Liability Pursuant to the Doctrine of Respondeat Superior

Lastly, Officers Truesdale and Mariscal argue that since they are entitled to summary judgment on Counts Three and Four, the NMDPS cannot be vicariously liable under the doctrine of *respondeat superior* for their alleged actions in Counts Three and Four. Having already determined that Officers Truesdale and Mariscal are not entitled to summary judgment on Counts Three and Four, the *respondeat superior* claims against the NMDPS are, likewise, not subject to summary judgment.

IT IS ORDERED that:

1. Defendant Kevin Truesdale's First Motion for Summary Judgment and Memorandum in Support Thereof (Doc. 90) is denied; and

2. Defendant Michael Mariscal's First Motion for Summary Judgment and Memorandum in Support Thereof (Doc. 91) is denied.

/s/ Kenneth Gonzales
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DANIEL T. PAULY, as
Personal Representative
of the ESTATE OF
SAMUEL PAULY, deceased,
and DANIEL B. PAULY,
Individually,

Plaintiffs,

vs.

STATE OF NEW MEXICO
DEPARTMENT OF PUBLIC
SAFETY, RAY WHITE,
MICHAEL MARISCAL,
and KEVIN TRUESDALE,

Defendants.

Civ. No. 12-1311 KG/WPL

MEMORANDUM OPINION AND ORDER

(Filed Feb. 5, 2014)

This matter comes before the Court upon Defendant Raymond White's First Motion for Summary Judgment and Memorandum in Support Thereof (Motion for Summary Judgment), filed November 13, 2013. (Doc. 83). Defendant Raymond White (Officer White) moves for summary judgment on the 42 U.S.C. § 1983 claim, the New Mexico Tort Claims Act (NMTCA) claim, and on the New Mexico State Constitution claim. Officer White also raises a qualified immunity defense with respect to the Section 1983 claim. Plaintiffs filed a response to the Motion for Summary Judgment on December 23, 2013, and Officer White filed a

reply on January 24, 2014. (Docs. 111 and 132). Having reviewed the Motion for Summary Judgment, the accompanying briefs, and the evidence of record, the Court denies the Motion for Summary Judgment for the following reasons.

A. The Second Amended Complaint for Damages for Deprivation of Civil Rights, Wrongful Death and Common Law Torts (Doc. 46)

This wrongful death lawsuit arises from an incident in which Officer White, a New Mexico State Police Officer, shot and killed Samuel Pauly at the house he shared with his brother, Plaintiff Daniel B. Pauly (Daniel Pauly). Daniel Pauly was at the house at the time of the shooting. In addition, Defendants Michael Mariscal and Kevin Truesdale, also New Mexico State Police Officers, were at the brothers' house when the shooting occurred.

Plaintiffs' lawsuit is based on Section 1983, the NMTCA, and the New Mexico State Constitution. In Count One, Plaintiffs bring a Section 1983 claim against Officers White, Truesdale, and Mariscal for allegedly violating Samuel Pauly's Fourth Amendment right to be free from excessive force.[1] In Count Three, Plaintiffs bring an NMTCA battery claim against Officers White, Truesdale, and Mariscal, and a corresponding NMTCA *respondeat superior* claim against Defendant State of New Mexico Department of Public Safety (NMDPS). In Count Four, Plaintiffs contend

[1] The parties stipulated to dismissing Count Two. (Doc. 117).

that the NMDPS violated article II, section 10 of the New Mexico State Constitution through Officers White, Truesdale, and Mariscal's alleged unreasonable seizure of Samuel Pauly. Finally, Plaintiffs bring a loss of consortium claim in Count Five.

B. Summary Judgment Standard of Review

Summary judgment is appropriate if there is no genuine dispute as to a material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).[2] When applying this standard, the Court examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Applied Genetics Intl, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Only then does the burden shift to the non-movant to come forward with evidence showing that there is a genuine issue of material fact. *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). An issue of material fact is genuine if a reasonable jury could return a verdict for the non-movant. *Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996) (citation omitted). The non-moving party may not avoid summary judgment by resting upon the mere

[2] Rule 56 was amended effective December 1, 2010, but the standard for granting summary judgment remains unchanged.

allegations or denials of his or her pleadings. *Bacchus Indus., Inc.*, 939 F.2d at 891.

Summary judgment motions involving a qualified immunity defense are determined somewhat differently than other summary judgment motions. *See Romero v. Fay*, 45 F.3d 1472, 1475 (10th Cir. 1995). "When a defendant raises the qualified immunity defense on summary judgment, the burden shifts to the plaintiff to meet a strict two-part test." *Nelson v. McMullen*, 207 F.3d 1202, 1206 (10th Cir. 2000). This is a heavy burden for the plaintiff. *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001) (citing *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995)). First, the plaintiff must demonstrate that the defendant's actions violated a constitutional or statutory right. Second, the plaintiff must show that the "right was clearly established such that a reasonable person in the defendant's position would have known that his conduct violated that right." *Maestas v. Lujan*, 351 F.3d 1001, 1007 (10th Cir. 2003). The Tenth Circuit Court of Appeals instructs that

> [i]f the plaintiff does not satisfy either portion of the two-pronged test, the Court must grant the defendant qualified immunity. If the plaintiff indeed demonstrates that the official violated a clearly established constitutional or statutory right, then the burden shifts back to the defendant, who must prove that "no genuine issues of material fact" exist and that the defendant "is entitled to judgment as a matter of law." In the end, therefore, the defendant still bears the normal summary judgment

> burden of showing that no material facts remain in dispute that would defeat the qualified immunity defense. When the record shows an unresolved dispute of historical fact relevant to this immunity analysis, a motion for summary judgment based on qualified immunity should be "properly denied."

Olsen v. Layton Hills Mall, 312 F.3d 1304, 1312 (10th Cir. 2002) (citations omitted).

C. Material Facts and Reasonable Inferences Viewed in the Light Most Favorable to Plaintiffs

In determining the material facts and reasonable inferences to be viewed in the light most favorable to Plaintiffs, the Court reviewed Officer White's Statement of Undisputed Material Facts, Plaintiffs' Additional Statement of Material Facts, the parties' responses to the statements of undisputed material facts, and the evidence of record. Unless otherwise noted, the following recitation of material facts and reasonable references reflects the Plaintiffs' version of the facts as gleaned from the evidence of record and excludes facts, contested or otherwise, which are not properly before this Court in this Motion for Summary Judgment.

On the evening of October 4, 2011, Daniel Pauly and two females became involved in a road rage incident on the interstate highway going north from Santa Fe, New Mexico towards Las Vegas, New Mexico. (Doc. 82-1) at 6 (depo. at 121). One of the females called 911 and reported a "drunk driver" who was "swerving all

crazy" and turning his lights off and on. (Doc. 82-1) at 23. After Daniel Pauly passed the females, they apparently tailgated Daniel Pauly. (Doc. 82-1) at 5 (depo. at 117-120).

Daniel Pauly, therefore, stopped at the Glorieta off-ramp as did the females who were following him. (Doc. 82-1) at 9 (depo. at 133). Daniel Pauly asked the females why they were following him and why they had the car's brights on. *Id.* One of the females reported that Daniel Pauly was "throwing up gang signs" during this encounter. (Doc. 82-1) at 24. Daniel Pauly, however, felt personally threatened by the females' driving behavior. (Doc. 82-1) at 9 (depo. at 134). Daniel Pauly then drove a short distance from the off-ramp to his house where his brother, Samuel Pauly, was playing a video game on the couch.[3] (Doc. 82-1) at 10 (depo. at 145). The house is located in a wooded rural area to the rear of another house on a hill. (Doc. 82-1) at 21.

The New Mexico State Police dispatcher contacted Officer Truesdale between 9:00 p.m. and 10:00 p.m. that night regarding the 911 call from the females. (Doc. 82-3) at 3. Officer Truesdale arrived at the Glorieta off-ramp to speak to the two females after Daniel

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[3] Defendants note that Samuel Pauly had smoked marijuana and drank half a beer that evening. (Doc. 87-1) at 2 (depo. at 101); (Doc. 87-1) at 5 (depo. at 148). Defendants also note that Daniel Pauly drank two beers at a club in Albuquerque and drank half a beer at the house. (Doc. 87-1) at 5-6 (depo. at 148-49). The Court will not consider this evidence in deciding the Motion for Summary Judgment because it is irrelevant to the issues now before the Court.

Pauly had driven to his house. *See id.* Officers White and Mariscal were *en route* to provide Officer Truesdale with back-up assistance. *Id.* The females informed Officer Truesdale about Daniel Pauly's alleged reckless and dangerous driving. *Id.* The females also described Daniel Pauly's vehicle as a gray Toyota pickup truck and gave dispatch a license plate number. *Id.* The dispatcher informed Officer Truesdale that the Toyota pickup truck was registered to an address on Firehouse Road, Glorieta, New Mexico. *Id.*

Once the two females went on their way, any threat to the females was over. (Doc. 82-2) at 5 (depo. at 208). Officers Mariscal and White subsequently joined Officer Truesdale at the Glorieta off-ramp. Although it was raining, the Officers were not wearing raincoats over their uniforms. (Doc. 82-1) at 13 (depo. at 179); (Doc. 84-3) at 4 (depo. at 134). It was also a dark night.[4] (Doc. 82-3) at 17 (depo. at 100).

Officer Truesdale decided to speak with Daniel Pauly to determine if he was intoxicated, "to make sure nothing else happened," and to get Daniel Pauly's version of the incident. (Doc. 82-2) at 6 (depo. at 218). At that point, the Officers did not believe any exigent circumstances existed. *Id.* at 7 (depo. at 213); (Doc. 82-4) at 9-10 (depo. at 20-21). The Officers also did not have

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[4] Officers White and Truesdale dispute this fact and claim that despite the rain the moon was out and they could see fairly well in the dark. (Doc. 84-2) at 5 (depo. at 117); (Doc. 85-2) at 4 (depo. at 227). Officers White and Truesdale do not describe how full the moon was that night.

enough evidence or probable cause to make an arrest. (Doc. 82-3) at 5); (Doc. 82-3) at 14 (depo. at 91).

The Officers then determined that Officers Truesdale and Mariscal should go, in separate patrol units, to see if they could locate Daniel Pauly's pickup truck at the Firehouse Road address while Officer White should stay at the off-ramp in case Daniel Pauly came back that way. (Doc. 82-3) at 14 (depo. at 92). Officers Truesdale and Mariscal drove a short distance to the Firehouse Road address and parked their vehicles in front of the main house along the road. *See* (Doc. 82-4) at 11 (depo. at 109). The vehicles had their headlights on and one vehicle had takedown lights on; none of the vehicles had flashing lights on. (Doc. 82-4) at 11 (depo. at 109-10). Officers Truesdale and Mariscal did not see Daniel Pauly's pickup truck at the main house. *See* (Doc. 82-2) at 9 (depo. at 230).

Officers Truesdale and Mariscal, however, saw a porch light and lights on in another house behind the main house, so they decided to walk up to that second house, Daniel and Samuel Pauly's house, to see if Daniel Pauly's pickup truck was there. (Doc. 82-2) at 9 (depo. at 232); (Doc. 82-3) at 6. The Officers did not activate any security lights as they walked up to the brothers' house. (Doc. 82-3) at 18 (depo. at 115).

Officers Truesdale and Mariscal approached the brothers' house in such a way that the brothers did not know that the Officers were there. (Doc. 82-2) at 12 (depo. at 224). The Officers chose this kind of approach in an attempt to maintain officer safety. *Id.* at 14 (depo.

at 233). Officers Truesdale and Mariscal, therefore, did not initially use their flashlights and then used the flashlights periodically. *Id.* at 13 (depo. at 226); (Doc. 82-3) at 15 (depo. at 101). After Officer Truesdale got close to the front of the house and began approaching the front door, he turned his flashlight on. (Doc. 85-3) at 3 (depo. at 249-50, 252). The Officers could see through the front window two males moving back and forth in the house. (Doc. 88-3) at 1 (depo. at 152). As the Officers got closer to the second house, they also saw Daniel Pauly's pickup truck and advised Officer White that they located the pickup truck. (Doc. 82-5) at 12. Officer White then proceeded to the Firehouse Road address. *Id.*

At around 11:00 p.m., the brothers saw through the front window two blue LED flashlights, five or seven feet apart at chest level, coming towards the house. (Doc. 82-1) at 11 (depo. at 170-71); (Doc. 82-3) at 4. Daniel Pauly could not see who held the flashlights, especially with the rain coming in sideways. (Doc. 82-1) at 11 (depo. at 171); (Doc. 87-2) at 3 (depo. at 208). Daniel Pauly thought the figures were intruders possibly related to the road rage incident; it did not enter Daniel Pauly's mind that the figures could have been police officers. (Doc. 82-1) at 11-12 (depo. at 171, 173); (Doc. 87-2) at 4 (depo. at 220). Both brothers then yelled out several times, "Who are you?" and, "What do you want?" (Doc. 82-1) at 13 (depo. at 179-80). In response to those inquiries, the brothers heard a laugh and, "Hey, (expletive), we got you surrounded. Come

out or we're coming in."[5] *Id.* at 13 (depo. at 180). Moreover, Officer Truesdale yelled out once, "Open the door, State Police, open the door." (Doc. 87-2) at 2 (depo. at 185-86); Truesdale Coban recording, Supp. #19. Daniel Pauly, however, did not hear anyone call out "State Police" until after Officer White shot Samuel Pauly.[6] (Doc. 82-1) at 14 (depo. at 181). Officer Mariscal also announced, "Open the door, open the door." (Doc. 82-3) at 5.

Daniel Pauly felt scared and that his life, his brother's life, and the lives of their dogs were being threatened by unknown people outside the house. (Doc. 82-1) at 16 (depo. at 205); (Doc. 82-1) at 17 (depo. at 222). The brothers then decided to call the police. (Doc. 82-1) at 17 (depo. at 222). Before they could do so, Daniel Pauly heard, "We're coming in. We're coming in." *Id.*

At that point, Samuel Pauly retrieved a shotgun and a box of shells for Daniel Pauly so that the brothers could get ready for a home invasion. *Id.* at 17 (depo.

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[5] The Officers did not actually intend to go inside; they were trying to get the brothers to come out of the house. (Doc. 82-4) at 2 (depo. at 162).

[6] The Officers dispute that Daniel Pauly did not know that State Police Officers were outside the house prior to Officer White shooting Samuel Pauly. The Officers claim that they shouted out "State Police" numerous times throughout the incident. *See, e.g.*, (Doc. 82-3) at 5-8. Officer Mariscal also claims that he illuminated himself with a flashlight and that "the individuals" in the house shined flashlights in the direction of himself and Officer Truesdale. *Id.* at 7-8. However, Officer Truesdale, Officer White, and Daniel Pauly did not testify to seeing Officer Mariscal shine a flashlight on himself nor did Daniel Pauly testify to using a flashlight. *See* (Doc. 84-3) at 2 (depo. at 127).

at 222-23). Samuel Pauly also obtained a loaded handgun. (Doc. 82-3) at 4. Daniel Pauly then stated to Samuel Pauly that he was going to fire a couple of warning shots. (Doc. 82-1) at 17 (depo. at 223). Samuel Pauly went back to the front room. *Id.* Next, one of the brothers yelled out from inside of the house, "We have guns." (Doc. 85-4) at 2 (depo. 276). Officers Mariscal and Truesdale subsequently saw someone, presumably Daniel Pauly, run towards the back of the house. (Doc. 82-2) at 23 (depo. at 272). Officer Truesdale, therefore, went to the far back corner of the house to see what was happening on the other side of the house. *Id.* at 21 (depo. at 274). Officer Truesdale then stated, "Open the door, come outside." (Doc. 82-3) at 5.

While Officers Truesdale and Mariscal were trying to get the brothers to come out of the house and before one of the brothers yelled out, "We have guns," Officer White arrived at the Firehouse Road address and walked up towards the brothers' house, using his flashlight periodically. *Id.*; (Doc. 84-2) at 4 (depo. at 116). Officer White could also see two males walking in the front living room. (Doc. 82-4) at 12 (depo. at 123). In addition, Officer White heard a male from inside of the house say, "We have guns." (Doc. 82-3) at 6. When Officer White reached the front of the house, Officer Mariscal was still in the front of the house while Officer Truesdale was already at the rear of the brothers' house. (Doc. 82-3) at 5.

After hearing, "We have guns," Officer White took cover behind a stone wall located 50 feet from the front of the house and drew his duty weapon while Officer

Mariscal took cover behind a Ford pickup truck and unholstered his duty weapon. (Doc. 82-4) at 13 (depo. at 132); (Doc. 84-3) at 4 (depo. at 135); (Doc. 84-5) at 3 (depo. at 191); (Doc. 88-3) at 5 (depo. at 173-74). A matter of seconds after one of the brothers yelled, "We have guns," Daniel Pauly stepped partially out of the back of the house and fired two warning shots up into a tree while screaming to scare people off. (Doc. 82-1) at 17 (depo. at 224); (Doc. 82-1) at 19 (depo. at 226); (Doc. 84-5) at 6 (depo. at 209). Daniel Pauly did not feel comfortable going out the front door after he initially heard someone say that the brothers were surrounded and "come out or we're coming in." (Doc. 82-1) at 18 (depo. at 204). Having heard the two rifle shots, Officer White believed that Officer Truesdale had been shot.[7] (Doc. 84-3) at 5 (depo. at 137).

Officers Mariscal and White then saw Samuel Pauly open the front window and hold his arm out with a handgun, pointing it at Officer White.[8] (Doc. 82-4) at

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[7] Officer White claims that after he heard the first two shotgun blasts he yelled out, "State Police, hands up, hands up, hands up." (Doc. 82-5) at 13. Officer Mariscal's audio recording of the gunfire, however, does not include this statement. DVD: Mariscal, NMSP.

[8] Officers Mariscal and White assert that not only did Samuel Pauly point the handgun at Officer White, but that Samuel Pauly actually fired the handgun. (Doc. 82-4) at 4 (depo. at 190-91); (Doc. 82-4) at 14 (depo. at 171-72). A revolver later found on the living room floor under the front window where Samuel Pauly was shot had one casing forward of the firing pin while the other four chambers were loaded. (Doc. 82-5) at 21. No bullet casing was recovered from the handgun, so there is no forensic proof that Samuel Pauly fired the handgun that night. *See id.* at 20.

3 (depo. at 185); (Doc. 82-4) at 4 (depo. at 190-91); (Doc. 82-4) at 14 (depo. at 171); (Doc. 88-4) at 3 (depo. at 193). Officer Mariscal then shot towards Samuel Pauly, but missed Samuel Pauly.[9] Four to five seconds after Samuel Pauly pointed his handgun at Officer White, Officer White shot Samuel Pauly. (Doc. 84-5) at 3 (depo. at 191). The entire incident, from the time Officers Truesdale and Mariscal arrived at the Firehouse Road address to the time of the shootings, took less than five minutes. (Doc. 113) at 28.

D. Discussion

Officer White argues that he is entitled to summary judgment on the Fourth Amendment excessive force claim because his use of force on Samuel Pauly was objectively reasonable under the totality of the circumstances. Officer White also argues that he is entitled to qualified immunity on the Fourth Amendment excessive force claim. Next, Officer White argues that

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However, from Officer Truesdale's position, "[t]he first two shots were louder than the third, and the third shot was quieter then [sic] the fourth" indicating that the third shot came from the house, i.e., that Samuel Pauly fired that third shot. *Id.* at 17.

[9] Officer Mariscal strongly believes that he fired a shot at Samuel Pauly after Samuel Pauly fired the handgun. (Doc. 82-4) at 6 (depo. at 210-211); (Doc. 82-5) at 15; (Doc. 88-4) at 3 (depo. at 195). Officer Mariscal normally carries a total of 16 cartridges in his duty weapon. (Doc. 82-4) at 5 (depo. at 130-31). After the shooting, Officer Mariscal was missing one cartridge from his magazine. (Doc. 82-5) at 19. Moreover, since only four shots were fired that night, if Officer Mariscal fired the third shot as he claims and Office White fired the fourth shot, then Samuel Pauly could not have fired upon Officer White.

the undisputed facts show that he did not violate Samuel Pauly's rights under article II, section 10 of the New Mexico State Constitution nor did he commit a battery on Samuel Pauly. Finally, Officer White argues that the NMDPS cannot be held vicariously liable for the alleged battery he committed or for his alleged violation of the New Mexico State Constitution. Plaintiffs contend that these arguments have no merit.

1. *Count One: the Section 1983 Fourth Amendment Excessive Force Claim*

   a. *Whether Officer White is Entitled to Summary Judgment on Count One*

Officer White argues first that he is entitled to summary judgment on Count One because the undisputed material facts show that his use of deadly force on Samuel Pauly was objectively reasonable under the totality of the circumstances and, therefore, lawful under the Fourth Amendment. Plaintiffs argue, however, that there are genuine disputes of material fact and that when the facts are viewed in the light most favorable to Plaintiffs a reasonable jury could find that the Officers' conduct was reckless and unreasonably created the need for Officer White to shoot Samuel Pauly. Plaintiffs, therefore, assert that a reasonable jury could find that Officer White's objectively unreasonable use of deadly force violated Samuel Pauly's Fourth Amendment right to be free from excessive force. Thus,

Plaintiffs contend that Officer White is not entitled to summary judgment on Count One.[10]

The issue in Fourth Amendment excessive force cases is whether, under the totality of the circumstances, an officer's use of force was objectively reasonable. *Thomson v. Salt Lake County*, 584 F.3d 1304, 1313 (10th Cir. 2009). Reasonableness of the use of force is judged from the viewpoint of a reasonable officer at the scene of the incident and not from hindsight. *Id.* As always, courts "recognize that officer may have 'to make split-second judgments in uncertain and dangerous circumstances.'" *Id.* (quoting *Phillips v. James*, 422 F.3d 1075, 1080 (10th Cir. 2004) (internal quotation marks omitted)).

If a use of force is deadly, as in this case, that force is reasonable "only 'if a reasonable officer in Defendant's position would have had probable cause to believe that there was a *threat of serious harm to themselves* or to others.'" *Id.* (quoting *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008)). To assess the degree of that threat of serious physical harm, the Court considers "factors that include, but are not limited to: '(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers;

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[10] Plaintiffs note that Officer White does not address their Fourth Amendment claim based on Officer White's alleged unreasonable seizure of Samuel Pauly prior to his shooting death. The Court, however, has determined that Plaintiffs have not pled a Fourth Amendment unreasonable seizure claim. *See* (Doc. 123).

(3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect.'" *Id.* at 1314-1315 (quoting *Estate of Larsen*, 511 F.3d at 1260). Another important factor is "'whether the officers were in danger at the precise moment that they used force.'" *Id.* at 1314 (quoting *Phillips v. James*, 422 F.3d 1075, 1083 (10th Cir. 2005) (internal quotation marks omitted)). Moreover, the "'reasonableness standard does not require that officers use alternative, less intrusive means' when confronted with a threat of serious bodily injury." *Blossom v. Yarbrough*, 429 F.3d 963, 968 (10th Cir. 2005) (quoting *Cram*, 252 F.3d at 1133) (internal quotations omitted). Whether the events leading up to the use of deadly force were "tense, uncertain, and rapidly evolving" is also "extremely relevant" to the totality of the circumstances review. *Thomson*, 584 F.3d at 1318 (quoting *Phillips*, 422 F.3d at 1083-84) (internal quotation marks omitted). Additionally, "a reasonable but mistaken belief that the suspect is likely to fight back justifies using more force than is actually needed." *Id.* at 1315.

Reasonableness of an officer's use of deadly force further depends on "whether their 'own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.' The conduct of the officers before a suspect threatens force is relevant only if it is 'immediately connected' to the threat of force." *Id.* at 1320 (citations omitted). Moreover, an officer's conduct prior to a suspect threatening force "is only actionable if it rises to the level of recklessness" or deliberateness, i.e., the officer's actions cannot

constitute mere negligence. *Id.* "An act is reckless when it reflects a wanton or obdurate disregard or complete indifference to risk, for example 'when the actor does not care whether the other person lives or dies, despite knowing that there is a significant risk of death' or grievous bodily injury." *Medina v. City and County of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992), *overruled on other grounds by Morris v. Noe*, 672 F.3d 1185, 1197 n. 5 (10th Cir. 2012) and *Williams v. City & County of Denver*, 99 F.3d 1009, 1014-1015 (10th Cir. 1996). In addition, if it was feasible for the officer to warn a suspect not to use force, the failure to issue such a warning could create an unreasonable need to use deadly force. *See Thomson*, 584 F.3d at 1321. Determining whether an officer's reckless or deliberate conduct unreasonably created a need to use force "is simply a specific application of the totality of the circumstances approach inherent in the Fourth Amendment's reasonableness standard." *Id.* at 1320 (internal quotation marks omitted) (citing *Cram*, 252 F.3d at 1132).

In this case, the Plaintiffs do not argue that Samuel Pauly did not make hostile motions with his weapon or that the events leading up to Officer White shooting Samuel Pauly were not "tense, uncertain, and rapidly evolving." Instead, Plaintiffs contend that the reckless or deliberate conduct of the Officers unreasonably created a need for Officer White to shoot Samuel Pauly. In fact, the record contains genuine disputes of material fact regarding whether the Officers' conduct prior to the shooting of Samuel Pauly was at the very

least reckless and unreasonably precipitated Officer White's need to shoot Samuel Pauly. For example, it is disputed whether (1) the Officers adequately identified themselves, either verbally or by using a flashlight; (2) the brothers could, nonetheless, see the Officers considering the ambient light and other light sources; and (3) it was feasible for Officer White to warn Samuel Pauly before shooting him.

Furthermore, viewing the evidence in the light most favorable to Plaintiffs, a reasonable jury could find the following: there were no exigent circumstances requiring the Officers to go to Daniel Pauly's house at 11:00 p.m.; Officers Truesdale and Mariscal purposefully approached the house in a surreptitious manner; despite the porch light and light from the house, the rain and darkness made it difficult for the brothers to see who was outside their house; the fact that the brothers' house is located in a rural wooded area would have heightened the brothers' concern about intruders; the Officers provided inadequate police identification by yelling out "State Police" once; the Officers' use of a hostile tone in stating, "we got you surrounded. Come out or we're coming in" was threatening; statements by Officers Truesdale and Mariscal of "open the door" and other statements of "we're coming in" were, likewise, threatening; it would have been reasonable for the Officers to conclude that Daniel Pauly could believe that persons coming up to his house at 11:00 p.m. were connected to the road rage incident which had occurred a couple of hours previously; that under these circumstances, the occupants of the house would feel a need

to defend themselves and their property with the possible use of firearms; and the incident occurred in less than five minutes. A reasonable jury could then find that under the totality of the above circumstances that (1) the Officers' conduct was "immediately connected" to Samuel Pauly arming himself and pointing a handgun at Officer White; and (2) the Officers' conduct reflected "wanton or obdurate disregard or complete indifference" to the risk of an occupant of the house being subject to deadly force in the course of protecting his house and property against threatening and unknown persons. A reasonable jury could, therefore, find that the Officers' reckless conduct unreasonably created the dangerous situation leading to Officer White's need to shoot Samuel Pauly. Consequently, a reasonable jury could find that Officer White's use of deadly force on Samuel Pauly was not objectively reasonable and violated the Fourth Amendment. Clearly, there are genuine issues of material fact which foreclose the Court from granting summary judgment on Count One.

b. Qualified Immunity

Officer White also argues that he is entitled to qualified immunity on Count One. To resolve the first part of the qualified immunity test, the Court must decide if the alleged facts, when viewed "in the light most favorable to the party asserting the injury, . . . show the officer's conduct violated a constitutional right[.]" *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (citation omitted). As shown above, Plaintiffs have produced sufficient

evidence to show that Officer White violated Samuel Pauly's Fourth Amendment right to be free from excessive force. Hence, Plaintiffs meet the first step in defeating qualified immunity.

To resolve the second part of the qualified immunity test, Plaintiffs must demonstrate that Samuel Pauly's Fourth Amendment right to be free from excessive force was clearly established at the time of the shooting. "In determining whether the right was 'clearly established,' the court assesses the objective legal reasonableness of the action at the time of the alleged violation and asks whether 'the right [was] sufficiently clear that a reasonable officer would understand that what he is doing violates that right.'" *Cram*, 252 F.3d at 1128 (quoting *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). "[I]n order for the law to be clearly established, there must be 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." *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992). A plaintiff, however, "is not required to show that the very conduct in question has previously been held unlawful." *Sh. A. ex rel. J. A. v. Tucumcari Mun. Schools*, 321 F.3d 1285, 1287 (10th Cir. 2003).

Since 1997, it has been clearly established in the Tenth Circuit "that an officer is responsible for his or her reckless conduct that precipitates the need to use force." *Murphy v. Bitsoih*, 320 F.Supp.2d 1174, 1193 (D.N.M. 2004) (citing *Allen v. Muskogee*, 119 F.3d 837, 841 (10th Cir. 1997)). Accepting Plaintiffs' version of

the facts, a reasonable person in Officer White's position would have understood that the reckless actions of the Officers, including his own reckless actions, unreasonably precipitated his need to shoot Samuel Pauly and, therefore, violated Samuel Pauly's Fourth Amendment right to be free from excessive force. Hence, Plaintiffs meet the second step in defeating qualified immunity.

Having met the test to defeat qualified immunity, the burden shifts back to Officer White to prove that there is no genuine issue of material fact that would defeat the qualified immunity defense. As discussed above, various genuine issues of material fact exist which concern whether the Officers' conduct prior to the shooting of Samuel Pauly was reckless and unreasonably created Officer White's need to shoot Samuel Pauly. Moreover, viewing the facts in the light most favorable to Plaintiffs, a reasonable jury could determine that the actions of the Officers were reckless and that those actions unreasonably precipitated the need for Officer White to shoot Samuel Pauly. Having failed to carry his burden of proving that there are no genuine issues of material fact that would defeat his claim for qualified immunity, Officer White cannot claim that qualified immunity entitles him to summary judgment on Count One.

2. Count Four: the New Mexico State Constitution Claim[11]

Next, Officer White argues that he is entitled to summary judgment on the New Mexico State Constitution claim because the undisputed material facts show that his use of force on Samuel Pauly was objectively reasonable under the totality of the circumstances. Count Four, however, does not state an excessive force claim under the New Mexico State Constitution. Rather, Count Four states a New Mexico State Constitution claim for unreasonable seizure. Consequently, the Court cannot grant summary judgment on Count Four. *See Elliott Industries Ltd. Partnership v. BP America Production Co.*, 407 F.3d 1091, 1121 (10th Cir. 2005) ("Obviously, under Rule 56(a) a party cannot move for summary judgment on a nonexistent, non-pleaded claim.").

3. Count Three: the NMTCA Battery Claim

Officer White argues that he is entitled to summary judgment on the NMTCA battery claim because the undisputed material facts demonstrate that his use of force was reasonably necessary. In New Mexico, an officer "is entitled to use such force as was reasonably necessary under all the circumstances of the case." *Mead v. O'Connor*, 1959-NMSC-077 ¶ 4, 66 N.M. 170. Accordingly, a battery claim exists only if the officer

[11] The Court will discuss Count Four before addressing Count Three because that is the order in which Officer White discusses those Counts in the Motion for Summary Judgment.

used unlawful or unreasonable force. *Reynaga v. County of Bernalillo*, 1995 WL 503973 *2 (10th Cir.). Since there are genuine questions of material fact pertaining to whether Officer White used objectively reasonable force under the totality of the circumstances, the Court cannot grant summary judgment on Count Three.

4. NMDPS Liability Pursuant to the Doctrine of Respondeat Superior

Lastly, Officer White argues that since he is entitled to summary judgment on Counts Three and Four, the NMDPS cannot be vicariously liable under the doctrine of *respondeat superior* for his alleged actions in Counts Three and Four. Having already determined that Officer White is not entitled to summary judgment on Counts Three and Four, the *respondeat superior* claims against the NMDPS are, likewise, not subject to summary judgment.

IT IS ORDERED that Defendant Raymond White's First Motion for Summary Judgment and Memorandum in Support Thereof (Doc. 83) is denied.

/s/ Kenneth Gonzales
UNITED STATES
DISTRICT JUDGE