

Case No. 24A_____

IN THE SUPREME COURT OF THE UNITED STATES

Jonathan Christian,

Petitioner/Applicant,

v.

Elisabeth Epps,

Respondent,

**APPENDIX TO APPLICATION TO RECALL AND STAY
THE MANDATE PENDING DISPOSITION OF PETITION
FOR CERTIORARI**

To the Honorable Neil Gorsuch,
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Tenth Circuit

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FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

May 28, 2026

Christopher M. Wolpert
Clerk of Court

ELISABETH EPPS,

Plaintiff - Appellee,

v.

JONATHAN CHRISTIAN,

Defendant - Appellant,

and

CITY AND COUNTY OF DENVER, et
al.,

Defendants.

No. 24-1371
(D.C. No. 1:20-CV-01878-RBJ)
(D. Colo.)

ORDER

Before **CARSON, EBEL, and FEDERICO**, Circuit Judges.

This matter comes before the court on appellant's motion to stay the mandate pending the filing of a petition for writ of certiorari. Upon consideration the motion is denied.

Entered for the Court

Per Curiam

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

April 21, 2026

UNITED STATES COURT OF APPEALS

Christopher M. Wolpert
Clerk of Court

FOR THE TENTH CIRCUIT

ELISABETH EPPS,

Plaintiff - Appellee,

v.

No. 24-1371

JONATHAN CHRISTIAN,

Defendant - Appellant,

and

CITY AND COUNTY OF DENVER;
KEITH VALENTINE,

Defendants.

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:20-CV-01878-RBJ)

Andrew D. Ringel (Robert A. Weiner with him on the briefs), Hall & Evans, L.L.C., Denver, Colorado, for Defendant – Appellant.

Brian M. Williams, Arnold & Porter Kaye Scholer LLP (Robert Reeves Anderson, Matthew J. Douglas, and Emily M. Sartin, Arnold & Porter Kaye Scholer LLP, Denver, Colorado, Timothy Macdonald and Sara R. Neel, American Civil Liberties Union of Colorado, Orion de Nevers, Arnold & Porter Kaye Scholer LLP, Washington, DC, and Mindy Gorin, Arnold & Porter Kaye Scholer LLP, New York, New York, with him on the brief), Denver, Colorado, for Plaintiff – Appellee.

Before **CARSON, EBEL, and FEDERICO**, Circuit Judges.

EBEL, Circuit Judge.

This appeal stems from civil rights litigation brought under 42 U.S.C. § 1983 challenging the response of the Denver Police Department (“DPD”) and its officers to demonstrations against police brutality sparked by the death of George Floyd at the hands of police officers in Minnesota. In this appeal, DPD officer Jonathan Christian challenges a jury’s verdict finding him liable for using excessive force against Plaintiff Elisabeth Epps, in violation of the Fourth Amendment, when he shot Epps with a pepperball while she was peacefully protesting. On appeal, Officer Christian argues that 1) he was entitled to qualified immunity from Epps’ Fourth Amendment claim; 2) the trial court abused its discretion in not bifurcating Epps’ claim against him from the claims brought by twelve protestors, including Epps, against the City and County of Denver challenging the DPD’s response to the protests; and 3) there was insufficient evidence to support the jury awarding punitive damages against Officer Christian. Having jurisdiction under 28 U.S.C. § 1291, we reject Officer Christian’s arguments and AFFIRM the jury’s verdict against him.

I. FACTUAL BACKGROUND

Viewed in the light most favorable to the jury’s verdict, see Harris v. City Cycle Sales, Inc., 112 F.4th 1272, 1275 (10th Cir. 2024), the evidence at trial indicated the following: George Floyd’s death sparked demonstrations throughout the

United States and across the world, protesting police brutality, particularly against black people. In Denver, protests occurred from May 28 through June 2, 2020. On the second night of the protests, Officer Christian was with a group of police officers located on the south side of the Colorado state capitol. Epps, by herself and not with any other protestors, unarmed and not acting aggressively, started to cross the street walking toward the capitol's south lawn. She was not in a cross walk and was using her cell phone to record police. Officer Christian knelt on one knee, aimed his weapon at Epps, and shot a pepperball at her without any warning. A pepperball is a "less lethal" munition, a gel-like ball that is typically filled with a powdered acid that is expelled when it explodes upon impact. That acid impairs breathing, inflames skin, and causes chest tightness and pain, involuntary eye closure, and profuse tearing. It is fired from a launcher at a velocity of between 280 and 350 feet per second. After Officer Christian shot Epps, a fellow officer told him, "sarge said don't hit her." (R. v. 22, p. 81.) Epps recorded this incident on her cell phone. The incident was also recorded by Officer Christian's and other officers' body-worn cameras.

Epps testified that the pepperball hit her in the leg, leaving a deep bruise which she documented with photographs. Epps, nevertheless, continued to cross the street. Several seconds after shooting her with a pepperball, Officer Christian yelled at her to get out of the street. Epps complied.

II. PROCEDURAL BACKGROUND

Epps sued Officer Christian under 42 U.S.C. § 1983, alleging that he violated her First and Fourth Amendment rights by shooting her with a pepperball. Epps' claim against Christian was part of a larger lawsuit brought by twelve protestors, including Epps, against the City and County of Denver and its police officers and officers from other jurisdictions aiding Denver during the protests. This appeal addresses only Epps' claim against Officer Christian.

Officer Christian moved for summary judgment, asserting that he was entitled to qualified immunity from any liability to Epps. The district court denied that motion.

Officer Christian then moved to bifurcate the trial on Epps' claim against him from the trial involving the claims brought by the twelve protestors against Denver. The district court denied that motion, as well.¹

Epps' claim against Officer Christian was then tried to a jury, along with the municipal liability claims against Denver, over the course of fifteen days. Officer Christian unsuccessfully reasserted his qualified immunity defense in his Fed. R. Civ. P. 50(a) motion for judgment as a matter of law, made at the end of Plaintiffs' case.

The jury found for Epps and against Officer Christian on her Fourth Amendment claim, and found for Officer Christian on Epps' First Amendment claim.

¹ When Officer Christian filed this motion to bifurcate, thirty-nine days before trial, he was joined by twenty-two other individual defendants. When trial began, he was the only remaining individual defendant.

The jury awarded Epps \$1 million in compensatory damages against Denver and Officer Christian, and awarded Epps \$250,000 in punitive damages against Officer Christian. At Officer Christian's request, the trial court reduced the punitive damages award against him to \$50,000. Epps accepted the reduced punitive damages award in lieu of a new trial. After the jury's verdict, Officer Christian unsuccessfully renewed his motion for qualified immunity in a Rule 50(b) motion.

III. DISCUSSION

On appeal, Officer Christian argues that the district court 1) erred in denying his post-verdict Fed. R. Civ. P. 50(b) motion for judgment as a matter of law based on his qualified immunity defense; 2) abused its discretion in refusing to bifurcate the trial on Epps' claim against him from the trial on the claims brought by multiple protestors against Denver; and 3) erred in denying his Rule 50(b) motion for judgment as a matter of law, based on his argument that there was no evidence to support the jury awarding any punitive damages against him. As we explain next, we reject each of Officer Christian's arguments and uphold the jury's verdict against him.

A. The district court did not err in denying Officer Christian's Rule 50(b) motion for judgment as a matter of law reasserting his qualified immunity defense

To overcome Officer Christian's qualified immunity defense, Epps had to establish that the officer 1) violated her Fourth Amendment rights 2) that were clearly established at the time he shot her with a pepperball on May 29, 2020. See

Luethje v. Kyle, 131 F.4th 1179, 1187 (10th Cir. 2025). Officer Christian contends that the district court, in denying his Fed. R. Civ. P. 50(b) motion based on qualified immunity, erred in concluding Epps met both requirements.

We review the district court’s Rule 50(b) decision de novo. See City of Ft. Collins v. Open Int’l, LLC, 146 F.4th 929, 937 (10th Cir. 2025) (reviewing denial of Rule 50(b) motion); Marshall v. Columbia Lea Reg’l Hosp., 474 F.3d 733, 737–38 (10th Cir. 2007) (reviewing denial of Rule 50(b) motion based on qualified immunity, addressing clearly established prong); see also Ciolino v. Gikas, 861 F.3d 296, 298–99, 302 (1st Cir. 2017) (noting, in reviewing denial of Rule 50(b) motion, that both qualified immunity inquiries present legal determinations reviewed de novo).

Because a Rule 50(b) motion is made after trial, we review the district court’s decision to deny qualified immunity based on the evidence presented at trial. See Ortiz v. Jordan, 562 U.S. 180, 184 (2011); see also Dupree v. Younger, 598 U.S. 729, 734 (2023). In doing so, we view the trial evidence in the light most favorable to the verdict—here, the verdict on the Fourth Amendment claim against Officer Christian—considering whether the evidence was so one-sided on behalf of Officer Christian that he was, instead, entitled to prevail on that constitutional claim against him as a matter of law. See Marshall, 474 F.3d at 739. We draw all reasonable inferences in Epps’ favor and refrain from making credibility determinations or weighing the evidence. See Mountain Dudes v. Split Rock Holdings, LLC, 946 F.3d

1122, 1125, 1130 (10th Cir. 2019) (reviewing denial of Rule 50(b) motion in civil action).²

1. Epps established that Officer Christian violated her Fourth Amendment rights

The Fourth Amendment protects individuals from “unreasonable . . . seizures.” U.S. Const., amend. IV. This court has recognized a “seizure” when police intentionally apply force to a protestor with the intent to exercise physical control over the protestor. See Packard v. Budaj, 86 F.4th 859, 865 & n.7, 867 (10th Cir. 2023) (“Budaj”). In reaching that conclusion, Budaj, id. at 865 n.7, relied on Torres v. Madrid, 592 U.S. 306, 325 (2021), holding “that the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued.” See also id. at 312 (“As applied to a person, ‘[t]he word “seizure” readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful.’” (quoting California v. Hodari D., 499 U.S. 621, 626 (1991))). Officer Christian does not challenge application of the Fourth Amendment to the circumstances presented here.

To establish that police violated the Fourth Amendment by using excessive force to effect a seizure, the plaintiff must show that an officer’s “use of force was objectively unreasonable under the circumstances.” Budaj, 86 F.4th at 865–66

² See also Hicks v. Ferreyra, 64 F.4th 156, 164 (4th Cir. 2023); Tan Lam v. City of Los Banos, 976 F.3d 986, 997 (9th Cir. 2020); Wiggington v. Jones, 964 F.3d 329, 334–35 (5th Cir. 2020); Dean v. Cnty. of Gage, 807 F.3d 931, 936 (8th Cir. 2015).

(citing, e.g., Tennessee v. Garner, 471 U.S. 1, 7 (1985)). We make that reasonableness determination based on the totality of the circumstances viewed “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,” allowing “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 866 (quoting Graham v. Connor, 490 U.S. 386, 396–97 (1989)). The reasonableness assessment is “objective, disregarding officers’ subjective ‘underlying intent or motivation.’” Id. (quoting Graham, 490 U.S. at 397).

Budaj applied the Supreme Court’s decision in Graham to determine whether the force police applied to protestors in that case was unreasonable.³ Id. at 865–67. “In Graham, the Supreme Court ‘outlined three factors that guide the reasonableness analysis: (1) “the severity of the crime at issue,” (2) “whether the suspect poses an immediate threat to the safety of the officers or others,” and (3) “whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.’”” Id. at 866–67 (quoting Vette v. K-9 Unit Deputy Sanders, 989 F.3d 1154, 1169 (10th Cir. 2021) (quoting Graham, 490 U.S. at 396)). Applying this analysis specifically in the

³ Budaj stems from litigation related to Epps’ claim at issue here against Officer Christian. In that related litigation, Epps and a number of other protestors sued the City of Aurora and several of its police officers who aided the DPD in its response to the George Floyd protests. Packard v. Budaj addressed an interlocutory decision in that related litigation denying several Aurora officers qualified immunity. 86 F.4th at 862–63.

context of police using force against protestors, Budaj held that officers violate the Fourth Amendment when they “shoot a protestor with pepper balls or other less-lethal munitions when that protestor is committing no crime more serious than a misdemeanor, not threatening anyone, and not attempting to flee.” Id. at 869 (record citation omitted; citing cases).⁴

Budaj, for example, addressed two incidents. In one, police shot a protestor in the head with a bean bag fired from a shotgun, after the protestor kicked a can of tear gas, thrown by police, away from protestors. Id. at 862–63. In the second, police shot a protestor, who was wearing a hard hat with the word “media” on it, “in the groin with a foam baton round” as he was standing near an intersection, talking to an acquaintance and filming the protest. Id. at 863. In Budaj, this court held that those two protestors could establish a Fourth Amendment violation based on evidence that there was “no indication that” either protestor was “committing (or had committed) [a criminal] offense of any kind”; neither protestor “posed an immediate threat to the safety of officers or others”; and neither protestor was “actively resisting arrest or attempting to flee.” Id. at 866–67.

⁴ Officer Christian argues that the Graham factors “are not readily applicable to these specific circumstances because” his “use of force was not an effort to arrest Ms. Epps or to seize her prior to arresting her.” (Aplt. Br. 17.) In applying the Graham factors to decide whether officers used excessive force against protestors, see 86 F.4th at 865–67, Budaj rejected a similar argument that “Graham is a framework ill-suited for protest cases,” id. at 867. In any event, “[t]he Graham factors are nonexclusive and not dispositive; the inquiry remains focused on the totality of the circumstances.” Est. of George v. City of Rifle, 85 F.4th 1300, 1316 (10th Cir. 2023) (quoting Palacios v. Fortuna, 61 F.4th 1248, 1256 (10th Cir. 2023)).

Similarly, in two cases arising from 2003 anti-war protests in Albuquerque, New Mexico, this court also held that a jury could find police used excessive force, in violation of the Fourth Amendment, by shooting peaceful protestors with less-lethal weapons. See Fogarty v. Gallegos, 523 F.3d 1147 (10th Cir. 2008); Buck v. City of Albuquerque, 549 F.3d 1269 (10th Cir. 2008). In Fogarty, the evidence, viewed in the light most favorable to the plaintiff protestor, indicated that he was unarmed, had moved from the street where the protest was occurring after police deployed tear gas, and was kneeling on the steps of a university bookstore when a police officer shot him with a pepperball. 523 F.3d at 1150–52, 1159–61. Fogarty had committed, at most, a petty misdemeanor (disorderly conduct), posed no threat to the safety of officers or others, and was neither actively resisting arrest nor trying to evade arrest by flight. Id. at 1159–61.

In Buck, after seeing police shoot a protestor next to her with a less-lethal munition, Plaintiff Camille Chavez sat down in the street as a sign of protest. 549 F.3d at 1274, 1289. “While seated on the street and not posing any threat, Ms. Chavez was subjected to tear gas and then shot repeatedly with pepper ball rounds.” Id. at 1289. “[T]he severity of Ms. Chavez’s purported infractions,” sitting in the street, “and the degree of potential threat that she posed to an officer’s and to others’ safety appeared to be nil—she was lying on the ground. She also did not resist or evade arrest.” Id.

Budaj, Fogarty, and Buck support the conclusion here that Epps established a claim that Officer Christian violated her Fourth Amendment rights. In fact, the jury,

when considering the evidence and relevant jury instruction, see R. v. 11, pp. 155–56 (Instruction 12), found that Officer Christian had violated Epps’ Fourth Amendment rights by using unreasonable force against her.⁵ There was sufficient evidence to support the jury’s finding, including Epps’ testimony and video evidence that Officer Christian shot Epps, without warning, with a pepperball as she walked by herself (and not in a group), unarmed and non-threatening, across the street toward the capitol. Any crime she may have been committing, including jaywalking, was minor. In light of this evidence, Officer Christian was unable to meet his Rule 50(b) burden of showing that “all of the evidence, viewed in the light most favorable to [Epps], reveals no legally sufficient evidentiary basis” for the jury to find for Epps on her Fourth Amendment claim. Burrell v. Armijo, 603 F.3d 825, 832 (10th Cir. 2010). We, therefore, conclude Epps established that Officer Christian used unreasonable force against her, violating her Fourth Amendment rights.

2. That Fourth Amendment violation was clearly established at the time Officer Christian shot Epps with a pepperball on May 29, 2020

In addition to proving that Officer Christian violated her Fourth Amendment rights, Epps, in order to overcome Officer Christian’s potential qualified immunity defense, also had to show that the constitutional violation was clearly established at the time he shot her with a pepperball, on May 29, 2020. See Luethje, 131 F.4th at 1187. To meet her burden, Epps had to “identify ‘a Supreme Court or Tenth Circuit

⁵ Officer Christian does not challenge the instruction given jurors regarding Fourth Amendment violations based on the use of excessive force.

decision on point, or the clearly established weight of authority from other courts” that previously recognized that constitutional violation. Budaj, 86 F.4th at 867–68 (quoting Klen v. City of Loveland, 661 F.3d 498, 511 (10th Cir. 2011)). While “a case precisely on point” is not required, Epps had to show that it would have been clear to a reasonable officer in Officer Christian’s position in May 2020 “that his conduct was unlawful in the situation he confronted.” Id. at 868 (quoting Redmond v. Crowther, 882 F.3d 927, 935 (10th Cir. 2018); City of Tahlequah v. Bond, 595 U.S. 9, 12 (2021)); see also Zorn v. Linton, 607 U.S.—, 146 S. Ct. 926, 930 (2026) (“A right is clearly established when it is sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” (quoting Rivas-Villegas v. Cortesluna, 595 U.S. 1, 5 (per curiam) (internal quotation marks omitted))). Such “specificity is ‘especially important in the Fourth Amendment context,’ where it is ‘sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.’” Budaj, 86 F.4th at 868 (quoting Bond, 595 U.S. at 12–13 (additional quotation marks omitted)).

Whether a constitutional right was clearly established is a legal determination to be made by the court, rather than the jury. See Cavanaugh v. Woods Cross City, 718 F.3d 1244, 1255 (10th Cir. 2013). Here, the district court, relying on this court’s 2008 decisions in Fogarty and Buck, ruled that it was clearly established by May 2020, when Officer Christian shot Epps with a pepperball during the George Floyd protests, “that an officer cannot shoot a protestor with pepperballs when the protestor

is committing no crime more serious than a misdemeanor, not threatening anyone, and not attempting to flee.” (R. v. 11, pp. 137–38 (denying summary judgment); see also R. v. 12, p. 95 (district court decision denying Rule 50(b) motion “for largely the same reasons I identified in my order on Denver’s motion for summary judgment”).) We agree with the district court. As explained above, those cases—Fogarty and Buck—recognized in 2008 that shooting a non-threatening protestor with a pepperball when the protestor had committed, at most, a minor offense and was not trying to evade arrest, violated the Fourth Amendment. Those two earlier Tenth Circuit cases are sufficiently analogous to the circumstances presented here to have put a reasonable officer in Officer Christian’s position on notice in May 2020 that shooting Epps with a pepper ball in the context of her peaceful behavior would violate the Fourth Amendment.

Our conclusion is bolstered by this court’s recent decision in Budaj, which also relied on Fogarty and Buck to conclude that, at the time of these George Floyd protests in May and June 2020, it was clearly established “that an officer cannot shoot a protestor with pepper balls or other less-lethal munitions when that protestor is committing no crime more serious than a misdemeanor, not threatening anyone, and not attempting to flee.” 86 F.4th at 868–69 (quotation marks omitted).⁶

⁶ We agree with Officer Christian that we cannot rely on this court’s 2023 decision in Budaj to create law that was clearly established when the George Floyd protests occurred in Denver in May and June 2020. We, instead, rely on Budaj for its holding that Fogarty and Buck had clearly established in 2008 that police violate the Fourth Amendment by shooting peaceful, non-threatening protestors with less-lethal munitions.

Officer Christian’s arguments to the contrary are unavailing. Fogarty and Buck address circumstances sufficiently analogous to the facts presented in this case to put a reasonable officer in Officer Christian’s position on notice that shooting the non-threatening Epps with a pepperball was unreasonable. For the same reason, we also reject Officer Christian’s assertion that he was reasonably mistaken in believing that shooting Epps with a pepperball under these circumstances was justified.

We, therefore, uphold the district court’s decision to deny Officer Christian qualified immunity.

B. The district court did not abuse its discretion in refusing to bifurcate trial on Epps’ claim against Officer Christian

Officer Christian next argues that the district court abused its discretion in denying his Fed. R. Civ. P. 42(b) motion to bifurcate trial on Epps’ claim against him from the trial involving multiple plaintiffs’ claims against Denver. Rule 42(b) provides, in relevant part, that, “[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims.” “District courts have broad discretion in deciding whether to sever issues for trial and the exercise of that discretion will be set aside only if clearly abused.” United States ex rel. Bahrani v. ConAgra, Inc., 624 F.3d 1275, 1283 (10th Cir. 2010) (quoting Anaeme v. Diagnostek, Inc., 164 F.3d 1275, 1285 (10th Cir.1999)). A court abuses its discretion when it “acts in an ‘arbitrary, capricious, or whimsical’ manner.” Fuqua v. Santa Fe Cnty. Sheriff’s Off., 157 F.4th 1288, 1297 (10th Cir. 2025) (quoting Alpenglow

Botanicals, LLC v. United States, 894 F.3d 1187, 1203 (10th Cir. 2018)). We cannot say that the district court acted in such a manner in this case when the court decided not to bifurcate trial on Epps’ claim against Officer Christian.

Officer Christian argues he was prejudiced by having the claim against him tried with the claims of multiple protestor plaintiffs against Denver because only a small portion of the three-week trial addressed Epps’ claim against him. Denying “bifurcation is an abuse of discretion if it is unfair or prejudicial to a party.” Angelo v. Armstrong World Indus., Inc., 11 F.3d 957, 964 (10th Cir. 1993). But we cannot agree that that occurred here. As the district court noted in denying Officer Christian post-judgment relief:

[T]he jury’s determination that Mr. Christian violated Ms. Epps’ Fourth Amendment but not her First Amendment rights shows that the jury did not simply lump Mr. Christian’s actions in with Denver’s—had [jurors] done so, they would have found Mr. Christian liable for First Amendment violations against Ms. Epps, as they found Denver was liable for First Amendment violations against Ms. Epps.

(R. v. 12, p. 98.⁷) Moreover, as previously set forth above, there was evidence to support the jury’s finding that Officer Christian violated Epps’ Fourth Amendment rights.

⁷ For the first time in his reply brief, Officer Christian counters this argument by perfunctorily suggesting that he was prejudiced by the jury holding him jointly and severally liable with Denver for \$1 million in compensatory damages owed to Epps. Officer Christian does not assert where he raised that argument to the district court, and we could not determine that he did raise it. Nor does he argue for plain error review. He has waived this argument, in any event, by not raising it on appeal until his reply brief. See Anderson v. U.S. Dep’t of Labor, 422 F.3d 1155, 1174 (10th Cir. 2005).

Officer Christian further asserts, without providing any detail, that because he was tried with Denver, “Plaintiffs introduced other incidents during the protests involving [him] which would likely not have been admitted in the absence of a joint trial.” (Aplt. Br. 37.) This vague argument is not persuasive in light of Epps’ claim for punitive damages against him, which required Epps to prove Officer Christian acted against her with malice.

For all these reasons, we conclude the district court did not abuse its discretion in denying Officer Christian’s motion to bifurcate the trial of Epps’ claims against him from the trial of multiple protestors’ claims against Denver.

C. The district court did not err in denying Officer Christian’s Fed. R. Civ. P. 50(b) motion for judgment as a matter of law challenging the jury’s decision to award Epps punitive damages against the officer

“[A] jury may be permitted to assess punitive damages in an action under § 1983 when the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.” Burke v. Regalado, 935 F.3d 960, 1037 (10th Cir. 2019) (quoting Smith v. Wade, 461 U.S. 30, 56 (1983)); see also 11.166 (instruction 20). “It is the defendant’s mental state, not the scope of the harm, that” is relevant. Eisenhour v. Weber Cnty., 897 F.3d 1272, 1281 (10th Cir. 2018).

In this case, the jury awarded Epps \$250,000 in punitive damages against Officer Christian. Although the district court, post-trial, reduced that award to \$50,000, the district court denied Officer Christian’s Fed. R. Civ. P. 50(a) and (b)

motions arguing that there was no evidence to support awarding any punitive damages against him. Officer Christian challenges the denial of his Rule 50 motion.

This court reviews the district court’s Rule 50 decision de novo. See Murphy v. Schaible, 108 F.4th 1257, 1264 (10th Cir. 2024).

“A party is entitled to judgment as a matter of law only if the court concludes that all of the evidence in the record reveals no legally sufficient evidentiary basis for a claim under the controlling law.” . . . “The court draws all reasonable inferences in favor of the nonmoving party and does not weigh evidence, judge witness credibility, or challenge the factual conclusions of the jury.”

Id. (quoting Bill Barrett Corp. v. YMC Royalty Co., 918 F.3d 760, 766 (10th Cir. 2019)).

There was sufficient evidence presented at trial from which the jury could have found that Officer Christian, when he shot Epps with a pepper ball, acted with an “evil motive or intent” or with “reckless or callous indifference” to her “federally protected rights.” Burke, 935 F.3d at 1037 (quoting Smith, 461 U.S. at 56). As previously described, there was evidence that Officer Christian took a knee to aim at Epps and intentionally fired a pepperball at her, without any warning or justification. There was further evidence from which a jury could have found that, on other occasions during the multi-day George Floyd protests, Officer Christian acted in a similar manner by unjustifiably using less-lethal munitions against other non-threatening protestors. In addition, Officer Christian was recorded agreeing with a fellow officer, during the protests, that he liked shooting people. In light of this

evidence, we uphold the district court's decision denying Officer Christian's Rule 50 motions challenging the evidence supporting a punitive damages award.

IV. CONCLUSION

We reject Officer Christian's challenges and AFFIRM the jury's verdict against him.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge R. Brooke Jackson

Civil Action No. 1:20-cv-01878-RBJ *consolidated with 1:20-cv-01922-RBJ*

ELISABETH EPPS, et al.,

Plaintiffs,

v.

CITY AND COUNTY OF DENVER, et. al.,

Defendants.

ORDER ON DENVER DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on a motion for summary judgment filed by defendants City and County of Denver, Officer Jonathan Christian, and Officer Keith Valentine (Denver defendants). For the below reasons, that motion (ECF No. 271) is GRANTED IN PART and DENIED IN PART.

I. STANDARD OF REVIEW

Summary judgment is warranted when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A fact is “material” if it is essential to the proper disposition of the claim under the relevant substantive law. *Wright v. Abbott Labs., Inc.*, 259 F.3d 1226, 1231–32 (10th Cir. 2001). A dispute is “genuine” if the evidence is such that it might lead a reasonable jury to return a verdict for the nonmoving party. *Allen v. Muskogee, Okl.*, 119 F.3d 837, 839 (10th Cir. 1997). When reviewing a motion for summary judgment, a court must view the evidence in the light most favorable to the non-moving party. *Id.* However, conclusory statements based merely

on conjecture, speculation, or subjective belief do not constitute competent summary judgment evidence. *Bones v. Honeywell Int’l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004).

The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact and entitlement to judgment as a matter of law. *Id.* In attempting to meet this standard, a movant who does not bear the ultimate burden of persuasion at trial does not need to disprove the other party’s claim; rather, the movant need simply point out a lack of evidence for the other party on an essential element of that party’s claim. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

Once the movant has met its initial burden, the burden then shifts to the nonmoving party to “set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The nonmoving party may not simply rest upon its pleadings to satisfy its burden. *Id.* Rather, the nonmoving party must “set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant.” *Adler*, 144 F.3d at 671. Stated differently, the party must provide “significantly probative evidence” that would support a verdict in her favor. *Jaramillo v. Adams Cnty. Sch. Dist. 14*, 680 F.3d 1267, 1269 (10th Cir. 2012). “[T]he facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein.” *Id.*

II. BACKGROUND

This case is a consolidation of claims arising from police-protestor interactions during demonstrations following George Floyd’s murder. The instant motion seeks summary judgement on all claims against the Denver defendants. The relevant claims fall into three categories. First are class action claims against the City and County of Denver. These claims

arise from an Emergency Curfew (curfew) imposed by the Mayor of Denver on May 30, 2020 after three days of protests. *See* ECF No. 271 at ¶¶15–20. The curfew, which was eventually extended through June 5, prohibited all persons from “using, standing, sitting, traveling or being present on any public street or in any public place,” with a few limited exceptions,¹ from 8:00 p.m. until 5:00 a.m.² Plaintiffs, who were arrested and detained pursuant to the curfew but not charged with any other violations, brought a putative class action alleging that the curfew and its enforcement violated their First, Fourth, and Fourteenth Amendment rights. *See* ECF No. 219. The Court certified a class consisting of “[p]rotesters who (1) between May 30 and June 5, 2020; (2) were arrested for violation of D.R.M.C. 1-13 (emergency curfew) or D.R.M.C. 38-31(c) (failure to obey lawful order); (3) were not charged with any other violations; and (4) whose charges were dismissed.” ECF No. 127.

The second category of claims seeks damages from the City and County of Denver for alleged policies that caused violations of plaintiffs’ First, Fourth, and Fourteenth Amendment rights. These municipal liability claims—also called *Monell* claims after *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978)—allege a slew of rights-violative policies and practices.³

¹ The curfew carved out exceptions for emergency personnel, individuals traveling directly to or from work or the airport, seeking exempt care, fleeing dangerous circumstances, or experiencing homelessness, and individuals granted special permission by the city council. ECF No. 255-13 at ¶2. It contained no exceptions for First Amendment activity. *See id.*

² From June 1–5, the curfew began at 9:00 p.m. ECF No. 255-14.

³ The alleged policies and practices include, but are not limited to:

[F]ailure to give audible dispersal orders before the use of force; indiscriminate and inappropriate use of chemical munitions such as tear gas; indiscriminate and inappropriate use of PepperBalls, including as a crowd control/dispersal measure or on anyone disrupting traffic and without warning, and inadequate training thereon; dangerous “kettling” tactics; inappropriate use of 40mm launchers and other projectiles, including authorized use based on any “articulatable” need, and inadequate training thereon; inappropriate use of pepper spray and inadequate training thereon; inappropriate use of flashbangs and Stinger grenades and failure to train thereon; failure to require officers to complete timely use-of-force reports,

Evidence for these policies and practices includes observations of their use during the protests and statements by Denver Police Department (DPD) personnel that all police actions taken during the protests were consistent with departmental policies. *See* ECF No. 286-7 at ¶13q.

The final category of claims alleges that two individual DPD officers, Jonathan Christian and Keith Valentine, violated plaintiff Elizabeth Epps’s First, Fourth, and Fourteenth Amendment rights when they hit her with pepperballs. Ms. Epps alleges that Officer Christian shot her with pepperballs “without any warning or justification while she was documenting the protests and isolated on a public street.” ECF No. 286 at p. 24. She alleges that Officer Valentine struck her with a pepperball when he improperly fired into a crowd. *Id.* Defendants argue that qualified immunity bars these claims. ECF No. 271 at pp. 23–25.

III. CLASS PLAINTIFFS

The class plaintiffs allege that defendants violated their First, Fourth, and Fourteenth Amendment rights by arresting and/or detaining them pursuant to the curfew. They argue that the curfew and its enforcement illegally infringed upon their right to freedom of expression, that their arrests for violating the curfew were unconstitutional seizures, and that defendants’ allegedly selective enforcement of the curfew constituted an improper classification in violation of the Fourteenth Amendment Equal Protection Clause. Defendants respond that undisputed evidence shows that the curfew withstands constitutional scrutiny and, in any case, plaintiffs are not entitled to relief because arrests were made with probable cause.

which negatively impacted officer accountability; inadequate BWC activation during crowd-control situations and failure to train thereon; failure to discipline officers for the excessive use of force; and dictating the rules of engagement for mutual assistance agencies from outside jurisdictions while simultaneously allowing agencies to follow their own policies.

ECF No. 286 at pp. 16–17 (internal citations omitted).

A. Defining the Curfew

The parties' dispute the curfew's content and Denver's policies surrounding curfew enforcement. Because the curfew's restrictions determine the proper level of constitutional scrutiny to apply, this section reviews the record to define the curfew. I keep in mind that I must view the evidence in the light most favorable to the plaintiffs but need not accept conclusory or unsupported allegations. *See Allen*, 119 F.3d at 839; *Bones*, 366 F.3d at 875.

I start with the curfew's text. It prohibited "all persons" from "being present on any public street or in any public place," defined as any place accessible to the general public. ECF Nos. 255-13; 255-14. The curfew carved out exceptions for emergency personnel, travel to and from work, individuals experiencing homelessness, and others, but it did not include an exception for First Amendment activity. The curfew order noted that, after Mr. Floyd's murder, "a civil disturbance ha[d] occurred within the downtown and surrounding areas of the City and County of Denver" resulting in "significant and extensive damage to people and/or property," and that the risk of continuing injury and/or damage remained. *Id.*

Defendants describe a version of the curfew I will call the "neutral curfew." Defendants emphasize that the curfew's language did not limit its applicability to demonstrators or protestors. They claim that the curfew's content-neutral text starts and ends the inquiry into its content—it applied to all citizens regardless of their speech or actions. Defendants further argue that the city's curfew enforcement policies did not draw distinctions based on speech. They highlight one instance supposedly confirming the curfew's neutral application: three non-protestors were arrested in Cherry Creek after fleeing from officers. ECF No. 271 at p. 13. If the majority of individuals cited for curfew violating were protestors, argue defendants, that was only because protestors constituted a disproportionate share of curfew violators.

Plaintiffs describe a different curfew and different enforcement policies. I will call plaintiff's version the "protest-targeted curfew." According to plaintiffs, despite the curfew's neutral language, Denver's actual curfew was a targeted order prohibiting protestors—and only protestors—from accessing public places after dark. They support this allegation with text messages, emails, and testimony that they claim show that the curfew was understood not as a curfew but as a ban on protesting. *See* ECF Nos. 286-19; 286-20; 286-21. The most notable texts convey a message from Division Chief Thomas: the curfew "is only to be used in relation to protest activity," and officers may "not [] cite for curfew just for being out after 2100." Instead, an individual must be engaged in "protest-related behavior" to be cited for a curfew violation. ECF No. 286-20 at pp.1, 4. Plaintiffs say that a reasonable jury could conclude that the text messages reflect a citywide policy because, although Division Chief Thomas is not a final policymaker, his texts summarized directives from the Chief of Police and other final policymakers. The one instance of curfew enforcement against non-protestors, claim plaintiffs, could reasonably be interpreted as an outlier when compared with over 300 instances of curfew enforcement against protestors. Plaintiffs argue in the alternative that even if the evidence does not show that the curfew's content discriminated based on speech, it nonetheless shows that DPD had adopted a speech-based selective enforcement policy.

I conclude that both versions of the curfew are supported by the record. A reasonable jury could accept defendants' claim that the policy was a "neutral curfew," but it could also accept plaintiffs' "protest-targeted curfew" description or plaintiffs' claims of selective enforcement. Internal DPD communications, which a jury might find persuasive, support plaintiffs' story. Because I must construe all evidence in the light most favorable to plaintiffs at this stage, I will analyze whether the protest-targeted curfew passes constitutional scrutiny.

B. First Amendment Claims

This Court applies a three-step inquiry to decide whether the government violated a plaintiff's First Amendment rights. *Verlo v. Martinez*, 820 F.3d 1113, 1128 (10th Cir. 2016). Plaintiff must first establish that his activities were protected by the First Amendment. *Id.* If they were, the Court must “identify whether the challenged restrictions impact a public or nonpublic forum, because that determination dictates the extent to which the government can restrict First Amendment activities within the forum.” *Id.* Finally, the Court determines whether a policy is content-based or content-neutral and then applies the requisite standard of review to the government's proffered justification for prohibiting plaintiff's speech. *Id.*

The parties agree that plaintiffs engaged in protected First Amendment activity and that the curfew, by closing all public places, impacted traditional public fora. The appropriate standard of review depends on whether the curfew was content-based or content-neutral. Content-based speech restrictions “must satisfy strict scrutiny,” meaning they must be “narrowly tailored to serve a compelling government interest.” *Id.* at 1134 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009)). Narrow tailoring in the strict-scrutiny context requires that a policy be “the least restrictive means” of achieving the government's interest. *Id.* Content-neutral restrictions undergo less rigorous scrutiny. They are permissible if they “(a) serve a significant government interest; (b) are narrowly tailored to advance that interest; and (c) leave open ample alternative channels of communication.” *Id.*

The protest-targeted curfew, which a reasonable jury could find was Denver's actual policy, would have been content-based because it applied only to those participating in what the DPD referred to as the George Floyd protests. *See Golan v. Gonzales*, 501 F.3d 1179, 1196 (10th Cir. 2007) (“Content-based restrictions on speech are those which suppress, disadvantage, or impose differential burdens upon speech because of its content.” (internal quotations

omitted)). Such a law is “presumptively unconstitutional.” *Nat’l Inst. of Family & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2371 (2018). I find that the protest-targeted curfew does not satisfy strict scrutiny because, although the government had a compelling interest in preventing “violent, destructive, and riotous behavior jeopardizing public and officer safety and significant property damage,” ECF No. 271 at p. 9, the protest-targeted curfew was not “narrowly tailored.” For content-based restrictions, a policy is narrowly tailored “only if it is the least restrictive means of achieving the government’s compelling objective.” *Verlo*, 820 F.3d at 1134. A court must analyze whether the government could have achieved the same compelling interest in a way that imposed a less onerous burden on speech. *Golan*, 501 F.3d at 1196.

I cannot conclude that the protest-targeted curfew was the least restrictive means of achieving the government’s interest. First, the government has not argued that its curfew was the least restrictive means—it argued only that the curfew survived First Amendment scrutiny if construed as a content-neutral restriction. *See* ECF No. 271 at pp. 9–10. Moreover, it is plausible that the government could have achieved its aims while imposing a less onerous burden on speech. The government identified disturbances “occurring Downtown” that “involved substantial destruction of property and endangered public safety.” *Id.* at p. 10. A geographically limited curfew, for example, might have fulfilled the governmental objective. Had the government chosen to clear 16th Street Mall, other business districts, and pedestrian-trafficked areas after dark but permitted peaceful protests to continue somewhere like City Park the “Downtown” disturbances would have ceased, property damage might have been eliminated or substantially reduced, public safety might have been preserved, and the foundational right to freedom of expression might have been maintained. The protest-targeted curfew therefore does not survive First Amendment scrutiny.

The neutral curfew, however, would survive First Amendment scrutiny. It would have been content-neutral and thus permissible even if it were not the *least* restrictive or intrusive means of advancing the government’s interest. *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1224 (10th Cir. 2021). The neutral curfew would have been narrowly tailored in the sense required for content-neutral restrictions and would have left open ample alternative channels for communications by allowing daytime protests. As a result, to succeed on their First Amendment claim at trial, plaintiffs must prove that Denver’s policy was a curfew for protestors but not for anyone else, the order’s text notwithstanding. I find that plaintiffs have presented sufficient evidence to potentially carry this burden at trial, and there therefore exists a genuine dispute of material fact about the content of Denver’s curfew policy.

C. Fourteenth Amendment

Plaintiffs claim that Denver’s curfew enforcement policies violated their rights under the Fourteenth Amendment Equal Protection clause. For this claim, plaintiffs argue that even if the curfew was content-neutral, Denver adopted a policy of discriminatory enforcement that targeted protestors because of their speech. *See* ECF No. 286 at pp. 20–21 (citing internal DPD text messages instructing officers to enforce the curfew only “in retaliation for protest activity”). Defendants dispute the existence of such a selective enforcement policy. They argue that not all protestors were arrested, and there was at least one instance in which a non-protestor was arrested. ECF No. 271 at p. 13. I found above that a reasonable jury could conclude that Denver had adopted a speech-based discriminatory enforcement policy. The only remaining question is whether this factual dispute is material. In other words, would the discriminatory enforcement policy described by plaintiffs affect their right to relief under the Fourteenth Amendment?

Defendants represent that an Equal Protection Clause selective enforcement claim “requires establishing: (1) different treatment from others similarly situated; and (2) the differing

treatment was based on clearly impermissible or invidious grounds ‘such as race, religion, or the desire to prevent the exercise of constitutional rights.’” ECF No. 271 at p. 12 (quoting *United States v. Salazar*, 720 F.2d 1482, 1487 (10th Cir. 1983)).

The discriminatory enforcement policy described by plaintiffs would suffice for Fourteenth Amendment liability under defendants’ standard. Plaintiffs contend that protestors—who were arrested—were treated differently under Denver’s enforcement policy than non-protestors. They further contend that the differing treatment was due to exercise of a constitutional right to free expression—as DPD text messages put it, whether an individual was “actively engaged in protest activity.” ECF No. 286-20. The enforcement policy described by plaintiffs would violate the Equal Protection Clause. If, however, defendants are correct that Denver’s policy did not enforce the curfew only against protestors, then the curfew would not have given rise to a claim under the Equal Protection Clause because there would be no speech-based disparate enforcement. The question of whether Denver adopted a protest-targeted enforcement policy is thus a genuine dispute of material fact.

D. Fourth Amendment

Defendants argue that, even if the curfew was unconstitutional, arrests for violating the curfew could not have violated plaintiffs’ Fourth Amendment right against unreasonable search and seizure because the arrests were supported by probable cause. ECF No. 271 at p. 14. I agree. Many courts have found that officers should be excused from liability under a statute they reasonably believed to be valid at the time of arrest. *See, e.g., Pierson v. Ray*, 386 U.S. 547, 555 (1967); *Roska v. Peterson*, 328 F.3d 1230, 1251 n. 29 (10th Cir. 2003); *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994); *Peterson Novelties, Inc. v. City of Berkley*, 672 N.W.2d 351, 363 (Mich. 2003). Although these sources deal with officer liability, I find the underlying principle persuasive. Because plaintiffs did not respond to this argument or provide

alternative authority, I find no genuine dispute of material fact and dismiss the Fourth Amendment class action claims.

IV. MONELL CLAIMS

Plaintiffs’ municipal liability claims against the City and County of Denver require (1) a city policy or custom; and (2) a causal link “between the policy or custom and the injury alleged.” *Waller v. Denver*, 932 F.3d 1277, 1283–84 (10th Cir. 2019). “A municipal policy or custom may take the form of (1) ‘a formal regulation or policy statement’; (2) an informal custom ‘amoun[ting] to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law’; (3) ‘the decisions of employees with final policymaking authority’; (4) ‘the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated . . .’; or (5) the ‘failure to adequately train or supervise employees, so long as that failure results from deliberate indifference⁴ to the injuries that may be caused.’” *Bryson v. City of Oklahoma City*, 627 F.3d 784, 788 (2010) (quoting *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1189–90 (10th Cir. 2010)) (citations omitted).

A. Fourth Amendment Claims

Plaintiffs claim that Denver’s policies deprived them of their Fourth Amendment right to freedom from unreasonable seizures. Claims that police used excessive force during a seizure are analyzed under the Fourth Amendment’s reasonableness standard.⁵ *Graham v. Connor*, 490

⁴ Deliberate indifference is required only for municipal liability based upon a failure to adequately train or supervise. See *City of Canton v. Harris*, 489 U.S. 378, 387 (1989). Other claims require only the existence of a policy and causation. *Waller*, 932 F.3d at 1283–84.

⁵ Plaintiffs must show both that a “seizure” occurred and that the seizure was “unreasonable.” *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989).

U.S. 386, 395 (1989). Defendants do not dispute that plaintiffs have sufficient evidence to sustain a Fourth Amendment claim; defendants argue only that the two *Monell* factors—policy and causation—are not met.

I find there is sufficient evidence for a jury to find in plaintiffs’ favor on the Fourth Amendment *Monell* claim. To prove the existence of a policy, plaintiffs present expert witness reports identifying numerous DPD policies and customs. ECF Nos. 286-6 at ¶¶6–142, 286-7; *see also supra*, p. 3 n.3. A jury could believe plaintiffs’ experts. Defendants’ litigation posture establishes the second *Monell* element, causation, for purposes of the summary judgment motion. Defendants do not dispute that plaintiffs have sufficiently alleged a Fourth Amendment injury at the hands of individual officers, nor do they dispute plaintiffs’ contention that all individual officers were following DPD policies to a “T.” If officer compliance with DPD policies led to violations of Fourth Amendment rights, then a reasonable jury could find a causal connection between the policies and the violations.

Defendants contest only the possibility of drawing a causal connection between three specific policies and plaintiffs’ injuries. They argue that Denver’s allegedly failing to discipline officers for uses of force, permitting officers to deactivate body worn cameras, and not requiring officers to complete use of force reports cannot have caused plaintiffs’ injuries because those actions and inactions happened after injuries had already occurred. ECF No. 271 at pp. 22–23. Defendants misunderstand the application of plaintiffs’ evidence. Plaintiffs argue that Denver’s failure to require use of force reports and body worn camera activation, a preexisting policy understood by officers before the protests, notified officers that they likely would not be held accountable for excessive uses of force and thus caused them to use excessive force. Plaintiffs have presented sufficient evidence to support this causal claim. *See* ECF No.286 at p. 8.

Defendants are correct that Denver’s alleged failure to discipline officers cannot be said to have caused an injury, but plaintiffs do not seek to introduce evidence of the policy for this purpose. Plaintiffs present evidence of failure to discipline as proof that specific policies existed—at least one DPD officer testified that “if [a DPD officer] is not disciplined, that shows that they were acting within policy.” ECF No. 286-8 at p. 2.

B. First Amendment Claims

Plaintiffs’ First Amendment retaliation claim requires proof of three elements: (1) constitutionally protected activity; (2) government conduct that chills the protected activity; and (3) motive. *Worrell v. Henry*, 219 F.3d 1197, 1206 (10th Cir. 2000). Defendants contest only the third element—they argue that plaintiffs cannot raise a genuine dispute of material fact on the question of whether defendants’ activities were “substantially motivated as a response to the plaintiff’s exercise of constitutionally protected conduct.” *Id.* I disagree. Plaintiffs argue that “[a] factual dispute exists as to whether officers’ actions were motivated, at least in part, by [p]laintiffs’ protected activity.” ECF No. 286 at p. 13. Plaintiffs present evidence that they did not engage in destructive activity, and that many officers used force in situations that support an inference of retaliatory motive, such as tear gassing kneeling protestors chanting “Hands Up Don’t Shoot” or shooting a plaintiff through her “Black Lives Matter” sign. *Id.* Denver’s allegedly permissive policies regarding officers’ use of less-lethal munitions could have caused retaliatory uses of force. Defendants’ contention that officer actions were motivated by a legitimate need to respond to violent protestors may be true, but that is for a jury to decide. Plaintiffs’ First Amendment *Monell* claim survives summary judgment.

C. Fourteenth Amendment Claims

Although plaintiffs are permitted to bring excessive force claims under the Fourteenth Amendment Due Process clause for uses of force that do not fall under the Fourth Amendment’s

“searches and seizures” requirement, *Roska v. Peterson*, 328 F.3d 1230, 1243 (10th Cir. 2003), plaintiffs’ Fourteenth Amendment claims are no longer at issue. Based on statements by counsel during the trial preparation conference held on February 23, 2022, this Court understands that plaintiffs pursued their Fourteenth Amendment claims only in case defendants argued that Denver’s actions were not within the Fourth Amendment’s ambit because, regardless of the actions’ unreasonableness, plaintiffs were not seized. *See Brower*, 489 U.S. at 599 (stating that Fourth Amendment claim requires plaintiffs must show both that a “seizure” occurred, and that the seizure was “unreasonable”). Defendants represented that they would make no such argument—if the evidence shows that Denver and its employees’ actions constituted unreasonable and/or excessive force, defendants will not seek to evade liability because the unreasonable and/or excessive force was not applied during the course of a seizure. The Fourteenth Amendment claims are therefore moot.

V. INDIVIDUAL DEFENDANTS

Plaintiff Elizabeth Epps brings Fourth, Fourteenth,⁶ and First Amendment claims against Officers Jonathan Christian and Keith Valentine in their individual capacities. Ms. Epps claims that Officer Christian shot her with a pepperball while she was livestreaming video of the police. ECF No. 286-35 at p.35. According to Ms. Epps, Officer Christian shot her without warning or justification. *See* ECF No. 178 at ¶ 95. Ms. Epps claims that Officer Valentine shot her in the face with a pepperball the next day while she peacefully protested. ECF No. 286-35 at p. 34. Ms. Epps alleges that Officer Valentine fired in retaliation when a different protestor threw a water bottle, but he did not give any warnings and took no precautions to ensure that he would

⁶ Like plaintiffs’ Fourteenth Amendment *Monell* claims, Ms. Epps’s Fourteenth Amendment claims against the individual officers are no longer contested for the purposes of trial. *See supra* pp. 7–8.

not injure innocent bystanders—Ms. Epps claims that Officer Valentine fired several rounds at face-level. *See* ECF No. 178 at ¶ 97.

Defendants respond that Officers Christian and Valentine are entitled to qualified immunity. ECF No. 271 at pp. 23–25. “Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). To avoid application of qualified immunity, a plaintiff must prove that (1) defendant violated a constitutional right, and (2) the constitutional right was clearly established at the time it was allegedly violated. *Id.* at 232. In arguing that the individual defendants are entitled to qualified immunity, defendants argue that no binding precedent “clearly established” that defendant officers’ alleged conduct was unlawful. ECF No. 721 at pp. 23–24. Defendants emphasize the “essence” of qualified immunity’s second prong: to ensure that “every reasonable official” has received “fair warning” before being held liable. *See id.* (quoting *Tolan v. Cotton*, 572 U.S. 650, 56 (2014)).

A. Officer Christian

I find that Officer Christian is not entitled to qualified immunity. Ms. Epps stated at her deposition that she was walking slowly and filming the protests when a police officer, who she identifies as Officer Christian, shot her with a less-lethal munition. ECF No. 286-35 at p. 27. Her cellphone video provides no reason to doubt her testimony—it shows her isolated and inoffensively crossing a street when an officer kneels and aims what appears to be a pepperball gun at her. ECF No. 286-36 at 2:50–3:10. She then states, “he just shot me,” and zooms in on the kneeling officer. *Id.*

The law was clearly established that an officer cannot shoot a protestor with pepperballs when that protestor is committing no crime more serious than a misdemeanor, not threatening

anyone, and not attempting to flee. In *Buck v. City of Albuquerque*, 549 F.3d 1269 (10th Cir. 2008), the Tenth Circuit “ha[d] little difficulty in holding that the law was clearly established at the time of the alleged infraction” with regard to a plaintiff shot with pepperballs when she “posed no threat and did not attempt to flee.” *Id.* at 1291. The Tenth Circuit reached the same conclusion in *Fogarty v. Gallegos*, 523 F.3d 1147 (10th Cir. 2008), where it held that because it was clearly established that “force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest,” a reasonable officer would have been on notice that deploying less-lethal munitions against such an individual violated the law. *Id.* at 1161. Ms. Epps’s allegation is that she posed no threat and was not attempting to flee, but she was shot by a pepperball nonetheless. It was clearly established that such a use of force is illegal, and qualified immunity is thus denied.

Regarding Ms. Epps’s First Amendment retaliation claim, “[i]t has long been clearly established that the First Amendment bars retaliation for protected speech and association.” *Buck*, 549 F.3d at 1292 (quoting *Mimics, Inc. v. Vill. of Angel Fire*, 394 F.3d 836, 848 (10th Cir. 2005) (alteration in original)). Because Ms. Epps alleges she was doing nothing but filming the events and, through her presence, protesting police violence, I find a genuine dispute of material fact over whether Officer Christian shot Ms. Epps in retaliation for protected speech and association.

B. Officer Valentine

I cannot find that Officer Valentine’s actions violated clearly established law. Officer Valentine allegedly saw a protestor throw an object at the police, fired at the protestor, missed, and hit Ms. Epps, who was standing 10-15 feet behind the thrower. *See* ECF No 286-6 at p.45. Ms. Epps protests that Officer Valentine unnecessarily deployed pepperballs, did not warn protestors before firing, and aimed too high. ECF No. 178 at ¶ 97. The cases cited above

establish that pepperballs are inappropriate against non-threatening individuals. I do not find them applicable here where an individual threw objects at the police. And plaintiffs have provided no authority clearly establishing that it violates the constitution for an officer to fail to give warning to those standing behind an aggressive individual before firing at that individual, or that an officer violates the constitutional rights of those standing behind a threatening individual by aiming too high and being a poor shot. Officer Valentine is thus entitled to qualified immunity.

VI. ORDER

For the above reasons, Denver's motion for summary judgment (ECF No. 271) is GRANTED as to Officer Valentine, GRANTED as to the Fourth Amendment class action claims, and DENIED as to all other claims and defendants.

DATED this 1st day of March, 2022.

BY THE COURT:



R. Brooke Jackson
Senior United States District Judge

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF COLORADO

3 Civil Action No. 20-cv-1878-RBJ

4 ELISABETH EPPS AND SARA FITOURI, ET AL.,

5 Plaintiffs,

6 vs.

7 CITY AND COUNTY OF DENVER, ET AL.,

8 Defendants.

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10 REPORTER'S TRANSCRIPT

11 Jury Trial, Vol. 11

12 -----

13 Proceedings before the HONORABLE R. BROOKE JACKSON,
14 Judge, United States District Court for the District of
15 Colorado, commencing on the 21st day of March, 2022, in
16 Courtroom A902, United States Courthouse, Denver, Colorado.

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I N D E X

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1 ladies and gentlemen, so we're going to have a little bit of an
2 early break for you. We will come for you as soon as we're
3 ready.

4 (Jury out at 9:46 a.m.)

5 THE COURT: The jury has been excused. Mr. Ringel, do
6 you wish to make a motion?

7 MR. RINGEL: I do, Your Honor. Thank you. At this
8 time, on behalf of the defendants the City and County of Denver
9 and Jonathan Christian, I move for judgment as a matter of law
10 on the following issues pursuant to Federal Rules of Procedure
11 50. Initially, I incorporate all of the arguments and
12 authorities made in the Denver defendants' motion for summary
13 judgment and the applicable arguments in the trial brief and the
14 second trial brief.

15 The first issue I would like to raise, Your Honor, is
16 related to the claims involving plaintiff Cidney Fisk. As the
17 Court knows, Ms. Fisk was previously represented by counsel for
18 the Epps plaintiffs. She became pro se. She has not appeared
19 in this matter in quite some time. She has failed to appear at
20 trial, and offered no evidence to support her claims. Because
21 no evidence has presented, it is our view that the defendants
22 are entitled to judgment as a matter of law related to Ms. Fisk.

23 THE COURT: Is there any objection to that from
24 anybody?

25 MS. STERK: We have no position on that, Your Honor.

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1 THE COURT: Winner, winner, chicken dinner.

2 MR. RINGEL: I thought I would start with the easy
3 one, Your Honor.

4 THE COURT: All right. Your claim by Ms. Fisk is
5 dismissed for failure to prosecute.

6 MR. RINGEL: All right. Moving on, Your Honor.

7 THE COURT: It has to be without prejudice. Any
8 failure to prosecute is without prejudice, but --

9 MR. RINGEL: Well, but shouldn't it be a dismissal
10 under Rule 50 for failure to present evidence?

11 THE COURT: Good question. You're probably right.

12 MR. RINGEL: And that would be with prejudice under
13 Rule 50.

14 THE COURT: You're right. I agree.

15 MR. RINGEL: Okay. Moving on, I want to address the
16 claims of plaintiff Elisabeth Epps against Jonathan Christian.
17 The first of those claims is a First amendment retaliation
18 claim. It is our position that Ms. Epps can't meet the
19 subjective intent requirement for a claim under *Worrell versus*
20 *Henry* for the causation claim aspect of the claim based on the
21 Tenth Circuit's decision that it has to be but for.

22 So, the issue here is whether Mr. Christian's firing of
23 a single PepperBall in the direction of Ms. Epps was
24 substantially motivated in our version of *Worrell*, or
25 substantial or motivated in the version from the plaintiffs for

1 her exercise of protected activity under the First amendment.

2 It is our view that there is not sufficient evidence in
3 the record of that subjective motivation by Mr. Christian.

4 There is not evidence that he specifically fired the PepperBall
5 because of any First amendment activity that Ms. Epps was
6 engaged in at that moment. He said that he didn't know that she
7 was filming anything, and that he fired the PepperBall for the
8 purpose of being -- because she was in the street and to get her
9 out of the street.

10 And one can argue about the legitimacy of that, and we
11 will in a minute with respect to the Fourth amendment claim, but
12 I don't think it fits a First amendment theory or there's
13 sufficient evidence on that issue.

14 With respect to the Fourth amendment claim against
15 Mr. Christian, it is our view that on the -- under the totality
16 of circumstances it was objectively reasonable for him to have
17 deployed the single PepperBall in an area saturation method to
18 encourage Ms. Epps to get out of 14th Avenue where she was
19 obstructing traffic. We think that it's simply not a Fourth
20 amendment violation.

21 In addition, Your Honor, we would renew the
22 articulation of qualified immunity. I understand the Court has
23 ruled against us with respect to the clearly established prong
24 of the qualified immunity analysis, but we would just renew that
25 argument to preserve that issue for purposes of the record.

1 And then the last issue with respect to Mr. Christian
2 is Ms. Epps has asserted a claim for punitive damages against
3 Mr. Christian, and on these facts, it is our position that under
4 the *Smith versus Wade* standard from the Supreme Court in 1983,
5 that there isn't sufficient evidence that a reasonable jury
6 could find that Mr. Christian's actions meet the extremely high
7 threshold for punitive damages under federal law.

8 There isn't any evidence that he acted with an evil
9 motive, and there isn't any evidence that he acted in reckless
10 disregard for Ms. Epps' federally protected rights. What we
11 have here is one single shot of a PepperBall. If it was a full
12 cartridge of PepperBalls, maybe it could support punitive
13 damages, but in this instance, it is our position that no
14 reasonable jury could conclude that punitive damages are
15 appropriate, and it doesn't meet the threshold for punitive
16 damages as a matter of law.

17 Do you want me to go on to the municipal liability
18 issues?

19 THE COURT: Yes.

20 MR. RINGEL: Thank you, Your Honor. Also, I am going
21 to move for judgment as a matter of law on the issue of
22 municipal liability with respect to Denver. And as the Court
23 understands and has been briefed, there are essentially five
24 different ways that a plaintiff can establish municipal
25 liability against Denver.

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1 matter whether it hit her or not, because it did affect her.

2 THE COURT: It matters a lot if it affects the
3 credibility of your case. I am going to deny the motion on
4 Epps, and in doing so, I am giving them a gift. I think you're
5 making an advocacy mistake. I have told you that before. I
6 tell you that again now, but if you're willing to have the
7 credibility of your whole case affected by that argument on
8 Epps, I can't help you.

9 MS. STERK: I understand, Your Honor.

10 THE COURT: All right. Let's hear the response on all
11 the rest of it, briefly.

12 MS. WANG: Judge, we -- as with the other attorneys,
13 we incorporate our responses to the motion for summary judgment,
14 but I will specifically address some of the things that
15 Mr. Ringel asked, unless you have some specific questions you
16 would like me to target my argument to.

17 THE COURT: No. It is totally not helpful to the
18 Court for any of the three of you to incorporate all your prior
19 briefs and motions.

20 MS. WANG: Okay. Great. So, with respect to
21 municipal liability, so we've heard a lot from Mr. Ringel in his
22 questioning of the experts and other witnesses about, you know,
23 whether or not Denver's official policies on BWC, meaning not
24 requiring officers to turn on or activate their body-worn
25 cameras during protests and not requiring officers to complete

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No. 1:20-cv-01878-RBJ
Consolidated with 1:20-cv-01922-RBJ-MEH

ELISABETH EPPS,
ASHLEE WEDGEWORTH,
AMANDA BLASINGAME,
MAYA ROTHLEIN,
ZACH PACKARD,
HOLLIS LYMAN,
CIDNEY FISK,
STANFORD SMITH,
SARA FITOURI,
JACQUELYN PARKINS,
KELSEY TAYLOR,
YOUSSEF AMGHAR,
JOE DERAS,
JOHNATHAEN DURAN,
MICHAEL ACKER and
CLAIRE SANNIER,

Plaintiffs,

v.

CITY AND COUNTY OF DENVER,
DANIEL FELKINS,
DAVID ABEYTA,
CITY OF AURORA,
CORY BUDAJ,
BOARD OF COUNTY COMMISSIONERS FOR JEFFERSON COUNTY, COLORADO,
JONATHAN CHRISTIAN,
KEITH VALENTINE,
DAVID MCNAMEE,
PATRICIO SERRANT,
MATTHEW BRUKBACHER,
J. LNU,
JOHN AND JANE DOES 1-100, and
JOHN AND JANE BOES 1-50,

Defendants.

ORDER ON THE MOTIONS FOR JUDGMENT AS A MATTER OF LAW, NEW TRIAL, OR
REMITTITUR AS TO DEFENDANTS DENVER AND JONATHAN CHRISTIAN

This matter is before the Court on Denver and Jonathan Christian's motions for judgment as a matter of law, new trial, and remittitur (ECF Nos. 373, 374). For the reasons discussed below, Denver's motion is DENIED. Mr. Christian's motion is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

This case is a consolidation of claims arising from police-protestor interactions during demonstrations following George Floyd's murder. It was tried to a jury from March 7 through March 25, 2022. The jury returned a verdict in favor of the plaintiffs on almost every claim. The jury found Denver liable for violating Ms. Wedgeworth's First Amendment rights and awarded her \$750,000 in compensatory damages. ECF No. 343 at 6. The jury found Denver liable for violating all the other plaintiffs' First and Fourth Amendment rights. *See* ECF No. 343. It awarded each of these plaintiffs, other than Mr. Packard, \$1 million in compensatory damages. *Id.* It awarded Mr. Packard \$3 million in compensatory damages. *Id.* at 3. Mr. Packard and Mr. Deras suffered injuries because of the actions of Aurora officers, who came to aid Denver's protest response as mutual aid officers. The jury found that Denver was liable for the actions of these mutual aid officers. *Id.* at 3, 5. Ms. Epps brought a claim against individual defendant Jonathan Christian, in addition to her claims against Denver. The jury found that Mr. Christian had violated Ms. Epps Fourth Amendment rights and awarded the \$1 million in compensatory damages against Denver and Mr. Christian. *Id.* at 8. In addition, the jury awarded Ms. Epps \$250,000 in punitive damages against Mr. Christian.

II. JUDGMENT AS A MATTER OF LAW OR NEW TRIAL

A. Standard of Review

1. Judgment as a Matter of Law (JMOL)

“A party is entitled to JMOL only if the court concludes that all of the evidence in the record reveals no legally sufficient evidentiary basis for a claim under the controlling law.” *ClearOne Commc’ns, Inc. v. Bowers*, 643 F.3d 735, 771 (10th Cir. 2011) (brackets and ellipsis omitted). All reasonable inferences should be drawn in favor of the nonmoving party. *See id.* at 772. Judgment as a matter of law is not warranted unless all evidence points in one direction, and the evidence is not susceptible to any reasonable inferences supporting the nonmoving party’s position. *Id.* “The question is not whether there is literally no evidence supporting the [nonmoving] party . . . but whether there is evidence upon which the jury could properly find [for that party].” *Century 21 Real Est. Corp. v. Meraj Int’l Inv. Corp.*, 315 F.3d 1271, 1278 (10th Cir. 2003). At bottom, the question in determining whether a motion for judgment as a matter of law should be granted is “whether there is any [evidence] upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

Federal Rule of Civil Procedure 50(a)(2) requires a party to make any motion challenging the sufficiency of the evidence prior to the case being submitted to the jury. *See Mountain Dudes v. Split Rock Holdings, Inc.*, 946 F.3d 1122, 1130–31 (10th Cir. 2019). The moving party must “specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.” Fed. R. Civ. P. 50(a)(2). A party can renew its motion for judgment as a matter of law under Rule 50(b) after the jury returns a verdict. Fed. R. Civ. P. 50(b). A Rule 50(b) movant, however, can only reassert the same grounds for judgment as a matter of law

that he first asserted in his pre-deliberation Rule 50(a) motion. *Mountain Dudes*, 946 F.3d at 1131.

2. New Trial

Under Federal Rule of Civil Procedure 59, a court may grant a new trial after a jury trial, “for any reason for which a new trial has heretofore been granted in an action at law in federal court.” A new trial may be granted if prejudicial error has occurred or if the verdict is against the weight of the evidence. *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 637 (10th Cir.1988). A new trial may also be granted if damages are excessive. See *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940). “A motion for new trial on the grounds that the jury verdict is against the weight of the evidence normally involves a review of the facts presented at trial, and thus involves the discretion of the court.” *Black v. Hieb’s Enter., Inc.*, 805 F.2d 360, 363 (10th Cir.1986). The Court must grant a new trial if it determines that excessiveness in the amount of the award gives rise to the inescapable inference that it resulted from passion or prejudice on the part of the jury, since the prejudice may have infected the jury’s liability determination as well. See *Malandris v. Merrill Lynch*, 703 F.2d 1152, 1168 (10th Cir.1981).

B. Analysis of Denver’s Motion for Judgment as a Matter of Law

Denver seeks judgment as a matter of law or a new trial because it believes the jury’s verdict was not supported by the evidence in this case. As an initial matter, plaintiffs pursued three theories of liability against Denver: (1) policy, custom, or practice, (2) failure to train, and (3) ratification. Any of these theories on their own would be sufficient to support liability against Denver, and the jury found Denver liable for each plaintiff’s injuries under all three theories.

1. Denver is Not Entitled to a Judgment as a Matter of Law or a New Trial on Plaintiffs' Claims Under an Official Policy, Practice, or Custom Theory

First, Denver argues that there was no evidence of a direct causal link between any municipal policy and plaintiffs' injuries. It argues that "a municipal policy must be the moving force behind the constitutional violation." ECF No. 373 at 2 (quoting *Bd. of Cnty. Comm'rs of Bryan Cty., Okla. v. Brown*, 520 U.S. 397 (1997)). It says there was no evidence that, "[f]or example, with respect to Mr. Christian's use of PepperBall in the direction of Ms. Epps . . . Mr. Christian specifically acted pursuant to an unconstitutional formal policy or an informal custom, he was a final policymaker for Denver, any final policymaker specifically ratified Mr. Christian's actions, or there was a specific known deficiency in Denver's training concerning PepperBall use." *Id.* Denver argues that the same logic applies to all plaintiffs; there was no evidence that a municipal policy was the moving force behind constitutional violations. Plaintiffs respond that significant evidence was presented on causation.

I agree with plaintiffs. There was evidence presented that the officers who violated plaintiffs' constitutional rights acted pursuant to an unconstitutional policy. The evidence supported a conclusion that Denver Police Department (DPD) policy gave command officers virtually limitless discretion to authorize officers to use less-lethal weapons in protest situations.¹ ECF No. 350 at 1202–04. In addition to the mountain of video evidence from which a reasonable jury could have inferred this policy's existence, Commander Phelan testified that he did not see any police actions during the protests that did not fall within DPD policy. *See* ECF No. 350 at 44. There was also evidence that the use of less-lethal weapons resulted in harm to protesters, including plaintiffs. *See e.g.*, ECF No. 387 at 90–91 (Sannier), 153–55 (Smith), 195

¹ This order is based on my recollections of the testimony and evidence presented at trial, as well as a review of the certified transcript.

(Packard); ECF No. 389 at 156 (Fitouri); ECF No. 390 at 10–11 (Rothlein), 62–63 (Blasingame); ECF No. 349 at 10–11 (Deras); ECF No. 351 at 160–62 (Taylor), 223 (Wedgeworth); ECF No. 352 at 1666 (Parkins), 191–93 (Epps); ECF No. 354 at 74 (Lyman).

As I said in ruling on the initial motion for judgment as a matter of law made at the close of plaintiffs’ evidence, on the issue of causation, “the overreaction of the cops, the excessive application of PepperBalls and tear gas and sometimes some of the other projectiles . . . if you construe in favor of the plaintiff, which I have to do, was what led to the exposure of the plaintiffs to PepperBalls and tear gas, notwithstanding their peaceful protesting.” ECF No. 344 at 31–32. As in the Rule 50(a) order, I must construe everything in favor of the plaintiffs in this order. A reasonable jury could find, and this jury did find, that Denver caused plaintiffs’ specific injuries. As the jury’s finding on causation was supported by evidence, Denver’s motion for judgment as a matter of law or a new trial is denied on the issue of causation.

Second, Denver complains that plaintiffs failed to specify “precisely what formal policy of Denver violated any of their constitutional rights” and how such a formal policy violated their rights. ECF No. 373 at 3. Plaintiffs respond that evidence was presented regarding “Denver’s official policies” of not requiring officers to activate body-worn cameras (BWCs), not requiring officers to timely complete use of force reports for protests, allowing “unlimited discretion to officers to use less lethal weapons as they saw fit,” and allowing the use of 12-gauge shotguns, flashbangs, and other explosives, and kettling. ECF No. 392 at 2–4.

Denver insists in its reply that plaintiffs have “failed to respond” to its argument that plaintiffs never specified any formal Denver policy violative of their constitutional rights. ECF No. 406 at 2. I disagree. Plaintiffs, in their presentation of evidence, specified several policies that caused violations of their First and Fourth Amendment rights and reiterated those policies in

their response to the instant motion. One policy emphasized by plaintiffs was Denver’s policy of permitting mutual aid partners to proceed under their own use-of-force policies, rather than requiring that they follow Denver’s use-of-force policy. *See* ECF No. 350 at 13–15. Another was Denver’s policy to permit use of less-lethal weapons against protesters on a discretionary basis. *See id.* at 44. Plaintiffs made sufficiently specific articulations of the Denver policies to which they objected. I outlined above the evidence that could lead a reasonable juror to conclude that these policies caused plaintiffs’ injuries. This argument does not warrant judgment as a matter of law or a new trial.

Third, Denver argues that plaintiffs could not have alleged a practice or custom because they only introduced evidence from the first six days of the George Floyd protests. ECF No. 373 at 3–4. It cites *Carney v. City and Cty. of Denver*, 534 F.3d 1269, 1274 (10th Cir. 2008) for the proposition that “[i]n order to establish a custom, the actions of the municipal employees must be ‘continuing, persistent and widespread.’” *Id.* (internal quotations omitted). Denver concludes that no practice or custom could have been established over such a short period. Plaintiffs respond that they “did *not* need to show that there was a history of problems relating to use of force reporting, BWC camera use at protests, or any of the official policies” because as an official policy, practice, or custom requires either a showing of deliberate action by policymakers or that the practice or custom is a “standard operating procedure.” ECF No. 392 at 3–4. Denver asserted in its reply that plaintiffs did not respond to this argument.

Once again, I disagree with Denver. I need not reach Denver’s arguments about its customs or practices because a reasonable juror could have found that certain *policies* of Denver caused plaintiffs’ injuries. As plaintiffs would be entitled to recover if they showed a policy, practice, *or* custom of Denver’s caused their injuries, it does not matter whether the six-day

period at issue would be sufficient to establish a custom or practice—there was sufficient evidence to support that Denver had a policy that caused the constitutional violations, which is enough to support the jury’s verdict. The evidence about Denver’s policies would, however, also be powerful evidence of identical practices or customs.

Fourth, Denver argues that there is no evidence to support liability against it on plaintiffs’ “policy, practice, or custom” theory because the final policymaker relied on by plaintiffs, Commander Phelan, has not been shown to have “personally participated in the specific events involving each plaintiff.” ECF No. 373 at 4. Denver posits that Commander Phelan’s orders as a final policymaker cannot be causally linked to the injuries suffered by plaintiffs. Plaintiffs respond that because Commander Phelan authorized use of chemical munitions each day, authorized the use of less-lethal weapons to move protestors and ordered commanders to use less-lethal weapons against protestors, each of these decisions directly resulted in injuries to the plaintiffs. ECF No. 392 at 4. Plaintiffs also identify several incidents where plaintiffs were injured, and Commander Phelan authorized use of force. *Id.*

Denver claims that the even if Commander Phelan was a final policymaker for the specific incidents cited, there remains no evidence of his participation as the final policymaker in the remaining incidents. I must reject this argument because most of the policies identified by plaintiffs were orders of Commander Phelan. A reasonable juror could find a causal link between the actions of Commander Phelan and the injuries suffered by plaintiffs on the evidence presented at trial. Every plaintiff was injured by the inhalation of CS gas (2-chlorobenzylidene malononitrile, commonly called tear gas) from less lethal weaponry. *See* ECF No. 387 at 90–91 (Sannier), 153–55 (Smith), 159–60 (Packard); ECF No. 389 at 156 (Fitouri); ECF No. 390 at 10–11 (Rothlein), 62–63 (Blasingame); ECF No. 349 at 10–11 (Deras); ECF No. 351 at 160–62

(Taylor), 223 (Wedgeworth); ECF No. 352 at 1666 (Parkins), 191–93 (Epps); ECF No. 354 at 74 (Lyman). Commander Phelan authorized use of chemical munitions at each daily supervisor briefing during the six-day period at issue. ECF No. 350 at 21.

The jury was instructed that “[o]fficial policy for Denver includes any actions Commander Phelan took or instructed others to take during the protests.” ECF No. 340 at 20. In light of those two facts and that instruction, there is sufficient evidence to conclude that Commander Phelan’s orders caused plaintiffs’ injuries. But for his authorization of the use of CS gas, plaintiffs would not have been injured by the inhalation and interaction with CS gas. There is additional evidence linking Commander Phelan’s actions to specific injuries sustained by plaintiffs, but the authorization of chemical munitions alone is sufficient for a reasonable juror to conclude that some of plaintiffs’ injuries were caused by Commander Phelan’s actions as policies of Denver.

Denver also argues that there is insufficient evidence to support the jury’s finding of liability under the “ratification” and “failure to train” theories. However, as I found above that there was sufficient evidence on the “policy, practice, or custom” theory to support the jury’s finding of liability, I need not determine whether there was sufficient evidence to support these other theories. For judgment as a matter of law to be warranted, Denver would have had to show that *no* theory of liability supported the jury’s verdict. As it has not done so, I will not address the remaining theories.

2. Denver is Not Entitled a Judgment as a Matter of Law or a New Trial on the Mutual Aid Officer Issue

Denver next argues that “there is no legal support for the proposition one municipality can be held liable under a municipal liability theory for the actions of an officer of another municipality pursuant to 42 U.S.C. § 1983.” ECF No. 373 at 6. It also argues that even if this

were a viable legal theory, it was not supported by sufficient evidence. *Id.* Plaintiffs respond that there was “extensive evidence” to support the jury’s finding on this point, including evidence of Denver’s policy to “allow mutual aid agencies to use their own policies and weapons,” evidence that the mutual aid agencies “operated under Phelan’s direction,” and evidence that a DPD supervisor was embedded with each mutual aid unit and “provided direction on how to deploy weapons through communications with the Command Post.” ECF No. 392 at 7.

This issue was hashed out at length during the jury instruction conference. ECF No. 357 at 222–233. At that time, the Court and the parties discussed the best way to ensure that the jury would understand that they could only hold Denver liable for acts committed by officers from other jurisdictions if they found that those mutual aid officers were acting pursuant to a policy, practice, or custom of *Denver*. There is a great deal of law supporting the proposition that a municipality can be liable for officers’ actions that violate citizens’ rights committed pursuant to an official policy, practice, or custom of the municipality. *See e.g., City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989). That is exactly what the jury was instructed. *See* ECF No. 340 at 24. Denver cannot escape liability for officers who acted pursuant to its policies simply because those officers were not Denver officers—liability attaches because it was Denver’s policy that caused the injury, not based on whether offending officers were on Denver’s payroll.

Additionally, I find the evidence presented sufficient to support the jury’s verdict that Denver was liable for the injuries caused by mutual aid officers. Commander Phelan testified that officers from mutual aid agencies were under his direction during the George Floyd protests. ECF No. 350 at 12–13. He also testified that Denver’s policy was to allow mutual aid officers to follow the policies of their home jurisdictions and use weapons authorized for use in their home

jurisdictions. *Id.* at 13–14. Mr. Packard and Mr. Deras were hit with munitions from 12-gauge shotguns shot by members of the Aurora police department. ECF No. 387 at 195. The DPD did not use these weapons. ECF No. 350 at 15. But for Denver’s policy of permitting mutual aid agencies to follow their own use-of-force policies and use their own weapons, Mr. Packard and Mr. Deras could not have suffered the injuries that they did. This evidence supports the jury’s finding that Denver’s policy of permitting mutual aid partners to use their own less-lethal weapons caused at least some of the injuries inflicted on plaintiffs. Judgment as a matter of law is not warranted on this issue.

3. Admission of Testimony of Nicholas Mitchell Does Not Warrant a New Trial

Mr. Mitchell was the independent monitor in Denver during the time of the protests. His office conducted a review of the actions of the DPD at the George Floyd protests and produced a report with its findings. Denver argues that Mr. Mitchell’s testimony should have been inadmissible for two reasons. First, it argues that his testimony regarding the Office of Independent Monitor’s (OIM) report was evidence of subsequent remedial measures and thus inadmissible under FRE 407. ECF No. 373 at 7. Second, it argues Mr. Mitchell’s testimony was inadmissible because Mr. Mitchell had no personal knowledge of anything that occurred at the protests, and he was not endorsed as an expert witness. *Id.* at 7–8. Finally, they argue that any probative value of Mr. Mitchell’s testimony was far outweighed by the prejudice to Denver. *Id.* at 8. Plaintiffs respond that because these evidentiary issues with Mr. Mitchell’s testimony were not raised in Denver’s Rule 50(a) motion, they cannot be raised in Denver’s Rule 50(b) motion. ECF No. 392 at 7–8. Rather, plaintiffs argue, this alleged error can only be considered under the Rule 59(a), where the grant of a new trial is appropriate “only where an error that led to a verdict that is ‘clearly, decidedly or overwhelmingly against the weight of the evidence.’” *Id.* at 8

(quoting *Elm Ridge Expl. Co., LLC v. Engle*, 721 F.3d 1199, 1216 (10th Cir. 2013)). Denver did not respond to this argument in its reply and instead reiterates the argument it made in its original motion. ECF No. 406 at 4.

I agree with plaintiffs that Denver did not raise this issue in its Rule 50(a) motion. Even if I were to assume for this purpose that the admission of Mr. Mitchell's testimony was an error, to find that a new trial is warranted I would have to find that the admission of Mr. Mitchell's testimony led to a verdict decidedly against the evidence. *See Anderson*, 861 F.2d at 637. I cannot make such a finding. There was substantial evidence supporting the verdict, including the testimony of plaintiffs, plaintiffs' expert witnesses, Commander Phelan, and numerous videos and pictures. As I discussed at length above, the jury's verdict was not contrary to the weight of the evidence. A new trial is not warranted due to the admission of Mr. Mitchell's testimony (which in any event I believe to have been proper).

4. Admission of OIM Memos Does Not Warrant a New Trial

The memos objected to in this section were created by the OIM in its process of reviewing DPD actions at the George Floyd protests. Denver argues that the admission of the OIM memos was improper for three reasons. First, it argues the OIM memos contain evidence of subsequent remedial measures, which are inadmissible under Federal Rule of Evidence 407. ECF No. 373 at 8. Second, it argues that the memos were hearsay that did not fall within any exception because the OIM did not have an agency relationship with Denver. *Id.* Third, it argues that any probative value of the OIM memos was substantially outweighed by the prejudice to Denver. *Id.* Plaintiffs respond first that Denver did not raise this issue in its Rule 50(a) motion, and so it can only proceed on a new trial motion with this issue and not under its renewed judgment as a matter of law motion, and second, that the officers interviewed by the

OIM were agents of Denver because they were employees acting within the scope of their responsibilities. ECF No. 392 at 9. Denver does not respond to plaintiffs' argument that this issue was not raised in its Rule 50(a) motion.

I agree with plaintiffs that Denver did not raise the admissibility of the OIM memos in its Rule 50(a) motion. A new trial is not warranted on this issue. Even assuming it was error to admit the OIM memos, I cannot find that their admission led to a verdict decidedly against the weight of the evidence. Moreover, the Court went through these memos carefully and in detail before trial and redacted information that it found to be protected by a privilege, including the law enforcement privilege.

5. Plaintiff Counsel's Misconduct Does not Warrant a New Trial

Next, Denver argues that Ms. Wang's (the Fitouri plaintiff counsel) reference to comments made by Derek Chauvin's lawyer during her examination of Officer Cunningham warrants a new trial. ECF No. 373 at 9. Plaintiffs respond that counsel's comment was not inappropriate, and even if it was, does not warrant a new trial. Ms. Wang asked Officer Cunningham, "[w]ould you agree that there's a limitation to cameras, that the camera only sees what the camera sees?" ECF No. 357 at 119. After Officer Cunningham responded in the affirmative, Ms. Wang asked, "[a]re you aware that the person who said that led Derek Chauvin's defense in his trial for the murder of George Floyd?" *Id.* The defense objected and that objection was immediately sustained. *Id.*

A judgment will not be disturbed for inappropriate remarks "unless it clearly appears that the challenged remarks influenced the verdict." *Burke v. Regalado*, 935 F.3d 960, 1026 (10th Cir. 2019). In deciding whether the jury was influenced by a remark, courts consider the extent of the remark, whether it can be cured through jury instruction, and whether the remark had a

prejudicial effect.” *Racher v. Westlake Nursing Home Ltd. P’ship*, 871 F.3d 1152, 1169 (10th Cir. 2017).

This Court made extremely clear that Ms. Wang’s reference to the Chauvin trial was inappropriate. ECF No. 357 at 119–21. The Court immediately sustained Denver’s objection to that question. *Id.* at 119. However, the remark was not extensive. It consisted of one question.

Id. And within minutes, the Court issued a curative jury instruction. It stated:

Ladies and gentlemen, you probably could tell from the tone of my sustaining that last objection that I was not amused. There is no basis whatsoever for counsel to have asked a question that suggests a comparison of what happened in Denver to what happened in the Chauvin case in Minnesota. Please don’t be prejudiced by that in any way. This case stands on its own evidence, its own facts, and I don’t want any counsel to be suggesting something different than that to you.

Id. at 121.

Denver argues that counsel’s statement was not remedied by instruction because counsel’s question equated all police officers with Mr. Chauvin would inflame the passions of the jury in a way that could not be remedied. ECF No 373 at 10. However, jurors are presumed to follow instructions, and there is no reason to believe that any prejudice Denver suffered could not be cured by this instruction or that it was not cured by this instruction. *See CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 341 (2009).

C. Analysis of Mr. Christian’s Motion for Judgment as a Matter of Law and for a New Trial

Mr. Christian first argues that there was not sufficient evidence to support the jury’s verdict against Mr. Christian because all the evidence indicated that his action in shooting a PepperBall at Ms. Epps as she crossed the street was objectively reasonable. ECF No. 374 at 4. He therefore requests judgment as a matter of law or a new trial. Second, he argues that he was entitled to qualified immunity because Ms. Epps did not sufficiently define which of her constitutional rights were violated by Mr. Christian’s actions. *Id.* at 4–5. Third, he argues that

he was entitled to judgment as a matter of law on the question of punitive damages because plaintiffs presented no evidence of the reckless or callous intent required to support a punitive damage award. *Id.* at 5. Fourth, Mr. Christian argues that he was prejudiced by the Court's denial of his motion for bifurcation and is entitled to a new trial because of that prejudice. *Id.* at 6. I will proceed through these arguments in turn.

1. Sufficiency of the Evidence

Mr. Christian first argues that judgment as a matter of law or a new trial is warranted because all the evidence indicated that his shooting a PepperBall at Ms. Epps was objectively reasonable. ECF No. 374 at 4. Ms. Epps responds that there was video of the incident showing that as Ms. Epps peacefully crossed the street, Mr. Christian, got on one knee and shot at her, and was subsequently told by another officer not to shoot at her anymore. ECF No. 391 at 2.

As Mr. Christian stated in his motion, “[w]hether Mr. Christian’s use of force against Ms. Epps violated the Fourth Amendment turns on whether his actions were objectively reasonable and requires a totality of the circumstances analysis considering the severity of the crime at issue, whether Ms. Epps posed an immediate threat to the safety of the officers or others, and whether Ms. Epps was actively resisting or attempting to evade arrest by flight.” ECF No. 374 at 4 (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Simpson v. Little*, 16 F.4th 1353, 1360-61 (10th Cir. 2021)). Based on those considerations, I find that the weight of the evidence is sufficient to support to jury’s finding in favor of Ms. Epps. Ms. Epps’ crime was not severe; she was, at most, jaywalking. There was no evidence that she posed an immediate threat to anyone other than the fact that she was crossing the street at night and not at the crosswalk. Mr. Christian argues that he “reasonably perceived Ms. Epps posed a danger to herself and the public in the traveling vehicles.” ECF No. 374 at 4. However, whether Mr. Christian’s perception of Ms. Epps as a threat was *reasonable* was a question of fact for the jury, not an issue that can be

determined by a conclusory statement by Mr. Christian in a motion. Further, there was no evidence that she was fleeing or actively resisting the officers. There is sufficient evidence to support the jury's conclusion that Mr. Christian's actions were not objectively reasonable—neither judgment as a matter of law nor a new trial is appropriate.

2. Qualified Immunity

Second, Mr. Christian argues that he was entitled to qualified immunity because Ms. Epps did not sufficiently define which of her constitutional rights were violated by Mr. Christian's actions. ECF No. 374 at 4–5. He argues that the two cases most relied on in the Court's order on Mr. Christian's motion for summary judgment likewise did not identify the constitutional right violated with sufficient specificity. *Id.* at 5. Ms. Epps responds that the right violated was sufficiently defined in those cases, and that those cases are analogous to this case—those cases “involved Fourth Amendment claims for the use of force, including the use of PepperBalls, on peaceful protestors.” ECF No. 391 at 3.

I agree with plaintiffs for largely the same reasons I identified in my order on Denver's motion for summary judgment. *See* ECF No. 304 at 15–16. In *Buck v. City of Albuquerque*, 549 F.3d 1269, 1290 (10th Cir. 2008), plaintiffs engaging in peaceful protest were subjected to tear gas and PepperBall shots. Ms. Epps behavior was even less likely than the plaintiffs in *Buck* to cause any danger from others. While some plaintiffs in *Buck* remained in the street to obstruct traffic, Ms. Epps was in the process of crossing the street when Mr. Christian shot at her, with no indication that she was going to stop in the street or was attempting to obstruct traffic. *See id.*; ECF No. 352 at 199. The illegality of actions like Mr. Christian's have been specifically outlined in past Tenth Circuit cases, and he is not entitled to judgment as a matter of law or a new trial on this issue.

3. Punitive Damages

Third, Mr. Christian argues that he was entitled to judgment as a matter of law on the question of punitive damages because plaintiffs presented no evidence of the reckless or callous intent required to support punitive damages. *Id.* at 5. Ms. Epps responds that there was evidence of Mr. Christian’s reckless or callous intent: the videos that show him shooting at Ms. Epps and Ms. Epps’ testimony recounting what she saw when Mr. Christian shot at her. Mr. Christian argues that the only evidence regarding his intent is his own testimony. ECF No. 374 at 5–6. However, intent can be inferred from a variety of evidence, including video evidence and the testimony of others, both of which Ms. Epps presented. I cannot agree with Mr. Christian that there is no evidence to support the jury’s finding that he acted with a reckless or callous intent.

Mr. Christian also argues that there is no evidence that Mr. Christian “perceived” the risk that his actions would violate Ms. Epps’ constitutional rights. He cited *Eisenhour v. Cnty.*, 897 F.3d 1272, 1281 (10th Cir. 2018) for the proposition that “‘reckless or callous indifference’ requires that the defendant have acted ‘in the face of a perceived risk that its actions will violate federal law.’” *Id.* (quoting *Kolstad v. American Dental Ass’n*, 527 U.S. 526, 536 (1999)). However, upon a review of that case, it seems that the perception requirement is another way of requiring that the law be clearly established. The *Eisenhour* Court explained the perception requirement by stating that, in the employment discrimination context, even where there has been intentional discrimination, there may not be liability because “the underlying theory of discrimination may be novel or otherwise poorly recognized, or an employer may reasonably believe that its discrimination satisfies a bona fide occupational qualification defense or other statutory exception to liability.” *Id.* (quoting *Kolstad*, 527 U.S. at 536–37). As I explained in the order on Mr. Christian’s motion for summary judgment and above, the law was sufficiently

established for liability, and Mr. Christian's hair-splitting legal argument on the perception requirement does not persuade me otherwise.

4. Bifurcation

Fourth, Mr. Christian argues that he was prejudiced by the Court's denial of his motion for bifurcation. ECF No. 374 at 6. Specifically, he claims that "the steady parade of video evidence involving other Denver police officers and other people and the allegations those actions were caused by failures by Denver itself were profoundly prejudicial to Mr. Christian." *Id.* Mr. Christian also argues that he should not have been made to proceed with Denver under *Tanburg v. Sholtis*, 401 F.3d 1151 (10th Cir. 2005), which stands for the proposition that evidence showing that an officer did not comply with department policy cannot be introduced to show that the officer violated a plaintiff's constitutional rights.

Ms. Epps responds that the jury did not just lump Mr. Christian in with Denver—it found Denver liable for violating Ms. Epps' Fourth and First Amendment rights but found Mr. Christian liable only for violation of Ms. Epps' Fourth Amendment rights. She also argues that evidence of Denver's policies and training was not prejudicial to Mr. Christian because the jury was instructed specifically on that issue. Instruction 10 stated, "[a]s you consider those instructions, you must bear in mind that in order for the plaintiffs to prove a constitutional violation, it is not enough to show that an officer violated a policy, regulation, rule, training, or practice." ECF No. 340 at 12. On the *Tanburg* issue, Ms. Epps responds that as plaintiffs did not argue or seek to argue that Mr. Christian's actions in shooting Ms. Epps were outside of Denver policy, *Tanburg* was inapplicable.

I agree with Ms. Epps on the *Tanburg* issue. Ms. Epps never argued that Mr. Christian's actions were outside of policy—she argued to the contrary, that Mr. Christian's actions were

exactly in line with Denver’s use-of-force policy, a policy that she and her co-plaintiffs argued was far too discretionary. *Tanburg* is not a consideration that would require the Court to bifurcate Ms. Epps’ case against Mr. Christian, and it is not a reason that Mr. Christian would be entitled to judgment as a matter of law or a new trial.

I also agree with Ms. Epps that the denial of Mr. Christian’s request to bifurcate did not unfairly prejudice the jury against him. There is no reason to believe that the jury did not follow the instruction “in order for the plaintiffs to prove a constitutional violation, it is not enough to show that an officer violated a policy, regulation, rule, training, or practice,” especially because jurors are presumed to follow jury instructions. ECF No. 340 at 12. Further, the jury’s determination that Mr. Christian violated Ms. Epps’ Fourth Amendment but not her First Amendment rights shows that the jury did not simply lump Mr. Christian’s actions in with Denver’s—had they done so, they would have found Mr. Christian liable for First Amendment violations against Ms. Epps, as they found Denver was liable for First Amendment violations against Ms. Epps. *See* ECF No. 343 at 7–8. This jury was extremely diligent throughout this case. They asked thoughtful questions and engaged in a lengthy deliberation, and they were instructed to consider Mr. Christian’s liability separately from Denver’s. *See* ECF No. 340 at 13–17, 18–23. I presume that they followed those instructions, and Mr. Christian has presented no evidence that they did not, other than the fact of the award against him. As there is no reason to believe that, even if the failure to bifurcate was error, such an error was prejudicial to Mr. Christian, he is entitled to neither judgment as a matter of law nor a new trial.

III. REMITTITUR

A. Standard of Review

Remittitur is appropriate only when “the jury award is so excessive . . . as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or

another improper cause invaded the trial.” *Murphy Oil USA, Inc. v. Wood*, 438 F.3d 1008, 1021 (10th Cir. 2006) (quotations omitted). “The [] court may order a remittitur and alternatively direct a new trial if the plaintiff refuses to accept the remittitur, a widely recognized remedy.” *Malandris v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152, 1168 (10th Cir. 1981). Courts evaluating emotional distress compensatory damages awards focus on the specific testimony of the plaintiff, whether medical or other healthcare assistance was sought, and corroborating objective evidence supporting the plaintiff’s testimony. *Smith v. Nw. Fin. Acceptance, Inc.*, 129 F.3d 1408, 1416–17 (10th Cir. 1997).

B. Denver’s Request for Remittitur

Denver argues that the damages awarded by the jury against Denver are so excessive that they cannot be compensatory. The jury awarded \$1,000,000 per plaintiff, except for Ms. Wedgeworth (\$750,000) and Mr. Packard (\$3,000,000). Denver argues that the only reasonable explanation of the jury award is that the award was based on “its determination Denver’s overall response to the protests was inappropriate and violative of people’s constitutional rights generally.” ECF No. 373 at 14. It asks the court to order remitter to \$100,000 per plaintiff except Ms. Wedgeworth \$75,000 and Mr. Packard \$500,000.

Plaintiffs respond that they presented evidence of physical injuries for each plaintiff that would be sufficient to support the jury’s award in favor of each plaintiff against Denver. However, they argue, even if the physical injuries were insufficient, the evidence of plaintiffs’ emotional damages would be more than sufficient to support the award.

Each plaintiff presented testimony that they suffered, at minimum, from the inhalation of CS gas. *See e.g.*, ECF No. 387 at 90–91 (Sannier), 153–55 (Smith), 195 (Packard); ECF No. 389 at 156 (Fitouri); ECF No. 390 at 10–11 (Rothlein), 62–63 (Blasingame); ECF No. 349 at 10–11

(Deras); ECF No. 351 at 160–62 (Taylor), 223 (Wedgeworth); ECF No. 352 at 1666 (Parkins), 191–93 (Epps); ECF No. 354 at 74 (Lyman). Almost all testified that they were chased through the streets, shot at or hit with PepperBalls or other less-lethal projectiles. Denver is correct that, other than Mr. Packard, none of the plaintiffs presented evidence that their physical injuries were extensive. However, physical damages are not the only damages suffered in this case.

Plaintiffs also testified at length regarding the emotional distress they suffered because of the police actions they experienced at the protests. Plaintiffs described the distress that they felt at the time, and the distress that they felt in the days, weeks, and months that followed their experiences at the protest. Plaintiffs did not testify to seeking much, if any, medical attention for their emotional distress, nor did any receive a diagnosis regarding their emotional distress.

However, measuring damages for emotional distress is not an exact science. The jurors observed the testimony of the plaintiffs regarding how their experiences at these protests affected them. The jurors, as judges of the facts, determined that the emotional distress suffered by the plaintiffs was significant. More than just the words that plaintiffs spoke, the jurors were able to observe the demeanor of plaintiffs as they spoke about their distress. And even without a diagnosis or significant long-term symptoms of that distress, there was evidence in the form of plaintiffs' testimony of significant distress suffered during the protests and in their immediate aftermath.

Remittitur is an extreme remedy and one that this Court would not engage in without a verdict that shocked the judicial conscience. This is not such a verdict. The plaintiffs testified about the impact that their experiences at the hands of the police while they peacefully protested had on them. It is clear from the verdict that the jury believed that testimony and assessed damages that they believed were warranted in light of that impact. The Court might have

awarded less. However, the jury is the conscience of the community. This was an attentive and thoughtful jury, and I do not find that its decision was shocking or the result of passion, prejudice, or impropriety. The police no doubt faced a very difficult situation, as there were individuals in the crowds who threw rocks, full water bottles, and other objects at officers throughout the protests. However, Denver's stubborn instance that the police did nothing wrong in the face of overwhelming video evidence to the contrary, coupled with evidence that each plaintiff was peaceful but sustained injuries as a result of the misconduct, was sufficient to support the jurors' verdict. The Court will not exercise its discretion to remit the awards against Denver.

C. Mr. Christian's Request for Remittitur

Mr. Christian argues that the punitive damages awarded against him are excessive, unfair, and in violation of the due process clause, and he requests that the Court remit the punitive damage award against him. More specifically, Mr. Christian argues that as the jury did not order any compensatory damages against him, the punitive damages are extremely excessive, as many courts have held that punitive damages should be held around a 1:1 ratio with compensatory damages. Ms. Epps responds that there was a compensatory award against Mr. Christian—after inquiring whether Denver was liable for the claims against it and whether Mr. Christian was liable for the claims against him, the verdict form asked the jurors only, “[w]hat amount of compensatory damages do you award to Elisabeth Epps?” and then “[w]hat amount of punitive damages do you award to Elisabeth Epps against Jonathan Christian?”. ECF No. 391 at 8–10 (quoting ECF No. 343 at 8). The jury answered the compensatory damages question with an award of \$1 million, not specifying which compensatory damages were against Denver and which were against Mr. Christian.

I agree with Ms. Epps that the jury did award compensatory damages against Mr. Christian, and that he is jointly and severally liable with Denver for the compensatory award in favor of Ms. Epps. However, I agree with Mr. Christian that the punitive damages awarded against him are excessive. Mr. Christian shot one PepperBall at Ms. Epps as she crossed the street. He should not have done that, and the jury found that by doing so, he violated her Fourth Amendment rights. However, the evidence was unclear as to whether the PepperBall hit her; at most, it caused a bruise. Compared to the other injuries that Ms. Epps suffered during the protests, Mr. Christian's shooting caused minimal damage. Ms. Epps was shot with PepperBalls and exposed to CS gas on numerous occasions, and from an objective standpoint, and considering those other shootings and exposures, Mr. Christian's actions do not warrant a punitive damage award of \$250,000.

While I have immense respect and appreciation for the jury's work in deciding this case, the punitive damages as to Mr. Christian are excessive. Using my discretion, I will remit the punitive damage award against Mr. Christian to \$50,000. I believe that would be a fair and not excessive punishment for the wrong he committed against Ms. Epps. If Ms. Epps is unwilling to accept that amount, then I will grant a new trial as to her claims against Mr. Christian.

ORDER

1. Defendant the City and County of Denver's motion for judgment as a matter of law, or a new trial, or remittitur, ECF No. 373, is DENIED.
2. Defendant Jonathan Christian's motion for judgment as a matter of law, or a new trial, or remittitur, ECF No. 374, is GRANTED IN PART and DENIED IN PART. It is granted to the extent that the Court orders that the punitive

damages award be remitted to \$50,000; and if that is not accepted by plaintiff Epps, then the Court orders a new trial as to her claims against Mr. Christian.

DATED this 19th day of September, 2022.

BY THE COURT:

A handwritten signature in black ink, appearing to read "R. Brooke Jackson", written in a cursive style. The signature is positioned above a horizontal line.

R. Brooke Jackson
United States District Judge