IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 14-2035

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

Plaintiffs - Appellees,

v.

RAY WHITE, MICHAEL MARISCAL, and KEVIN TRUESDALE,

Defendants - Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
THE HON. KENNETH J. GONZALES
DISTRICT COURT NO. 12-CV-1311 KG/WPL

APPELLANTS' OPENING BRIEF

ORAL ARGUMENT IS REQUESTED

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STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior appeals in the United States Court of Appeals for the Tenth Circuit on behalf of Defendant-Appellants Ray White, Michael Mariscal and Kevin Truesdale.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case was brought pursuant to a Complaint filed in the First Judicial District Court for the State of New Mexico, which was subsequently removed to the United States District Court for the District of New Mexico on December 19, 2012 pursuant to 28 U.S.C. §§ 1441 and 1446.

On November 13, 2013, the Appellants each filed motions for summary judgment, asserting the defense of qualified immunity. Appellants' motions were denied by the District Court, in two separate Memorandum Opinions and Orders dated February 5 and 10, 2014.

Pursuant to FED. R. APP. P. 4(a)(1)(A), the appeal was timely filed. Jurisdiction of this Court is conferred pursuant to 28 U.S.C. § 1291 and *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), as this matter involves the appeal of the District Court's denial of Appellants' assertion of qualified immunity. *See also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945-46 (2009).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Did the District Court err in denying Officer Ray White's motion for summary judgment seeking qualified immunity, where Officer White's use of force on Samuel Pauly was objectively reasonable, when judged from the viewpoint of a reasonable officer at the scene of the incident, under the totality of the circumstances in light of the facts as set forth by the District Court?

B. Did the District Court err in denying Officer Michael Mariscal's motion for summary judgment seeking qualified immunity, where Officer Mariscal's actions and use of force (if any) on Samuel Pauly were objectively reasonable, when judged from the viewpoint of a reasonable officer at the scene of the incident, under the totality of the circumstances in light of the facts as set forth by the District Court?

C. Did the District Court err in denying Officer Kevin Truesdale's motion for summary judgment seeking qualified immunity, where Officer Truesdale's actions were objectively reasonable, when judged from the viewpoint of a reasonable officer at the scene of the incident, under the totality of the circumstances in light of the facts as set forth by the District Court?

STATEMENT OF THE CASE

This is an appeal taken from two Memorandum Opinions and Orders entered by the United States District Court for the District of New Mexico, in which the District Court denied Appellants' motions for summary judgment asserting the defense of qualified immunity. *See generally* Aplt. App'x at 672-708. This wrongful death lawsuit arises from an incident in which Officer Ray White, a New Mexico State Police Officer, shot and killed Samuel Pauly at the house he shared with his brother, Plaintiff-Appellee Daniel B. Pauly. Daniel Pauly was at the house at the time of the shooting. *See generally id.* at 13-26. Officers Michael Mariscal and Kevin Truesdale, also New Mexico State Police Officers, were outside the Pauly house when the shooting occurred. Appellees' lawsuit is based on, *inter alia*, 42 U.S.C. § 1983. Appellants, the three New Mexico State Police Officers, each asserted the defense of qualified immunity in their Answer to appellees' Complaint, *see* Aplt. App'x at 43, and in summary judgment motions filed on November 13, 2013. *See generally* Aplt. App'x at 173-410.

The District Court's orders denying qualified immunity were entered on February 5 and 10, 2014. *See generally* Aplt. App'x at 672-708. This appeal timely followed.

STATEMENT OF FACTS

A. Facts As Known to Officers Kevin Truesdale and Michael Mariscal

On the evening of October 4, 2011, Daniel Pauly became involved in a road rage incident with a car driven by two women on the interstate highway going north from Santa Fe towards Las Vegas, New Mexico. Aplt. App'x at 694. One of the women called 911 and reported a "drunk driver" who was "swerving all crazy." *Id*. Pauly stopped at the highway's Glorieta off-ramp, as did the female drivers. *Id.* Pauly asked the women why they were following him; one of the women stated that Pauly was "throwing up gang signs" as he spoke to them. *Id*. 694

Pauly then drove a short distance from the off-ramp to a house which he rented with his brother, Samuel Pauly.[1] Aplt. App'x at 694. The Pauly house is located in a wooded rural area to the rear of another house bearing the same address. *Id.*

A New Mexico State dispatcher contacted Officer Kevin Truesdale between 9:00pm and 10:00pm that night regarding the 911 call received from the young women. Aplt. App'x at 694. Officer Truesdale arrived at the Glorieta off-ramp to speak to the two women after Daniel Pauly had driven to his house. *Id*. Officers Raymond White and Michael Mariscal were *en route* to provide Officer Truesdale

[1] The District Court found irrelevant the fact that Samuel had been drinking and smoking marijuana prior to the arrival of the officers at the Pauly residence, and that Daniel had drank a couple of beers. Aplt. App'x at 694 n.4.

with back-up assistance. *Id*. at 694-95. The women informed Officer Truesdale about Daniel Pauly's reckless and dangerous driving. *Id*. at 695. The women also described Pauly's vehicle as a gray Toyota pickup truck and provided a license plate number. *Id*. The dispatcher informed Officer Truesdale that the Toyota pickup truck was registered to an address on Firehouse Road very close to the Glorieta off-ramp. *See id*.

Officers Mariscal and White joined Officer Truesdale at the Glorieta off-ramp where he briefed them on what he had learned. *See* Aplt. App'x at 346-47, 376, 695. Although it was raining, the officers were not wearing raincoats over their uniforms. *Id.* at 695. Officer Truesdale decided to speak with Daniel Pauly to determine if he was intoxicated, "to make sure nothing else happened," and to get Daniel Pauly's version of the incident. *Id.*

The officers then determined that Officers Truesdale and Mariscal should go, in separate patrol units, to see if they could locate Daniel Pauly's pickup truck at the Firehouse Road address, while Officer White should stay at the off-ramp to prevent Daniel Pauly from circling back and re-entering the Interstate. *See* Aplt. App'x at 343, 377, 695.

Officers Truesdale and Mariscal drove a short distance down Firehouse Road and parked their vehicles in front of the main house. Aplt. App'x at 695. Both

vehicles had their headlights on, and one vehicle had its takedown lights on. *Id*. at 696. As the officers got out of their vehicles, they did not see Daniel Pauly's truck at the main house. *Id*.

Officers Truesdale and Mariscal did see a porch light and lights on in another house behind the main house. Aplt. App'x at 696. They decided to walk up to the second house, which was the Pauly residence, to see if Daniel's truck was there. *Id*. The officers approached the house cautiously in an attempt to ensure officer safety. *See id*. They used their flashlights periodically until they got close to the front of the house, when Officer Truesdale turned his flashlight on. *Id*. The officers located Daniel's truck in front of the house. *Id*.

The Paulys noticed the flashlights, and yelled out "Who are you?" and "What do you want?" Aplt. App'x at 697. The officers responded, "Open the door, State Police, open the door." *Id*. Although the officers did not intend to go inside, one of them yelled, "Hey (expletive). We've got you surrounded. Come out or we're coming in."[2] *Id*.; *see also id.* at 697 n.6. The officers made that statement in an attempt to get the brothers to come out of the house. *Id.* at 697 n.6.

When he heard "we're coming in," Samuel Pauly retrieved a shotgun and a box

[2] Oddly, Daniel Pauly was apparently not able to hear Officers Mariscal and Truesdale repeatedly identify themselves as State Police officers. *See, e.g.*, *Truesdale COBAN recording*.

of shells for Daniel, and procured a loaded handgun for himself. Aplt. App'x at 698. Samuel then went back to the front room, and Daniel ran to the back of the house. *Id*. Observing Daniel run towards the back of the house, Officer Truesdale headed to the far back corner of the house. *Id*. Officer Mariscal stayed in front of the house, and was then joined by Officer White. *Id*. Officer White had not been present at the front of the Pauly house until this point, as discussed *infra.*

From inside the house, one of the Pauly brothers yelled, "We have guns." Aplt. App'x at 698. Upon hearing that threat, Officer White took cover behind a stone wall located 50 feet from the front of the house and drew his duty weapon, while Officer Mariscal took cover behind a Ford pickup truck and unholstered his duty weapon as well. *Id*.

A matter of seconds after one of the brothers yelled, "We have guns," Daniel Pauly stepped out of the back of the house and fired two blasts. Aplt. App'x at 699. Having heard the two shots, Officer White thought that Officer Truesdale had been shot. *Id*.

Officers White and Mariscal saw Samuel Pauly open the front window and hold his arm out with a handgun, pointing the handgun at Officer White. Aplt. App'x at 699. The District Court found that Officer Mariscal then shot towards Samuel

Pauly, missing him. *Id*.[3] Four to five seconds after Samuel Pauly pointed his handgun at Officer White, Officer White shot Samuel Pauly, killing him. *Id*. at 699-700.

At no time did Officer Truesdale fire, attempt to fire, or utilize any force at all against either of the Pauly brothers.

B. Facts As Known to Officer White

Curiously, the District Court included in its Memorandum Opinion and Order denying Officer White's Motion for Summary Judgment a variety of facts that were unknown to Officer White. *See generally* Aplt. App'x at 677-79. As noted above, Officer White did not arrive at the Paulys' house until just before one of the Pauly brothers yelled out "We have guns." The following section of Appellants' Statement of Facts relates only to the facts known to Officer White at the times material to this case.

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[3] In taking the facts and inferences in the light most favorable to the plaintiff-appellees, the District Court found that Officer Mariscal fired his weapon and Samuel Pauly did not. The District Court's finding is sharply disputed. Officers White and Mariscal testified that Samuel Pauly actually fired the revolver found on the living room floor where Samuel was shot. As there were only four shots fired that night, and there is no dispute that Daniel Pauly fired the first two shotgun blasts and Officer White fired the final shot, either Officer Mariscal or Samuel Pauly fired the third shot. For purposes of this appeal, however, Appellants accept the District Court's finding–and as discussed herein, Appellants are nonetheless entitled to reversal of the District Court's opinion even assuming *arguendo* that Officer Mariscal fired the third shot.

Officer White was briefed by Officer Truesdale as to what he had learned about Daniel Pauly's road rage incident, and the officers decided that Officer White should stay at the off-ramp in case Daniel Pauly attempted to re-enter the freeway. Aplt. App'x at 175-76, 676-77.

Officer White remained at the freeway off-ramp until the other officers advised him they had located Daniel Pauly's pickup truck at the residence. Aplt. App'x at 678. Officer White then proceeded to the Firehouse Road address and walked up towards the Pauly house, using his flashlight periodically. *Id.* at 680.[4] When he arrived, Officer Mariscal was at the front of the house and Officer Truesdale was at the rear of the house. *Id*. Officer White was able to see two males in the front living room. *Id*.

Officer White then heard one of the males say, "We have guns." Aplt. App'x at 680. After hearing "We have guns," Officer White took cover behind a stone wall located 50 feet from the front of the house and drew his duty weapon. *Id*. Seconds later, Officer White heard Daniel Pauly fire two shots, and believed that Officer Truesdale had been shot. *Id*.

Just after hearing Daniel's shotgun blasts, Officer White saw Samuel Pauly

[4] It is unclear whether the District Court found that Officer White heard Officer Truesdale state, "Open the door, come outside." *See* Aplt. App'x at 679-80.

open the front window and hold his arm out of the window, pointing a handgun directly at him. Aplt. App'x at 681. Four to five seconds later, Officer White shot Samuel Pauly, killing him. *Id*. The District Court noted that both Officers Mariscal and White testified that Samuel Pauly fired at Officer White prior to Officer White's shot. *Id.* at 681 n. 8.[5]

[5] There was forensic evidence supporting that Samuel had fired at the officer, as a revolver found where Samuel Pauly was shot had an empty shell casing forward of the firing pin, though no projectile from the revolver was found. Aplt. App'x at 681 n.8.

ARGUMENT

I. The District Court Erred in Denying Officer Ray White's Motion for Summary Judgment on the Issue of Qualified Immunity

Standard of Review: This Court reviews the District Court's denial of a motion asserting qualified immunity *de novo*. *See*, *e.g.*, *Brown v. Montoya*, 662 F.3d 1152, 1162 (10th Cir. 2011).

"Law enforcement officers are...entitled to a presumption that they are immune from lawsuits seeking damages for conduct they undertook in the course of performing their jobs." *Kerns v. Bader*, 663 F.3d 1173, 1180 (10th Cir. 2011). A plaintiff "can overcome this presumption of immunity only by carrying the heavy burden of showing both that (1) the Defendant-officer in question violated one of his constitutional rights, and (2) that the infringed right at issue was clearly established at the time of the allegedly unlawful activity such that 'every reasonable official would have understood that what he [was] doing' violated the law." *Id.* (quoting *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2080, 2083 (2011) (internal quotation marks omitted)). Failure on either qualified immunity element is fatal to the plaintiff's cause. *Kerns*, 663 F.3d at 1180.

As discussed herein, even under the facts as set forth by the District Court (in

the light most favorable to Paulys), Officer White did not violate Samuel Pauly's constitutional rights, nor was his use of force clearly unlawful–as such, Officer White is entitled to qualified immunity.

A. Officer White Did Not Violate Samuel Pauly's Constitutional Rights

1. Officer White's use of force was objectively reasonable

Every claim that law enforcement officers have used excessive force, including deadly force, must be analyzed under the Fourth Amendment and its reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 395 (1989). Determining whether a particular use of force is reasonable "requires careful attention to the facts and circumstances of each case" and is not susceptible to "precise definition or mechanical application." *Id.* at 396. The "'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* It is a "standard of reasonableness at the moment[,]" and the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments–in circumstances that are tense, uncertain, and rapidly evolving..." *Id*. at 396-97; *see also Medina v. Cram*, 252 F.3d 1124, 1131 (10th Cir. 2001) (recognizing that an "officer may be 'forced to make split-second judgments' under stressful and dangerous conditions"). Stated succinctly, the inquiry in an excessive force case is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances

confronting them." *Graham*, at 397.

Deadly force is "justified under the Fourth Amendment if a reasonable officer in Defendants' position would have had probable cause to believe that there was a threat of serious physical harm to themselves or to others" (emphasis omitted). *Estate of Larsen v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008). Police officers may use deadly force to stop an assailant before the assailant fires a shot or otherwise attempts to use a weapon. *See, e.g.*, *Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1317-18 (10th Cir. 2009) (officer justified in shooting armed suspect where suspect was moving a gun up and down and had previously aimed the weapon at officers, even where, at the moment the officer fired the fatal shot, the suspect was pointing the gun towards his own head and not towards the officer); *Estate of Larsen*, 511 F.3d at 1260 (officer justified in shooting man with knife raised even if man did not make stabbing or lunging motions towards him, as a "reasonable officer need not await the 'glint of steel' before taking self-protective action; by then, it is 'often too late to take safety precautions'") (quoting *People v. Morales*, 198 A.D.2d 129, 130 (N.Y. App. Div. 1993)); *Wilson v. Meeks*, 52 F.3d 1547, 1553-54 (10th Cir. 1995) (use of deadly force reasonable where suspect aimed pistol in officer's direction); *Thomas v. Durastanti*, 607 F.3d 655, 668 (10th Cir. 2010) ("[a] law enforcement agent, faced with the possibility of danger, has a right to take reasonable steps to protect himself") (quoting *United States v. Merkley*, 988 F.2d 1062, 1064 (10th Cir. 1993)); *Young Han v. City*

of Folsom, 2014 WL 59731 (9th Cir. Jan. 8, 2014) (unpublished) (officers' use of force was reasonable where decedent moved toward the officers with a knife and did not comply with the officers' commands to drop his weapon) (citing *Smith v. City of Hemet*, 394 F.3d 689, 704 (9th Cir. 2005) (en banc) ("where a suspect threatens an officer with a weapon such as a gun or a knife, the officer is justified in using deadly force"). Strikingly, in *Wilson*, this Court noted that "[a]ny reasonable officer in [the Defendant's] position would reasonably assume his life to be in danger when confronted with a man whose finger was on the trigger of a .357 magnum revolver *pointed in his general direction*. The exact manner in which [decedent] held out the gun is not dispositive" (emphasis supplied). *Wilson*, *supra*, 52 F.3d at 1553.

When examining the reasonableness of a particular use of force, courts evaluate a number of factors. *See Estate of Larsen*, 511 F.3d at 1260 ("In assessing the degree of threat facing officers...we consider...(1) whether the officers ordered the suspect to drop his weapon and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect"); *see also Samuel v. City of Broken Arrow*, 506 F. App'x 751 (10th Cir. Dec. 21, 2012) (unpublished). Other factors may include "'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by

flight.'" *See Weigel v. Broad*, 544 F.3d 1143, 1151-52 (10th Cir. 2008) (quoting *Graham*, *supra*, 490 U.S. at 396).

Notably, a police officer's failure to conform with particular tactics and procedures or departmental regulations and policies does not create liability under 42 U.S.C. § 1983. *Marquez v. City of Albuquerque*, 399 F.3d 1216, 1222 (10th Cir. 2005) (violations of police procedure and departmental regulations "do not give rise to a 1983 claim") (quoting *Romero v. Bd. of Cnty. Comm'rs Cnty. of Lake*, 60 F.3d 702, 704-05 (10th Cir. 1995)); *Cram*, 252 F.3d at 1133 ("claims based on violations of police procedure are not actionable under 1983"); *Wilson*, 52 F.3d at 1554 ("violation of a police department regulation is insufficient for liability under section 1983"). Ultimately, the most "important aspect of [the] inquiry is 'whether the officers were in danger at the precise moment that they used force.'" *Thomson*, 584 F.3d at 1315 (quoting *Phillips v. James*, 422 F.3d 1075, 1083 (10th Cir. 2005)). The officers are not required to be correct in their assessment of the danger presented by the situation, only that their assessment be objectively reasonable. *Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2004).

In the present case, Officer White's use of force on Samuel Pauly was plainly and unequivocally reasonable. As the District Court found, Samuel Pauly aimed a gun at Officer White, or at the very least, in his general direction. *See* Aplt. App'x aty 681. Any police officer faced with such a threat "would reasonably assume his life

to be in danger." *Wilson*, 52 F.3d at 1554. It is hard to imagine that pointing a handgun in any direction would not cause a reasonable police officer to fear for someone's life, including his own or those of his partners. *See id.* at 1553. Indeed, the Paulys' own expert in this matter testified at his deposition that "[i]f you feel that you are in a deadly force situation, that your life is in danger or someone else's life, you have the right to pull the trigger." Aplt. App'x at 284. Moreover, the District Court itself noted that "the [Paulys] do not argue that Samuel Pauly did not make hostile motions with his weapon or that the events leading up to Officer White shooting Samuel Pauly were not 'tense, uncertain, and rapidly evolving.'" Aplt. App'x at 684.

The reasonableness of Officer White's use of force is only strengthened by examining the totality of circumstances immediately preceding that use of force: (1) White and the other officers were responding to a 911 call regarding a "road rage" incident involving a potential drunk driver who, per the 911 callers, was "swerving all crazy"; (2) the officers were responding in a relatively remote and wooded rural area at night; (3) Officers Mariscal and Truesdale notified Officer White that they had positively identified the suspect vehicle parked at the Pauly residence; (4) upon arriving at the registered address Officer White saw two male individuals at the front window of the house; (5) the individuals did not open the door and made no effort to come outside and talk with the officers; (6) one of the men inside the house suddenly

yelled out, "We have guns"; (7) seconds later, someone inside the house (Daniel Pauly) fired two shotgun rounds adjacent to Officer Truesdale's position at the back of the house; and (8) given Officer Truesdale's location in relation to the gunshots, Officer White believed Officer Truesdale had just been shot. This is the context within which Officer White then observed a male individual (Samuel Pauly) aim a handgun at him out the front window of the house.

Even assuming that Samuel only aimed his weapon towards Officer White and did not fire, Officer White's use of force was reasonable under the circumstances. A police officer clearly does not have to wait until his assailant fires before using deadly force. *See*, *e.g.*, *Thomson*, 584 F.3d at 1317-18; *Estate of Larsen*, 511 F.3d at 1260; *Wilson*, 52 F.3d at 1553-54. The Paulys' own expert provided a useful example by distinguishing between an officer seeing someone shoot up into the air, knowing the weapon is not aimed in their direction, and an officer observing an assailant aiming his gun at them. Aplt. App'x at 284-85, 289. The expert colorfully noted, "[b]ut if I feel they are aiming the gun right at me, I'm going to blow your head off." Aplt. App'x at 284.

Additionally, even if Officer White was mistaken about Samuel Pauly's intentions in aiming the gun (i.e. supposing that Samuel merely wanted to warn off "intruders" and could not see Officer White in front of the house), it is Samuel's "manifest intentions"–and how a reasonable officer in Officer White's position would

have perceived such–that matter. *Estate of Larsen*, 511 F.3d at 12 (when examining reasonableness of use of force, court evaluates the "manifest intentions of the suspect"); *Thomson*, 584 F.3d at 1315 ("a reasonable but mistaken belief that the suspect is likely to fight back justifies using more force than is actually needed"); *Wilson*, 52 F.3d at 1553 (rejecting plaintiffs' contention that the way decedent was holding his gun suggested he intended to surrender: "the inquiry here is not into [decedent's] state of mind or intentions, but whether, from an objective viewpoint and taking all factors into consideration, [the officer] reasonably feared for his life"); *Bell v. City of East Cleveland*, 125 F.3d 855, 1997 WL 640116, *3 (6th Cir. 1997) (unpublished table decision) ("In determining whether the use of deadly force was justified, the relevant consideration 'is whether a reasonable officer in [Defendants]' shoes would have feared for his life, not what was in the mind of [the decedent] when he turned around with the gun in his hand").

In sum, Officer White's use of force was objectively reasonable, and indeed, was dictated by the actions of both Daniel and Samuel Pauly. Samuel Pauly pointed a handgun in Officer White's direction almost immediately after Daniel had fired two shotgun blasts near Officer Truesdale's position. Any reasonable officer faced with the threat Officer White observed would be justified in using deadly force, even assuming that Samuel merely aimed, but did not fire his weapon or did not actually intend any harm to any of the officers. As such, Officer White's use of force was

objectively reasonable.

2. Officer White did not create the need to use deadly force

The pre-seizure conduct of a police officer who uses force can be evaluated as part of the Fourth Amendment reasonableness inquiry, but only where the officer's "*own* reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Jiron*, *supra*, 392 F.3d at 415 (quoting *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir.1995) (emphasis supplied). Furthermore, "[o]nly events immediately connected with the actual seizure may be considered, and mere negligent actions precipitating a confrontation would not, of course be actionable." *Jiron*, 392 F.3d at 415 (internal quotations omitted); *see also Cram*, *supra*, 252 F.3d at 1132 ("We emphasize, however, that, in order to constitute excessive force, the conduct arguably creating the need for force must be immediately connected with the seizure and must rise to the level of recklessness, rather than negligence"); *Sevier*, 60 F.3d at 702 n.8 ("Of course, if the preceding events are merely negligent or if they are attenuated by time or intervening events, then they are not to be considered in an excessive force case"). A finding of "recklessness" requires "a wanton or obdurate disregard or complete indifference to risk." *Medina v. City and Cnty. of Denver*, 960 F.2d. 1493, 1496 (10th Cir. 1992), *overruled on other grounds by Morris v. Noe*, 672 F.3d 1185, 1197 (10th Cir. 2012). A standard which relies on "deliberate" conduct

is also "sensibly employed only when actual deliberation is practical…[not] where unforeseen circumstances demand an instant judgment on the part of an officer." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 851, 853 (1998)

Given these significant limitations on consideration of pre-seizure conduct, "[t]he primary focus of [the Fourth Amendment reasonableness] inquiry…remains on whether the officer was in danger at the exact moment of the threat of force." *Cram*, 252 F.3d at 1132; *see also Billington v. Smith*, 292 F.3d 1177, 1187 (9th Cir. 2002) (observing that this Court already significantly limits consideration of pre-seizure conduct, and noting "[b]ut even then, the Tenth Circuit [has] held, the primary focus remains on the exact moment of the threat of force") (citing *Cram*, internal quotations omitted). Indeed, a plaintiff is not generally permitted to establish a "Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided." *Billington*, 292 F.3d at 1190; *see also Young Han v. City of Folsom*, *supra* (rejecting argument that the officers created the need to use force by confronting decedent inside his room when they could have chosen to retreat and monitor decedent from outside the room).

This Court has nearly uniformly rejected "danger creation" theories of liability in the context of excessive force lawsuits. *See, e.g.*, *Cram*, 252 F.3d at 1132 (rejecting claim that officers' decision to leave cover and pursue suspect constituted

reckless conduct and provoked the need for deadly force); *Thomson*, 584 F.3d at 1320-21 (officers did not recklessly create the need for deadly force by releasing a police dog without warning and by failing to negotiate); *Jiron*, 392 F.3d at 418-19 (officer did not recklessly and intentionally create deadly force situation in attempting to prevent the escape of an armed and agitated suspect); *Blossom v. Yarbough*, 429 F.3d 963, 968 (10th Cir. 2005) (deputy's actions in pushing decedent after he grabbed deputy's protective vest, following decedent without waiting for backup, not carrying and using a baton or OC spray to subdue decedent, and not conducting a preliminary investigation to discover decedent's nature and character did not "rise to the required level of recklessness"); *Durastanti*, *supra*, 607 F.3d at 667-68 (ATF agents' failure to identify themselves as law enforcement officers and drawing/pointing their weapons during the course of an allegedly minor traffic stop did not constitute reckless conduct which provoked the need for force); *Romero v. Bd. of Cnty. Comm'rs Cnty. of Lake*, *supra*, 60 F.3d at 704 (officer did not unreasonably put himself into a deadly force situation when he failed to handcuff the suspect).

Tactical errors allegedly committed by officers in relation to a particular use of force do not constitute reckless or deliberate conduct. As stated in *Billington*, *supra*, 292 F.3d at 1186:

> even if we were to assume…that a jury could conclude that [the officer]

> should have sat in his car until backup arrived, or donned all of his equipment before approaching…or have taken precautions against [decedent] grabbing him by his throat and pulling himself out of the car window…or that [the officer] should have dropped off his wife and daughter somewhere before…none of [the officer's] supposed errors could be deemed intentional or reckless, much less unconstitutional provocations that caused [decedent] to attack him.

Moreover, a critique of particular tactical decisions made by officers in the moment demonstrates improper hindsight analysis of split-second decisions made by officers in tense, rapidly evolving circumstances. *See*, *e.g.*, *Cram*, 252 F.3d at 1133 ("If we were to...consider the expert's assertions regarding the failure to use pepper spray and other tactical measures, we would be evaluating the officers' conduct from the 20/20 perspective of hindsight rather than from the perspective of an officer making split-second judgments on the scene"); *Billington*, 292 F.3d at 1186 (rejecting the "litany of tactical errors" cited by the plaintiff's estate: "All of the estate's criticisms of [the officer] fit the '20/20 vision of hindsight' category *Graham v. Connor* holds must be disregarded"); *see also Roy v. Inhabitants of the City of Lewiston,* 42 F.3d 691, 695 (1st Cir. 1994) ("in close cases, a jury does not automatically get to second guess these life and death decisions, even though plaintiff has an expert and a plausible claim that the situation could better have been handled differently").

In the present case, Officer White clearly did not create the need to use deadly force. Officer White arrived late on scene, well after Officers Mariscal and

Truesdale. Aplt. App'x at 217. Within moments of arriving at the front of the Pauly residence, one of the Pauly brothers yelled out "We have guns." *Id*.; *see also* Aplt. App'x at 117-18. A matter of seconds after the Paulys made this threatening statement, Daniel Pauly fired off both barrels of his shotgun and Samuel Pauly extended his arm out the front window holding a handgun, and pointed the handgun at Officer White. Aplt. App'x at 82, 82 , 133-34, 144, 234, 324. Officer White, fearing for his safety and that of the other officers, fired a single shot, killing Samuel. Aplt. App'x at 231. Nowhere in its Memorandum Opinion and Order denying Officer White's summary judgment motion does the District Court actually articulate a single reckless act by Officer White. *See generally* Aplt. App'x at 672-89. Indeed, the undisputed facts as set forth by the District Court demonstrate that Officer White arrived just moments before Daniel Pauly began firing and Samuel aimed a handgun at Officer White. *Id*. at 680. Certainly, Officer White's inability to issue a warning to Samuel in the little more than four seconds Officer White had to process what was happening, aim his weapon, and accurately fire at the threat cannot by itself be construed as a reckless act which caused him to have to use force.[6]

[6] The District Court identifies as an issue of disputed material fact whether it was feasible for Officer White to have warned Samuel before shooting him.Aplt. App'x at 684-85. The District Court also cites *Thomson*, *supra*, for the proposition that failure to give a warning could create an unreasonable need to use deadly force. *Id*. at 684. However, the District Court does not address how Officer White's failure to warn Samuel Pauly in the few seconds he had could

Even assuming that the *other* officers acted recklessly *prior* to Officer White's arrival on scene (which is expressly denied, as discussed *infra*), those actions cannot be attributed to Officer White, nor can he be held liable for them. Officer White's liability can only flow from his *own* reckless pre-seizure conduct or *own* use of unreasonable force. *See*, *e.g.*, *Jiron*, *supra*, 392 F.3d at 415 (officer only responsible for his "*own* reckless or deliberate conduct during the seizure.") (emphasis supplied, internal quotation marks omitted); *Henry v. Storey*, 658 F.3d 1235, 1241 (10th Cir. 2011) ("§ 1983 imposes liability for a defendant's own actions"); *Trujillo v. Williams*, 465 F.3d 1210, 1227 (10th Cir. 2006) ("In order for liability to arise under § 1983, a defendant's direct personal responsibility for the claimed deprivation of a

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independently constitute a reckless act making his otherwise completely reasonable use of force unconstitutional, and, in *Thomson*, this Court specifically rejected such a danger creation argument. *Thomson*, 584 F.3d at 1321 (rejecting plaintiff's argument that releasing a police dog without a warning created need to use deadly force). This Court further noted in *Thomson*, that "[a] warning is not invariably required even before the use of deadly force..." *Thomson*, at 1321; *see also Wilson*, *supra*, 52 F.3d at 1554 (court rejected plaintiffs' argument that the defendant officer "must verbally warn a suspect before using lethal force"). Additionally, plaintiffs' own expert cited a widely accepted use of force manual that states, "if an armed attack happens so quickly that you must immediately fire your weapon…it will be physically impossible to verbally warn the attacker." Aplt. App'x at 287-88. Thus, not only was giving a warning not feasible, even if it had been feasible, Officer White's failure to give such a warning under the stressful, rapidly evolving circumstances he faced (in a matter of seconds Daniel Pauly firing off both barrels of his shotgun and Samuel aiming a handgun directly at him) would not rise to the level of recklessness, nor would it render his use of force unconstitutional.

constitutional right must be established"). Officer White's own pre-seizure conduct consisted in taking cover and trying to protect himself from what he reasonably perceived to be an imminent threat. His conduct was therefore far from reckless and his use of force was unquestionably reasonable and justified under the circumstances.

3. Officer White did not proximately cause Samuel Pauly's death

In order to prevail on a Section 1983 claim, a plaintiff must show that an officer's actions "were both the but-for and the proximate cause" of the suspect's death. *James v. Chavez*, 511 F. App'x 742, 746 (10th Cir. Feb. 19, 2013) (unpublished) (citing *Trask v. Franco*, 446 F.3d 1036, 1046 (10th Cir. 2006)); *Lamont v. New Jersey*, 637 F.3d 177, 185 (3rd Cir. 2011) ("Like a tort plaintiff, a § 1983 plaintiff must establish both causation in fact and proximate causation"). Of course, if a superseding event, like the suspect's own actions, caused the suspect's death, then an officer cannot have proximately caused the death and the officer is not liable for that death under Section 1983. *See Trask*, 446 F.3d at 1046 ("the officers only would be liable for the harm legally or proximately caused by their tortious conduct...They would not, however, necessarily be liable for all of the harm caused in the philosophic or but-for sense by the illegal entry...a superseding cause...relieves a defendant of liability") (internal quotation marks and citations omitted); *James*, 511 F. App'x at 747; *see also Burke v. McDonald*, 572 F.3d 51, 60 (1st Cir. 2009) ("§

1983 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions").

It is undisputed that Officer White shot and killed Samuel Pauly. However, Officer White was not the proximate or legal cause of Samuel's death. Even if Daniel Pauly's "warning shots" near Officer Truesdale were not a superseding cause for Officer White's return fire, Samuel Pauly's act of pointing a weapon at Officer White most certainly *was* a superseding event that proximately caused Officer White's use of force, and relieved him of any liability.

The District Court purported to analyze proximate causation, but its analysis was flawed in two fundamental ways. First, the District Court improperly viewed unfolding events from the perspective of the Pauly brothers, speculating as to what they could see or what they could hear. Second, whether or not the Pauly brothers *knew* that State Police officers were outside does not change the legal significance of the Pauly brothers' actions as a superseding cause (in particular, Samuel aiming his revolver at Officer White).

As to the first point, the District Court noted:

> If a jury finds that the brothers knew that State Police Officers were outside their house, but the brothers, nonetheless, armed themselves and Samuel Pauly pointed a handgun at Officer White, then a reasonable jury could find that the brothers' hostile actions were superseding or intervening causes of Samuel Pauly's death...On the other hand, if a jury

> finds that the brothers did not know who was outside their house, then a reasonable jury could determine that Officer Truesdale and Mariscal proximately caused Samuel Pauly's death by failing to adequately identify themselves...

Aplt. App'x at 703. However, both the Supreme Court and this Court have repeatedly emphasized the necessity of viewing rapidly unfolding events from the perspective of a *reasonable officer* on the scene. *See, e.g.*, *Graham*, *supra*, 490 U.S. at 396; *Durastanti*, *supra*, 607 F.3d at 667-68.

In *Durastanti*, for example, the occupants of an automobile claimed that none of them heard ATF agents identify themselves as law enforcement officers before an agent opened fire, just as Daniel Pauly claimed at his deposition that he did not hear the Officers announce "State Police" until after Officer White fired. *See Durastanti*, 607 F.3d at 667; Aplt. App'x at 79. However, as this Court stated in *Durastanti*, "[a]ccepting the district court's characterization of the dispute as a dispute over whether the occupants of the Lincoln *heard* Thompson identify himself–as opposed to whether he actually *did* identify himself–is immaterial. We must view the events from the perspective of the officer, not the occupants of the Lincoln." *Durastanti*, 607 F.3d at 667. Substituting the word "residence" for "Lincoln" here leads to the inescapable conclusion that what the Pauly brothers thought or heard at the time is similarly immaterial. What is material is what a reasonable officer would have

perceived and how a reasonable officer would have reacted under the circumstances.

Viewing the events through the eyes of a reasonable officer in Officer White's position, the following facts are undisputed: (1) Officer White arrived on scene shortly before one of the Pauly brothers yelled out "We have guns," Aplt. Appx' at 680; (2) Officer White was wearing his full uniform and was not wearing a raincoat, *Id*. at 676; (3) the porch light and other lights at the Pauly residence were turned on, *Id*. at 677; (4) Officer White heard the threatening statement "We have guns" and took cover, drawing his duty weapon, *Id*. at 680; (5) a matter of seconds after one of the brothers yelled "We have guns", Daniel Pauly fired off both barrels of his shotgun, *Id*.; (6) given Officer Truesdale's location at the back of the house, Officer White believed Officer Truesdale had been shot, *Id*.; (7) Samuel Pauly then held his arm out the front window of the house holding a handgun, *Id*. at 681; and (8) pointed that handgun at Officer White. *Id*. Under those circumstances, Officer White reasonably perceived and responded to the imminent threat Samuel Pauly posed.

With regard to the second point, what the Pauly brothers knew or did not know is immaterial to the superseding cause analysis for Officer White. There is nothing in the record or in the District Court's findings to suggest that any action taken by Officer White "caused" Daniel Pauly to open fire with a shotgun, or "caused" Samuel Pauly to aim his revolver at Officer White. Officer White arrived on scene, heard

"We have guns", and took cover. According to Daniel, the brothers speculated that the people outside might be intruders related to his road rage. Aplt. App'x at 697. However, Officer White was not, nor could he have been aware of such speculation on Daniel's part. Officer White could only know what the Pauly brothers' intentions were by how those intentions were manifested, and the Pauly brothers' intentions were manifested by the pronouncement "We have guns," by gunfire and by the pointing of a weapon at Officer White. *See Estate of Larsen*, 511 F.3d at 1260 (when examining reasonableness of use of force, court evaluates the "manifest intentions of the suspect"); *Wilson*, 52 F.3d at 1553 ("the inquiry here is not into [decedent's] state of mind or intentions, but whether, from an objective viewpoint and taking all factors into consideration, [the officer] reasonably feared for his life").

One of the key factors in determining whether an event constitutes a superseding cause is foreseeability. *See Trask*, *supra*, 446 F.3d at 1046-47 (identifying the foreseeability of the intervening act's occurrence as an important factor in determining whether that act constitutes a superseding cause absolving a defendant of liability). Here, Officer White could not possibly have foreseen that the two males inside the residence would suddenly act with hostile intent. Under the circumstances, the brothers' actions were so wholly disproportionate and unexpected that they clearly constituted superseding events. *See James*, *supra*, 511 F. App'x at

750 ("even if the actions of [the officer] violated [decedent's] constitutional rights, [decedent's] unlawful and deliberate attack on the SWAT team constitutes a superseding cause of his death that defeats liability for the officer"); *Estate of Sowards v. City of Trenton*, 125 F.App'x 31, 42 (6th Cir. 2005) (unpublished) ("Sowards's own conduct of pointing the handgun toward the officers *was* the intervening or superseding cause that set in motion the events that ultimately led to his death") (emphasis supplied). As such, Officer White cannot be liable for Samuel Pauly's death.

B. Officer White's Use of Force Was Not Clearly Unlawful

Qualified immunity protects governmental officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This doctrine balances "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). "If qualified immunity is to mean anything, it must mean that public employees who are simply doing their jobs are generally immune from suit." *Kerns*, *supra*, 663 F.3d at 1180 (quoting *Lewis v. Tripp*, 604 F.3d 1221, 1230 (10th Cir.2010)). A plaintiff can overcome a law

enforcement officer's presumption of immunity only by showing that the infringed right at issue was clearly established at the time of the allegedly unlawful activity such that "every reasonable official would have understood that what he [was] doing" violated the law. *Kerns*, 663 F.3d at 1180 (quoting *Ashcroft v. al-Kidd*, *supra*, 131 S.Ct. at 2080, 2083 (internal quotation marks omitted)).

In analyzing the qualified immunity defense, "[t]he relevant, dispositive inquiry is whether it would be clear to a reasonable officer that the conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). While *Graham v. Connor*

> clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive…that is not enough. Rather...the right the official is alleged to have violated must have been clearly established in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Id. (internal quotation marks omitted). Stated simply, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Thus, qualified immunity serves to "protect officers from the sometimes 'hazy border between excessive and acceptable force[,]'" and if the "law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Saucier*,

533 U.S. at 202, 206.

With regard to the second element of the qualified immunity burden, plaintiffs must do more than assert that it is well established that citizens have a right to be free from unreasonable seizures. *Saucier*, *supra*, 533 U.S. at 202; *Jantz v. Muci*, 976 F.2d 623, 627 (10th Cir. 1992) (plaintiffs need to "do more than simply allege the violation of a general legal precept"; rather, they are required to "demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited"); *Kerns*, *supra*, 663 F.3d at 1182-83 ("Of course [the plaintiff]…has a well-established privacy interest in his home. But the Supreme Court and we have explained that, when it comes to deciding the second qualified immunity question, it is not enough to look at, and declare a law enforcement officer liable, based on such generalized principles") (citation and internal quotations omitted).

In the instant case, Officer White is plainly entitled to qualified immunity, as he did not act to violate Samuel Pauly's Fourth Amendment rights. The undisputed facts are that Officer White fired his duty weapon at Samuel only: (1) after one of the Pauly brothers had yelled "We have guns"; (2) after Samuel's brother Daniel Pauly had just fired two blasts from his 12 gauge shotgun adjacent to Officer Truesdale's location at the back of the house; and (3) after Officer White observed Samuel aim

a gun in his direction. Given the totality of circumstances and what Officer White actually observed Samuel doing at the front window, Officer White's decision to defend himself and Officer Marsical did not violate Samuel Pauly's rights, nor was Officer White's action otherwise unreasonable. As amply discussed in the preceding section of this Brief, it is axiomatic that an officer may use deadly force against an armed threat, and "need not await the 'glint of steel' before taking self-protective action." *Estate of Larsen*, *supra*, 511 F.3d at 1260 (quoting *People v. Morales*, *supra*, 198 A.D.2d at 130 ("the 'glint of steel' that often indicates it is too late to take safety precautions would never have been revealed had a gun been fired from its place of concealment")).

Even assuming *arguendo* that Officer White's use of force was not objectively reasonable, i.e., that Officer White was mistaken in his belief about what the law governing Fourth Amendment reasonableness permitted, such a mistake was eminently reasonable under the uncertain, stressful, and dangerous conditions he faced at the time. *See Saucier*, *supra*, 533 U.S. at 205 (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[,]" and concluding that qualified immunity shields officers who have reasonable, but mistaken beliefs about what the law requires in such tense, rapidly evolving situations). Thus, the doctrines of

objective reasonableness and qualified immunity converge in this case to protect both Officer White's reasonable belief as to what he observed Samuel Pauly doing in the window, as well as his reasonable belief about what force he was entitled to use in response to the perceived threat. *See id.* (mistake as to legality of officer's actions); *cf. Thomson*, *supra*, 584 F.3d at 1315 (mistake as to facts perceived–"a reasonable but mistaken belief that the suspect is likely to fight back justifies using more force than is actually needed.").

Since Officer White did not violate Samuel Pauly's Fourth Amendment rights even under the factual scenario set forth by the District Court, and because it cannot be shown that Officer White knowingly violated Samuel Pauly's rights (or otherwise recognized the alleged illegality of his actions), Officer White is entitled to qualified immunity. Even if Officer White's use of force was somehow deemed unlawful, his reasonable, but mistaken belief about the use of force required at the time (and under the stressful, tense circumstances he faced) would still shield him from liability. As such, the District Court's denial of Officer White's summary judgment motion should be reversed.

II. The District Court Erred in Denying Officer Michael Mariscal's Motion for Summary Judgment on the Issue of Qualified Immunity

A. Officer Mariscal Did Not Violate Samuel Pauly's Constitutional Rights

1. If Officer Mariscal shot at Samuel Pauly, that action was reasonable

As was the case with Officer White, deadly force is justified under the Fourth Amendment if a reasonable officer in Officer Mariscal's position would have had probable cause to believe that there was a threat of serious physical harm to himself or others. *Estate of Larsen*, *supra*, 511 F3d. at 1260. It is not necessary for an officer to be fired upon *before* he uses deadly force, as this Court held in *Larsen*. *Id*.; *accord Thomson*, *supra*, 584 F.3d at 1317-18 (officer justified in shooting armed suspect when suspect was moving gun up and down and had previously aimed weapon at officers, even though at the moment the officer fired the fatal shot, suspect was pointing the gun towards his own head and not towards officers); *Durastanti*, *supra*, 607 F.3d at 668 (a law enforcement agent, faced with the *possibility of danger* has a right to take reasonable steps to protect himself) (quoting *United States v. Merkley*, *supra*, 988 F.2d at 1064; *Wilson, supra*, 52 F.3d at 1554 (use of deadly force reasonable where suspect aimed pistol in officer's direction, and finding that "[a]ny reasonable officer in [the Defendant's] position would reasonably assume his life to

be in danger when confronted with a man whose finger was on the trigger of a .357 magnum revolver pointed in his general direction. The exact manner in which [decedent] held out the gun is not dispositive.").

In this case, there is no doubt that Officer Mariscal correctly perceived that Samuel Pauly was threatening the life of Officer White at the moment that Officer Mariscal thought that he had fired his weapon. Mariscal, as well as Officer White, saw Samuel Pauly open the front window and hold his arm out with a handgun, pointing it at Officer White. Aplt. App'x at 133-34, 144, 324. This was, again, after Daniel Pauly had fired two shotgun blasts near Officer Truesdale. Whether or not Officer Mariscal fired his weapon, he was clearly justified in using deadly force in defense of Officer White's life.

Thus, even under the scenario posited by Appellees (i.e. that Officer Mariscal, and not Samuel Pauly, fired the "third shot" of the four shots fired that night), the undisputed evidence from both Officer White and Officer Mariscal is that just over four seconds prior to Officer White firing the shot that killed Samuel Pauly, Samuel pointed his weapon toward Officer White. Assuming Officer Mariscal actually fired his weapon, he was absolutely entitled to do so in defense of Officer White, and thus his use of force was objectively reasonable under the circumstances.

2. Officer Mariscal cannot be held liable for Officer White's objectively reasonable use of force

In order to be liable under Section 1983, a defendant must subject a citizen, or cause the citizen to be subjected, to a constitutional deprivation. 42 U.S.C. § 1983. This means that a defendant must, at a minimum, "set in motion a series of events that the [defendant] knew or reasonably should have known would cause others to deprive the plaintiff of his constitutional rights." *Trask*, *supra*, 446 F.3d at 1046. It is axiomatic that absent a constitutional deprivation or violation there can be no Section 1983 liability. *See*, *e.g.*, *Tatum v. City and Cnty. of San Francisco*, 441 F.3d 1090, 1100 (9th Cir. 2006) ("Absent a constitutional deprivation, neither [the officers], nor the City and County of San Francisco may be held liable under § 1983"); *Zakrzewski v. Fox*, 87 F.3d 1011, 1015 (8th Cir. 1996) ("Absent a constitutional deprivation [the plaintiff's] § 1983 claim against each defendant necessarily fails."); *Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. Town of Allendale*, 833 F.2d 1004, 1004 (4th Cir. 1987) ("Absent a deprivation of their constitutional rights, the plaintiffs have established no right of action").

In this lawsuit, appellees have made just one Section 1983 claim, for excessive force in violation of the Fourth Amendment. However, it is undisputed that Officer Mariscal did not shoot Samuel Pauly, and as previously addressed in Section I of this

Brief *supra*, Officer White's use of force on Samuel was objectively reasonable. Samuel, therefore, suffered no constitutional deprivation, which is the *sine qua non* of any Section 1983 action. Even assuming *arguendo* that Officer Mariscal engaged in reckless pre-seizure conduct (which is expressly denied–*see* discussion in Section II(A)(4), *infra*), that reckless conduct did not result in any constitutional violation, i.e., Officer Mariscal did not set in motion a series of events which caused Samuel to be deprived of his Fourth Amendment rights. Officer Mariscal consequently cannot be liable unless his actions constituted an independent constitutional tort separate and apart from the use of force, which Plaintiffs have never pled, and which, under the circumstances, simply did not occur.

This Court has applied the danger creation doctrine in cases where an officer's *own* reckless conduct directly created *his* need to use deadly force. *See*, *e.g.*, *Jiron*, *supra*, 392 F.3d at 418-19 ("[t]he reasonableness of the use of force depends...also on whether the officers' own 'reckless or deliberate conduct during the seizure unreasonably created the need to *use such force*[,]'" and holding that officer who shot teenaged girl armed with knife did not recklessly and intentionally create deadly force situation) (quoting *Sevier*, *supra*, 60 F.3d at 699) (emphasis supplied); *Cram*, *supra*, 252 F.3d at 1132 (rejecting claim that two officers who shot and injured plaintiff recklessly provoked the need for deadly force); *Thomson*, *supra*, 584 F.3d at 1320-21

(officer who shot and killed suspect did not unreasonably create need to use deadly force); *Blossom*, *supra*, 429 F.3d at 968 (deputy who fatally shot suspect did not create need to use deadly force); *Durastanti*, *supra*, 607 F.3d at 667-68 ("Even if Agent Durastanti [shooting officer] reasonably believed that it was necessary to use deadly force, we must still determine whether he recklessly or deliberately brought about the need to use such force."); *see also* Aplt. App'x at 702 (District Court acknowledging that this Court "has not applied the reckless endangerment doctrine to the conduct of non-shooting officers").

Again, it is undisputed that Officer White shot and killed Samuel Pauly; at most, Officer Mariscal unsuccessfully attempted to use force. Aplt. App'x at 699-700. Since Officer Mariscal was not the "shooting officer," the danger creation doctrine does not apply to his pre-seizure conduct, i.e. Officer Mariscal did not recklessly create the need for deadly force and then "take advantage of that situation." *See Thomson*, 584 F.3d at 1320. It would be an absurd legal result (and logically nonsensical) to hold that Officer Mariscal's pre-seizure conduct violated Samuel Pauly's constitutional right to be free from excessive force, when Officer Mariscal did not even seize Samuel Pauly[7], and where Officer White's use of force was objectively

[7] *See California v. Hodari*, 499 U.S. 621, 626 and n. 2 (1991) (assertion of authority by the police without submission by the fleeing person does not constitute a seizure and "neither usage nor common-law tradition makes an *attempted* seizure a seizure") (emphasis in original); *Bella v. Chamberlain*, 24

reasonable.

3. Officer Mariscal did not proximately cause Samuel Pauly's death

Even assuming *arguendo* that Officer White's use of force was *not* reasonable, or that Officer Mariscal committed a constitutional tort prior to Samuel Pauly's seizure (separate and apart from the use of force), Officer Mariscal still cannot be liable for Samuel's death, because Samuel's actions constituted a superseding cause relieving Officer Mariscal of liability. *See James*, *supra*, 511 F. App'x at 746; (plaintiff must show that officer's actions "were both the but-for and the proximate cause" of the suspect's death); *Trask*, 446 F.3d at 1046 ("In civil rights cases, a superseding cause, as we traditionally understand it in tort law, relieves a defendant of liability") (internal quotation marks and citations omitted).

F.3d 1251, 1255-56 (10th Cir. 1994) (when "officers shoot at a fleeing suspect, a 'seizure' occurs only if the shot strikes the fleeing person or if the shot causes the fleeing person to submit to this show of authority", and holding that plaintiff was not seized even when an officer shot plaintiff's helicopter, because the bullet did not strike plaintiff, nor did plaintiff submit to the officer's assertion of authority); *see also United States v. Spence*, 397 F.3d 1280, 1283 (10th Cir. 2005) (there is no *per se* rule that a police encounter within or around an individual's home is a seizure within the meaning of the Fourth Amendment). Here, at most, Officer Mariscal *attempted* to seize Samuel Pauly, but since the round he purportedly fired did not strike Samuel, and Samuel did not submit to this assertion of authority (Samuel had armed himself and was aiming his revolver at Officer White at the time), Samuel was not seized for purposes of the Fourth Amendment until he was actually struck by Officer White's bullet.

In analyzing proximate causation, the District Court fixated on whether or not the Pauly brothers knew it was State Police outside, and then mistakenly concluded that this fact was dispositive in determining whether or not the Pauly brothers' actions constituted a superseding cause. Aplt. App'x at 703. The District Court's analysis of proximate causation is therefore flawed with respect to Officer Mariscal for the same reasons articulated above regarding Officer White.

Even assuming *arguendo* that Officers Mariscal and Truesdale were negligent or mistaken in the manner in which they approached the Pauly residence or in how they identified themselves, these actions did not "cause" Daniel Pauly to open fire with a shotgun near Officer Truesdale, or "cause" Samuel Pauly to aim his revolver at the officers. According to Daniel, the brothers speculated that the people outside might be intruders related to the road rage incident. But even taking Daniel's claims at face value, he and Samuel did not know who the people were outside, if they had any weapons, what their intentions were, and no one had attempted to enter the house. Yet Daniel nonetheless opened fire with his shotgun, and Samuel aimed his gun out the window at Officer White.

Of course, Officer Mariscal did not know what the Pauly brothers were thinking in those moments prior to shots being fired, nor could he have guessed that the brothers would assume that he and Officer Truesdale were intruders seeking

revenge for Daniel's road rage. After all, the officers were in the front yard, in uniform, with their flashlights, the porch light and other house lights were on, the officers could clearly see the Pauly brothers at the window, and had announced their presence. The officers therefore reasonably believed that the Paulys knew exactly who they were. Consequently, the officers could not have foreseen that the two males inside the residence would suddenly act with such manifest hostile intent. *See Trask*, *supra*, 446 F.3d at 1046-47 (identifying the foreseeability of the intervening act's occurrence as an important factor in determining whether that act constitutes a superseding cause absolving a defendant of liability). Under the circumstances, the brothers' actions were so ill-advised, disproportionate, and unexpected as to clearly constitute superseding events that relieve Officer Mariscal of any liability for Samuel's death. *See James*, *supra*, 511 F.App'x at 748-50; *Estate of Sowards*, *supra*, 125 F.App'x at 42. In short, Samuel Pauly proximately caused his own death when he aimed a handgun directly at Officer White, who had just arrived on scene. Not only can Officer Mariscal not be liable for such an eminently reasonable use of force, none of the officers can be liable for the Pauly brothers' tragic, but completely fool-hardy, and unpredictable actions.

4. Officer Mariscal's alleged pre-seizure conduct did not rise to the level of recklessness

An officer can be liable for his own reckless or deliberate conduct that unreasonably creates his subsequent need to use deadly force.[8] *Jiron*, *supra*, 392 F.3d at 415. Only events immediately connected with the seizure may be considered, and merely negligent acts are not sufficient. *Sevier*, *supra*, 60 F.3d at 702 n.8 ("Of course, if the preceding events are merely negligent or if they are attenuated by time or intervening events, then they are not to be considered in an excessive force case"). Tactical errors allegedly committed by officers in relation to a particular use of force do not constitute reckless or deliberate conduct, and to critique particular tactical decisions made by officers in the moment demonstrates improper hindsight analysis of split-second decisions made by officers in tense, rapidly evolving circumstances. *See*, *e.g.*, *Cram*, 252 F.3d at 1133; *Thomson*, *supra*, 584 F.3d at 1321 ("We cannot now consider whether other actions would have been more appropriate or, indeed, optimal."); *Billington*, *supra*, 292 F.3d at 1190 (a plaintiff is not generally permitted to establish a "Fourth Amendment violation based merely on bad tactics that result

[8] Of course, since Officer Mariscal at most attempted to use deadly force, his purportedly reckless pre-seizure conduct should not even be subject to Fourth Amendment analysis unless he set in motion a series of events that caused Officer White to deprive Samuel Pauly of his constitutional rights, which plainly did not occur, as Officer White's use of force was reasonable. *See* Section II(A)(2) of this Brief, *supra*. Appellants will nonetheless address the supposed recklessness of Officer Mariscal because this issue was key to the District Court's analysis and erroneous decision.

in a deadly confrontation that could have been avoided"); *see also Roy*, *supra*, F.3d at 695.

In determining whether the defendant officers recklessly endangered Samuel Pauly, the District Court's analysis is flawed in two respects. First, as discussed in previous sections of this Brief, the District Court examined the evidence from the perspective of the Pauly brothers, rather than from the perspective of a reasonable officer on the scene. Second, it extrapolated to the status of reckless conduct, actions which were at worst, judgment calls.

The District Court specifically asserted that "if a jury finds that the brothers did not know who was outside their house, then a reasonable jury could determine that Officer Truesdale and Officer Mariscal proximately caused Samuel Pauly's death by failing to identify themselves." Aplt. App'x at 703. In so concluding, however, the District Court ignored *Graham*, and imputed a duty to the officers to ensure that the Pauly brothers knew who they were. The District Court goes too far in requiring that the Paulys understand who was outside their home and comprehend the nature of the officers' instructions, and by subjecting the officers to the potential for civil liability if the Paulys, for whatever reason, did not do so. Respectfully, all that is required is that the officers act reasonably under the tense, uncertain, and rapidly evolving circumstances with which they were faced.

The District Court and the Plaintiffs also conflate the actions of Officers Truesdale and Mariscal. Even so, the purported deficiencies of their actions, taken either individually or collectively, do not amount to reckless endangerment. The District Court found that the following actions could amount to reckless behavior:

- there were no exigent circumstances requiring the officers to go to Daniel Pauly's house at 11:00pm;
- Officers Truesdale and Mariscal approached the house in a surreptitious manner;
- Officers Truesdale and Mariscal provided inadequate police identification by yelling out "State Police " once; and
- Officers Truesdale and Mariscal used a hostile tone stating "We've got you surrounded. Come out or we're coming in".

Aplt. App'x at 685.[9]

The District Court's suggestion that there were no "exigent circumstances" requiring the officers to go to Daniel Pauly's home at 11:00 in the evening confuses the concepts of investigation with entry into a home. The officers were concerned about the potential for Daniel Pauly reentering the freeway and endangering other

[9] The District Court also suggested that a jury could find that the rain and darkness made it difficult for the brothers to see who was outside their house, that the house was located in a rural area that might have heightened the brothers' concern about intruders, or that the brothers could have concluded that the officers were people connected to the road rage incident. These suggestions are mere speculation about what was in the Paulys' minds or regarding their ability to perceive certain events. They do not describe any negligent, much less reckless, action by the Officers.

people. They were cognizant that he might have committed a crime by endangering the women who reported his actions. They were less than a mile from his house. The concept of exigent circumstances simply has no place in the analysis of whether the officers should have investigated Daniel Pauly's actions. Certainly, it was not reckless for the officers to have done so, and could arguably have been considered reckless if they had not.[10]

When Officers Truesdale and Mariscal approached the home, they did so using flashlights occasionally as they walked up, and then turning them on completely when they reached the residence. Aplt. App'x at 696. There is nothing reckless, or even negligent, in police officers approaching a home cautiously, particularly when they believe one of the home's residents has recently acted violently. The fact that the officers turned on their flashlights once they reached the Pauly residence and announced their presence as State Police officers certainly militates against a finding that their approach was somehow inappropriate.

[10] Indeed, under New Mexico law, the officers had a legal duty to investigate ongoing criminal violations as well as a continuing duty to preserve the peace. *See Romero v. Sanchez*, 1995-NMSC-028, ¶11, 119 N.M. 690 (citing NMSA 1978, §§ 29-1-1, 29-2-18(A) (NMSP officers "shall be conservators of the peace within the state, with full power to apprehend, arrest and bring before the proper court all law violators within the state")).

The District Court next suggests that a jury could find that the officers' identification was inadequate because they only identified themselves once.[11] There is no clearly established law stating that a police officer must identify himself a particular number of times. *See Durastanti, supra*, 607 F.3d at 667-68 (plainclothes ATF agent not reckless for failing to identify himself prior to shooting plaintiff). The facts as gleaned from the District Court's opinions are straightforward. The officers were in uniform. There was a porch light on as well as light coming from the house. The officers had their flashlights on when they were at the house. Critically, at least once, the officers loudly and clearly identified themselves as State Police officers. Nothing about that conduct approaches the high standard of recklessness. *See Medina v. City and Cnty. of Denver*, *supra*, 960 F.2d. at 1493 (in order for an act to be considered reckless, it must show a "wanton or obdurate disregard or complete indifference to risk, for example, when the actor does not care whether the other

[11] Officer White testified that when he got out of his car at the lower residence on Firehouse Road, he could hear Officers Truesdale and Mariscal repeatedly yelling "State Police" from his position several hundred feet away. The District Court, however, found that the officers only identified themselves once. In making this finding, the District Court ignored the testimony of all of the officers, including Officer White. The Court also did not credit the testimony of Daniel Pauly, who claims to have never heard the officers make this pronouncement. Apparently, the Court made this finding on the basis of Officer Truesdale's COBAN recording, which (albeit not a complete recording of the encounter), when listened to, shows the officers identifying themselves *twice*–"State Police. Open the door. State Police. Open the door." *See Truesdale COBAN Recording* (approx. 11:18pm to 11:18:20pm).

person lives or dies, despite knowing that there is a significant risk of death") (citation and internal quotation marks omitted); *Williams v. City and Cnty. of Denver*, 99 F.3d 1009, 1014, n.4 (10th Cir. 1996) (to satisfy the recklessness requirement under Section 1983, the defendant must "recognize[] the unreasonable risk and actually intend[] to expose the plaintiff to such risks without regard to the consequences").

The final factor by which the District Court determined a jury could find recklessness is the comment made by the Officers, "We've got you surrounded, come out or we're coming in." The District Court found that this statement was made in an attempt to get the Paulys to come out of the house. Aplt. App'x at 697. Taken in light of the District Court's express finding that the purpose of the officers' statement was legitimate, the statement inherently cannot be found to be reckless. The statement was, of course, unsuccessful. It could even have been a misguided tactic. However, that statement does not reflect a "wanton or obdurate disregard or complete indifference to risk." *Medina v. City and Cnty. of Denver,* 960 F.2d. at 1496. It is clearly not a statement evincing that the police did not "care whether the other person lives or dies, despite knowing that there is a significant risk of death." *Id*. It was

merely a tactic, used by Officer Mariscal in the hope of persuading the Paulys to allow the officers to conduct an appropriate police investigation.[12]

Either individually or in combination, the four factors identified by the Court as suggesting the potential for a finding of recklessness do not come close to meeting that standard. Civil rights liability cannot be imposed on police officers who were threatened with deadly force on the speculation inherent in "horseshoe nail" analysis.[13] The purportedly reckless acts set forth by the District Court are simply far too attenuated, far too benign, and too consistent with reasonable police behavior to allow liability to be imposed on these officers, including Officer Mariscal.[14]

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[12] Even assuming that Officers Mariscal and Truesdale's decisions to approach the house cautiously, or not to get back in their cars and drive to the upper house with their emergency lights activated, or the manner in which they identified themselves, were tactical mistakes, such tactical mistakes do not constitute reckless or deliberate conduct as set forth in Section I of this Brief.

[13] Benjamin Franklin's famed proverb is:

> "For the want of a nail the shoe was lost,
> For the want of a shoe the horse was lost,
> For the want of a horse the rider was lost,
> For the want of a rider the battle was lost,
> For the want of a battle the kingdom was lost,
> And all for the want of a horseshoe-nail."

[14] All of the second-guessing of Officers Mariscal and Truesdale's pre-seizure conduct ultimately also misses the principal point and purpose of Fourth Amendment reasonableness/qualified immunity analysis. *See Cram*, *supra*, 252 F.3d at 1132; *Thomson*, *supra*, 584 F.3d at 1315.

B. Officer Mariscal's Actions Were Not Clearly Unlawful

Even assuming *arguendo* that Officer Mariscal's attempted use of force was not objectively reasonable, i.e., that he was mistaken in his belief about what the law governing Fourth Amendment reasonableness permitted, such a mistake was eminently reasonable under the uncertain, stressful, and dangerous conditions he faced at the time. *See Saucier v. Katz*, *supra*, 533 U.S. at 205. Officer Mariscal was suddenly confronted with an armed assailant who was aiming a handgun at his partner. This occurred moments after one of the Paulys yelled "We have guns", and Daniel Pauly fired off both barrels of his 12 gauge shotgun adjacent to Officer Truesdale's location at the back of the house. At the time, Officer Mariscal also reasonably believed that the occupants of the house knew it was State Police outside, and yet had opened fire anyway, which made the threat posed by Samuel at the window that much more alarming and imminent. All of this happened within the context of a follow-up criminal investigation for road rage in an isolated rural area with a suspect who demonstrated no intention of complying with police pronouncements and directives. Under the circumstances Officer Mariscal faced in those brief moments, he could not have been on notice that attempting to defend himself and Officer White was "clearly unlawful."

None of the decisions Officers Mariscal and Truesdale made regarding their approach to the residence or the manner in which they identified themselves were clearly unlawful either. At worst, the Officers made tactical judgment calls, not deliberate or reckless decisions to violate clearly established constitutional norms known to a reasonable officer. As with Officer White, therefore, the doctrines of objective reasonableness and qualified immunity converge in this case to protect both Officer Mariscal's reasonable belief as to the facts of what he observed Samuel Pauly doing in the window (objective reasonableness), as well as his reasonable belief about what force he was entitled to use in response to the perceived threat (qualified immunity).

Since plaintiffs cannot show that Officer Mariscal violated Samuel Pauly's Fourth Amendment rights or that he did so knowingly (or otherwise recognized the illegality of his actions), Officer Mariscal is entitled to qualified immunity. Even if Officer Mariscal's attempted use of force was somehow deemed unlawful, his reasonable but mistaken belief about the use of force required in this instance would still shield him from liability. In sum, Officer Mariscal is entitled to qualified immunity, and it was error for the District Court to conclude otherwise.

III. The District Court Erred in Denying Officer Kevin Truesdale's Motion for Summary Judgment on the Issue of Qualified Immunity

A. Officer Truesdale Did Not Violate Samuel Pauly's Constitutional Rights

1. Officer Truesdale did not use, nor attempted to use force on either Daniel or Samuel Pauly

Officer Truesdale was at the back of the house when Officer White had to use deadly force to defend himself against Samuel Pauly. More specifically, Officer Truesdale was face down in the dirt, hoping not to get shot after Daniel Pauly fired off both barrels of his shotgun.[15] Officer Truesdale had no idea at the time that Daniel's blasts were "warning shots" up into a tree. Officer Truesdale was neither a party to nor witnessed the gunfire at the front of the house. Therefore, Officer Truesdale's "use of force" is not an issue at all in this lawsuit.

2. Officer Truesdale cannot be held liable for Officer White's objectively reasonable use of force

Since Officer White's use of force was objectively reasonable, and did not violate Samuel Pauly's Fourth Amendment rights, Officer Truesdale cannot be liable for that use of force even assuming his pre-seizure conduct was reckless (which is expressly denied–*see* discussion in Section III(A)(4) *infra*). *See James*, *supra*, 511 F.

[15] The District Court did not specifically make this finding. However, this fact is undisputed and clearly part of the Record.

App'x at 746 (quoting *Trask*, *supra*, 446 F.3d at1046 (in order for 'non-shooting' officer to be liable for excessive force under Section 1983, the officer must have "set in motion a series of events that the defendant[s] knew or reasonably should have known would cause others to deprive the plaintiff of [his] constitutional rights."). Officer Truesdale did not subject or cause Samuel Pauly to be subjected to any constitutional deprivation.

Additionally, since Officer Truesdale did not use force against either of the Pauly brothers, the danger creation doctrine does not apply to his pre-seizure conduct. *See, e.g.*, *Sevier*, *Cram*, *Thomson*, *Jiron*, *Blossom*, *Durastanti*, *supra* (applying danger creation/reckless endangerment doctrine to officers who actually shot suspect); *see also* Aplt. App'x at 702 (District Court acknowledges that Tenth Circuit has not applied reckless endangerment doctrine to non-shooting officers).

3. Officer Truesdale did not proximately cause Samuel Pauly's death

Even assuming *arguendo* that Officer White's use of force was *not* reasonable, or that Officer Truesdale committed a constitutional tort prior to Samuel Pauly's seizure (separate and apart from the use of force), Officer Truesdale still cannot be liable for Samuel's death because Samuel's actions constituted a superseding cause

relieving Officer Truesdale of liability. *See James*, 511 F. App'x at 746-47; *Trask*, 446 F.3d at 1046; *see also Burke*, *supra*, 572 F.3d at 60.

Officer Truesdale and Mariscal's actions were not the proximate or legal cause of Samuel's death. Even if the officers were negligent or mistaken in the manner in which they approached the Pauly residence or in how they identified themselves, the officers reasonably believed that the Pauly brothers knew it was State Police outside. Consequently, neither officer could have foreseen that the two males inside the residence would suddenly threaten them and open fire. Under the circumstances, the brothers' wholly disproportionate and unexpected response constituted superseding events that relieved Officer Truesdale of any liability for Samuel's death. *See James,* 511 F. App'x at 748-50; *Estate of Sowards*, *supra*, 125 F.App'x at 42. In particular, Samuel's decision to aim a handgun at Officer White (not any pre-seizure act by Officer Truesdale) proximately caused Officer White to utilize deadly force in self-defense.

4. Officer Truesdale's alleged pre-seizure conduct did not rise to the level of recklessness

Under Section 1983, 'recklessness' is a very high standard, requiring a "wanton or obdurate disregard or complete indifference to risk." *Medina v. City and Cnty. of Denver*, *supra*, 960 F.2d. at 1493. The defendant must "recognize[] the unreasonable

risk and actually intend[] to expose the plaintiff to such risks without regard to the consequences." *Williams*, *supra*, 99 F.3d at 1014, n.4. As discussed in Section II(A)(4) of this Brief, *supra*, no action taken by Officer Truesdale qualified as reckless. Even assuming that Officer Truesdale made a tactical mistake in his approach or attempts to communicate with the Paulys, or that some act, upon later reflection, was misguided or ill-advised, such does not create liability under Section 1983. *See*, *e.g.*, *Thomson*, *supra*, 584 F.3d at 1321 ("We cannot now consider whether other actions would have been more appropriate or, indeed, optimal."); *Billington*, *supra*, 292 F.3d at 1190 (a plaintiff is not generally permitted to establish a "Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided").

B. Officer Truesdale's Actions Were Not Clearly Unlawful

Even assuming *arguendo* that some aspect of Officer Truesdale's approach to the residence, his decision to contain the threat at the back of the house, or other tactics he employed in relation to this incident somehow violated Samuel Pauly's rights, Officer Truesdale certainly did not believe, nor could he have been on notice that his conduct was "clearly unlawful." *See Saucier*, *supra*, 533 U.S. at 202 (officer must be "on notice that his conduct would be clearly unlawful"); *Kerns*, *supra*, 663 F.3d at 1183 (to satisfy the "clearly established" standard, this Court does not require

a case directly on point, but neither may a district court deny immunity unless existing precedent has placed the constitutional question beyond debate).

Members of the public do not have a clearly established right that officers drive as opposed to walk up to their house (or that officers engage their emergency lights every time they respond to a call), nor do they have a clearly established right to the response of a full tactical team under every situation where a potential threat manifests itself at their residence. Members of the public likewise do not have a clearly established right that officers announce their presence a certain number of times or in a particular way.

As with Officer Marsical, Officer Truesdale did not violate Samuel Pauly's Fourth Amendment rights. Even if Officer Truesdale's actions (in relation to Officer White's use of force) were somehow deemed unlawful, his reasonable but mistaken belief about what the situation required at the time (and under the stressful, tense circumstances he faced) would still shield him from liability. As such, Officer Truesdale is also entitled to qualified immunity, and the District Court erred in ruling to the contrary.

CONCLUSION AND STATEMENT CONCERNING ORAL ARGUMENT

Defendant-Appellants Ray White, Michael Mariscal, and Kevin Truesdale respectfully request that this honorable Court vacate the Memorandum Opinions and Orders denying their motions for summary judgment, and that this Court remand this matter with instructions to grant Appellants' motions on the grounds that Appellants are entitled to qualified immunity.

Appellants respectfully request oral argument as the issues raised in this brief address important issues of federal law and the argument of counsel may materially assist the Court in determination of this Appeal.

Respectfully submitted,

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BRIEF FORMAT CERTIFICATION

Pursuant to FED. R. APP. 32 (a)(7)(C)(I), I hereby certify that the foregoing brief is proportionally spaced, has a typeface of 14 points or more and contains 13,742 words, inclusive of footnotes (computed using Corel Word Perfect Office X6 word counting system) in compliance with the requirement in FED. R. APP. P. 32(a)(7)(B)(i) that the principal brief not exceed14,000 words.

Dated this 12th day of May 2014.

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CERTIFICATION OF DIGITAL SUBMISSION

I HEREBY CERTIFY that one copy of the foregoing Opening Brief was submitted in Digital Form via this Court's CM/ECF filing system, and that seven (7) hard copies of this Opening Brief were sent via FedEx to Elisabeth A. Shumaker, Clerk, United States Court of Appeals for the Tenth Circuit Byron White U.S. Courthouse 1823 Stout Street Denver, CO 80257, on the 12th day of May, 2014.

I ALSO CERTIFY that all required privacy redactions have been made and, with the exception of those redactions, if any, the copy of this document submitted to the Court in Digital Form is an exact copy of the written document filed with the Clerk.

I ALSO CERTIFY that the Digital Form of the foregoing Opening Brief has been scanned for viruses with scanning program AVG Internet Security 2013, last updated on this 12th day of May, 2014, and that according to the program, this Brief is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opening Brief and an electronic copy of the Appendix thereto (including copies of all electronic recordings contained therein) was served via U.S. Mail and e-mail upon the following counsel of record on this 12th day of May, 2014:

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

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

Plaintiffs,

vs. Civ. No. 12-1311 KG/WPL

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

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court upon Defendant Raymond White's First Motion for Summary Judgment and Memorandum in Support Thereof (Motion for Summary Judgment), filed November 13, 2013. (Doc. 83). Defendant Raymond White (Officer White) moves for summary judgment on the 42 U.S.C. § 1983 claim, the New Mexico Tort Claims Act (NMTCA) claim, and on the New Mexico State Constitution claim. Officer White also raises a qualified immunity defense with respect to the Section 1983 claim. Plaintiffs filed a response to the Motion for Summary Judgment on December 23, 2013, and Officer White filed a reply on January 24, 2014. (Docs. 111 and 132). Having reviewed the Motion for Summary Judgment, the accompanying briefs, and the evidence of record, the Court denies the Motion for Summary Judgment for the following reasons.

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

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

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

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

B. Summary Judgment Standard of Review

Summary judgment is appropriate if there is no genuine dispute as to a material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).[2] When applying this standard, the Court examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Applied Genetics Intl, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Only then does the burden shift to the non-movant to come forward with evidence showing that there is a genuine issue of material fact. *Bacchus Indus., Inc.*

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

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

v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir. 1991). An issue of material fact is genuine if a reasonable jury could return a verdict for the non-movant. *Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir.1996) (citation omitted). The non-moving party may not avoid summary judgment by resting upon the mere allegations or denials of his or her pleadings. *Bacchus Indus., Inc.*, 939 F.2d at 891.

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

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

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

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

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

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

Daniel Pauly, therefore, stopped at the Glorieta off-ramp as did the females who were following him. (Doc. 82-1) at 9 (depo. at 133). Daniel Pauly asked the females why they were following him and why they had the car's brights on. *Id*. One of the females reported that Daniel Pauly was "throwing up gang signs" during this encounter. (Doc. 82-1) at 24. Daniel Pauly, however, felt personally threatened by the females' driving behavior. (Doc. 82-1) at 9 (depo. at 134). Daniel Pauly then drove a short distance from the off-ramp to his house where

his brother, Samuel Pauly, was playing a video game on the couch.[3] (Doc. 82-1) at 10 (depo. at 145). The house is located in a wooded rural area to the rear of another house on a hill. (Doc. 82-1) at 21.

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

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

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

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

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

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

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

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

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

At around 11:00 p.m., the brothers saw through the front window two blue LED flashlights, five or seven feet apart at chest level, coming towards the house. (Doc. 82-1) at 11 (depo. at 170-71); (Doc. 82-3) at 4. Daniel Pauly could not see who held the flashlights, especially with the rain coming in sideways. (Doc. 82-1) at 11 (depo. at 171); (Doc. 87-2) at 3 (depo. at 208). Daniel Pauly thought the figures were intruders possibly related to the road rage incident; it did not enter Daniel Pauly's mind that the figures could have been police officers. (Doc. 82-1) at 11-12 (depo. at 171, 173); (Doc. 87-2) at 4 (depo. at 220). Both brothers then yelled out several times,"Who are you?" and, "What do you want?" (Doc. 82-1) at 13 (depo. at 179-80). In response to those inquiries, the brothers heard a laugh and, "Hey, (expletive), we got you surrounded. Come out or we're coming in."[5] *Id*. at 13 (depo. at 180). Moreover, Officer Truesdale yelled out once, "Open the door, State Police, open the door." (Doc. 87-2) at 2 (depo. at 185-86); Truesdale Coban recording, Supp. #19. Daniel Pauly, however, did not hear anyone

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

call out "State Police" until after Officer White shot Samuel Pauly.[6] (Doc. 82-1) at 14 (depo. at 181). Officer Mariscal also announced, "Open the door, open the door." (Doc. 82-3) at 5.

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

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

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

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

After hearing, "We have guns," Officer White took cover behind a stone wall located 50 feet from the front of the house and drew his duty weapon while Officer Mariscal took cover behind a Ford pickup truck and unholstered his duty weapon. (Doc. 82-4) at 13 (depo. at 132); (Doc. 84-3) at 4 (depo. at 135); (Doc. 84-5) at 3 (depo. at 191); (Doc. 88-3) at 5 (depo. at 173-74). A matter of seconds after one of the brothers yelled, "We have guns," Daniel Pauly stepped partially out of the back of the house and fired two warning shots up into a tree while screaming to scare people off. (Doc. 82-1) at 17 (depo. at 224); (Doc. 82-1) at 19 (depo. at 226); (Doc. 84-5) at 6 (depo. at 209). Daniel Pauly did not feel comfortable going out the front door after he initially heard someone say that the brothers were surrounded and "come out or we're coming in." (Doc. 82-1) at 18 (depo. at 204). Having heard the two rifle shots, Officer White believed that Officer Truesdale had been shot.[7] (Doc. 84-3) at 5 (depo. at 137).

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

Officers Mariscal and White then saw Samuel Pauly open the front window and hold his arm out with a handgun, pointing it at Officer White.[8] (Doc. 82-4) at 3 (depo. at 185); (Doc. 82-4) at 4 (depo. at 190-91); (Doc. 82-4) at 14 (depo. at 171); (Doc. 88-4) at 3 (depo. at 193). Officer Mariscal then shot towards Samuel Pauly, but missed Samuel Pauly.[9] Four to five seconds after Samuel Pauly pointed his handgun at Officer White, Officer White shot Samuel Pauly. (Doc. 84-5) at 3 (depo. at 191). The entire incident, from the time Officers Truesdale and Mariscal arrived at the Firehouse Road address to the time of the shootings, took less than five minutes. (Doc. 113) at 28.

D. Discussion

Officer White argues that he is entitled to summary judgment on the Fourth Amendment excessive force claim because his use of force on Samuel Pauly was objectively reasonable under the totality of the circumstances. Officer White also argues that he is entitled to qualified immunity on the Fourth Amendment excessive force claim. Next, Officer White argues that the undisputed facts show that he did not violate Samuel Pauly's rights under article II, section 10 of

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

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

the New Mexico State Constitution nor did he commit a battery on Samuel Pauly. Finally, Officer White argues that the NMDPS cannot be held vicariously liable for the alleged battery he committed or for his alleged violation of the New Mexico State Constitution. Plaintiffs contend that these arguments have no merit.

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

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

Officer White argues first that he is entitled to summary judgment on Count One because the undisputed material facts show that his use of deadly force on Samuel Pauly was objectively reasonable under the totality of the circumstances and, therefore, lawful under the Fourth Amendment. Plaintiffs argue, however, that there are genuine disputes of material fact and that when the facts are viewed in the light most favorable to Plaintiffs a reasonable jury could find that the Officers' conduct was reckless and unreasonably created the need for Officer White to shoot Samuel Pauly. Plaintiffs, therefore, assert that a reasonable jury could find that Officer White's objectively unreasonable use of deadly force violated Samuel Pauly's Fourth Amendment right to be free from excessive force. Thus, Plaintiffs contend that Officer White is not entitled to summary judgment on Count One.[10]

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

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

uncertain and dangerous circumstances.'" *Id.* (quoting *Phillips v. James*, 422 F.3d 1075, 1080 (10th Cir. 2004) (internal quotation marks omitted)).

If a use of force is deadly, as in this case, that force is reasonable "only 'if a reasonable officer in Defendant's position would have had probable cause to believe that there was a *threat of serious harm to themselves* or to others.'" *Id.* (quoting *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008)). To assess the degree of that threat of serious physical harm, the Court considers "factors that include, but are not limited to: '(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect.'" *Id*. at 1314-1315 (quoting *Estate of Larsen*, 511 F.3d at 1260). Another important factor is "'whether the officers were in danger at the precise moment that they used force.'" *Id*. at 1314 (quoting *Phillips v. James*, 422 F.3d 1075, 1083 (10th Cir. 2005) (internal quotation marks omitted)). Moreover, the "'reasonableness standard does not require that officers use alternative, less intrusive means' when confronted with a threat of serious bodily injury." *Blossom v. Yarbrough*, 429 F.3d 963, 968 (10th Cir. 2005) (quoting *Cram*, 252 F.3d at 1133) (internal quotations omitted)). Whether the events leading up to the use of deadly force were "tense, uncertain, and rapidly evolving" is also "extremely relevant" to the totality of the circumstances review. *Thomson*, 584 F.3d at 1318 (quoting *Phillips*, 422 F.3d at 1083-84) (internal quotation marks omitted). Additionally, "a reasonable but mistaken belief that the suspect is likely to fight back justifies using more force than is actually needed." *Id*. at 1315.

Reasonableness of an officer's use of deadly force further depends on "whether their 'own reckless or deliberate conduct during the seizure unreasonably created the need to use such

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

In this case, the Plaintiffs do not argue that Samuel Pauly did not make hostile motions with his weapon or that the events leading up to Officer White shooting Samuel Pauly were not "tense, uncertain, and rapidly evolving." Instead, Plaintiffs contend that the reckless or deliberate conduct of the Officers unreasonably created a need for Officer White to shoot Samuel Pauly. In fact, the record contains genuine disputes of material fact regarding whether the Officers' conduct prior to the shooting of Samuel Pauly was at the very least reckless and unreasonably precipitated Officer White's need to shoot Samuel Pauly. For example, it is disputed whether (1) the Officers adequately identified themselves, either verbally or by using a

flashlight; (2) the brothers could, nonetheless, see the Officers considering the ambient light and other light sources; and (3) it was feasible for Officer White to warn Samuel Pauly before shooting him.

Furthermore, viewing the evidence in the light most favorable to Plaintiffs, a reasonable jury could find the following: there were no exigent circumstances requiring the Officers to go to Daniel Pauly's house at 11:00 p.m.; Officers Truesdale and Mariscal purposefully approached the house in a surreptitious manner; despite the porch light and light from the house, the rain and darkness made it difficult for the brothers to see who was outside their house; the fact that the brothers' house is located in a rural wooded area would have heightened the brothers' concern about intruders; the Officers provided inadequate police identification by yelling out "State Police" once; the Officers' use of a hostile tone in stating, "we got you surrounded. Come out or we're coming in" was threatening; statements by Officers Truesdale and Mariscal of "open the door" and other statements of "we're coming in" were, likewise, threatening; it would have been reasonable for the Officers to conclude that Daniel Pauly could believe that persons coming up to his house at 11:00 p.m. were connected to the road rage incident which had occurred a couple of hours previously; that under these circumstances, the occupants of the house would feel a need to defend themselves and their property with the possible use of firearms; and the incident occurred in less than five minutes. A reasonable jury could then find that under the totality of the above circumstances that (1) the Officers' conduct was "immediately connected" to Samuel Pauly arming himself and pointing a handgun at Officer White; and (2) the Officers' conduct reflected "wanton or obdurate disregard or complete indifference" to the risk of an occupant of the house being subject to deadly force in the course of protecting his house and property against threatening and unknown persons. A reasonable jury could, therefore, find that the Officers'

reckless conduct unreasonably created the dangerous situation leading to Officer White's need to shoot Samuel Pauly. Consequently, a reasonable jury could find that Officer White's use of deadly force on Samuel Pauly was not objectively reasonable and violated the Fourth Amendment. Clearly, there are genuine issues of material fact which foreclose the Court from granting summary judgment on Count One.

b. Qualified Immunity

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

To resolve the second part of the qualified immunity test, Plaintiffs must demonstrate that Samuel Pauly's Fourth Amendment right to be free from excessive force was clearly established at the time of the shooting. "In determining whether the right was 'clearly established,' the court assesses the objective legal reasonableness of the action at the time of the alleged violation and asks whether 'the right [was] sufficiently clear that a reasonable officer would understand that what he is doing violates that right.'" *Cram*, 252 F.3d at 1128 (quoting *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). "[I]n order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992). A plaintiff, however, "is not required to show

that the very conduct in question has previously been held unlawful." *Sh. A. ex rel. J. A. v. Tucumcari Mun. Schools*, 321 F.3d 1285, 1287 (10th Cir. 2003).

Since 1997, it has been clearly established in the Tenth Circuit "that an officer is responsible for his or her reckless conduct that precipitates the need to use force." *Murphy v. Bitsoih*, 320 F.Supp.2d 1174, 1193 (D.N.M. 2004) (citing *Allen v. Muskogee*, 119 F.3d 837, 841 (10th Cir. 1997)). Accepting Plaintiffs' version of the facts, a reasonable person in Officer White's position would have understood that the reckless actions of the Officers, including his own reckless actions, unreasonably precipitated his need to shoot Samuel Pauly and, therefore, violated Samuel Pauly's Fourth Amendment right to be free from excessive force. Hence, Plaintiffs meet the second step in defeating qualified immunity.

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

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

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

3. Count Three: the NMTCA Battery Claim

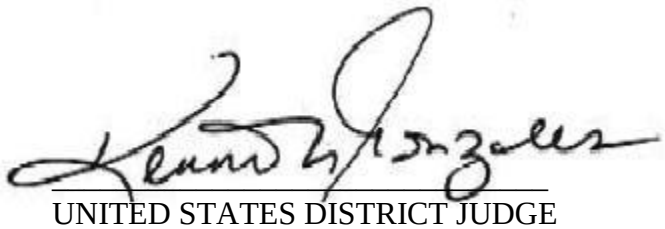
Officer White argues that he is entitled to summary judgment on the NMTCA battery claim because the undisputed material facts demonstrate that his use of force was reasonably necessary. In New Mexico, an officer "is entitled to use such force as was reasonably necessary under all the circumstances of the case." *Mead v. O'Connor*, 1959-NMSC-077 ¶ 4, 66 N.M. 170. Accordingly, a battery claim exists only if the officer used unlawful or unreasonable force. *Reynaga v. County of Bernalillo*, 1995 WL 503973 *2 (10th Cir.). Since there are genuine questions of material fact pertaining to whether Officer White used objectively reasonable force under the totality of the circumstances, the Court cannot grant summary judgment on Count Three.

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

4. NMDPS Liability Pursuant to the Doctrine of Respondeat Superior

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

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



UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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

Plaintiffs,

vs. Civ. No. 12-1311 KG/WPL

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

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court upon Defendant Kevin Truesdale's First Motion for Summary Judgment and Memorandum in Support Thereof (Officer Truesdale's Motion for Summary Judgment), filed November 13, 2013. (Doc. 90). Defendant Kevin Truesdale (Officer Truesdale) moves for summary judgment on the 42 U.S.C. § 1983 claim, the New Mexico Tort Claims Act (NMTCA) claim, and the New Mexico State Constitution claim. In addition, Officer Truesdale raises a qualified immunity defense with respect to the Section 1983 claim. Plaintiffs filed a response to Officer Truesdale's Motion for Summary Judgment on December 23, 2013, and Officer Truesdale filed a reply on January 24, 2014. (Docs. 113 and 128).

This matter also comes before the Court upon Defendant Michael Mariscal's First Motion for Summary Judgment and Memorandum in Support Thereof (Officer Mariscal's Motion for Summary Judgment), filed November 13, 2013. (Doc. 91). Like Officer Truesdale, Defendant Michael Mariscal (Officer Mariscal) moves for summary judgment on the Section 1983 claim,

the NMTCA claim, and the New Mexico State Constitution claim. Moreover, Officer Mariscal raises a qualified immunity defense with respect to the Section 1983 claim. Plaintiffs filed a response to Officer Mariscal's Motion for Summary Judgment on December 23, 2013, and Officer Mariscal filed a reply on January 24, 2014. (Docs. 110 and 130).

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

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

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

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

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

Constitution through Officers White, Truesdale, and Mariscal's alleged unreasonable seizure of Samuel Pauly. Finally, Plaintiffs bring a loss of consortium claim in Count Five.

B. Summary Judgment Standard of Review

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

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

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

Cir. 1995)). First, the plaintiff must demonstrate that the defendant's actions violated a constitutional or statutory right. Second, the plaintiff must show that the "right was clearly established such that a reasonable person in the defendant's position would have known that his conduct violated that right." *Maestas v. Lujan*, 351 F.3d 1001, 1007 (10th Cir. 2003). The Tenth Circuit Court of Appeals instructs that

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

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

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

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

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

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

Daniel Pauly, therefore, stopped at the Glorieta off-ramp as did the females who were following him. (Doc. 82-1) at 9 (depo. at 133). Daniel Pauly asked the females why they were following him and why they had the car's brights on. *Id*. One of the females reported that Daniel Pauly was "throwing up gang signs" during this encounter. (Doc. 82-1) at 24. Daniel Pauly, however, felt personally threatened by the females' driving behavior. (Doc. 82-1) at 9 (depo. at 134). Daniel Pauly then drove a short distance from the off-ramp to his house where his brother, Samuel Pauly, was playing a video game on the couch.[4] (Doc. 82-1) at 10 (depo. at 145). The house is located in a wooded rural area to the rear of another house on a hill. (Doc. 82-1) at 21.

The New Mexico State Police dispatcher contacted Officer Truesdale between 9:00 p.m. and 10:00 p.m. that evening regarding the 911 call from the females. (Doc. 82-3) at 3. Officer Truesdale arrived at the Glorieta off-ramp to speak to the two females after Daniel Pauly had driven to his house. *See id*. Officers White and Mariscal were *en route* to provide Officer

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

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

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

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

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

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

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

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

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

At around 11:00 p.m., the brothers saw through the front window two blue LED flashlights, five or seven feet apart at chest level, coming towards the house. (Doc. 82-1) at 11 (depo. at 170-71); (Doc. 82-3) at 4. Daniel Pauly could not see who held the flashlights,

especially with the rain coming in sideways. (Doc. 82-1) at 11 (depo. at 171); (Doc. 87-2) at 3 (depo. at 208). Daniel Pauly thought the figures were intruders possibly related to the road rage incident; it did not enter Daniel Pauly's mind that the figures could have been police officers. (Doc. 82-1) at 11-12 (depo. at 171, 173); (Doc. 87-2) at 4 (depo. at 220). Both brothers then yelled out several times, "Who are you?" and, "What do you want?" (Doc. 82-1) at 13 (depo. at 179-80). In response to those inquiries, the brothers heard a laugh and, "Hey, (expletive), we got you surrounded. Come out or we're coming in."[6] *Id*. at 13 (depo. at 180). Moreover, Officer Truesdale yelled out once, "Open the door, State Police, open the door." (Doc. 87-2) at 2 (depo. at 185-86); Truesdale Coban recording, Supp. #19. Daniel Pauly, however, did not hear anyone call out "State Police" until after Officer White shot Samuel Pauly.[7] (Doc. 82-1) at 14 (depo. at 181). Officer Mariscal also announced, "Open the door, open the door." (Doc. 82-3) at 5.

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

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

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

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

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

After hearing, "We have guns," Officer White took cover behind a stone wall located 50 feet from the front of the house and drew his duty weapon while Officer Mariscal took cover behind a Ford pickup truck and unholstered his duty weapon. (Doc. 82-4) at 13 (depo. at 132); (Doc. 84-3) at 4 (depo. at 135); (Doc. 84-5) at 3 (depo. at 191); (Doc. 88-3) at 5 (depo. at 173-74). A matter of seconds after one of the brothers yelled, "We have guns," Daniel Pauly stepped

partially out of the back of the house and fired two warning shots up into a tree while screaming to scare people off. (Doc. 82-1) at 17 (depo. at 224); (Doc. 82-1) at 19 (depo. at 226); (Doc. 84-5) at 6 (depo. at 209). Daniel Pauly did not feel comfortable going out the front door after he initially heard someone say that the brothers were surrounded and "come out or we're coming in." (Doc. 82-1) at 18 (depo. at 204). Having heard the two rifle shots, Officer White believed that Officer Truesdale had been shot.[8] (Doc. 84-3) at 5 (depo. at 137).

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

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

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

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

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

D. Discussion

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

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

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

Officers Truesdale and Mariscal argue first that they are entitled to summary judgment on Count One because the undisputed material facts show that their conduct at Daniel and Samuel Pauly's house was objectively reasonable under the totality of the circumstances and, therefore, lawful under the Fourth Amendment. Plaintiffs argue, however, that there are genuine issues of material fact and that when the facts are viewed in the light most favorable to Plaintiffs a reasonable jury could find that Officers Truesdale and Mariscal's conduct was reckless and unreasonably created the need for Officer White to shoot Samuel Pauly. Plaintiffs, therefore,

assert that a reasonable jury could find that Officers Truesdale and Mariscal's objectively unreasonable conduct violated Samuel Pauly's Fourth Amendment right to be free from excessive force. Thus, Plaintiffs contend that Officers Truesdale and Mariscal are not entitled to summary judgment on Count One.[11]

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

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

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

Amendment's reasonableness standard." *Id*. at 1320 (internal quotation marks omitted) (citing *Cram*, 252 F.3d at 1132).

This District Court has held that the reckless endangerment doctrine described above also applies to a non-shooting officer's conduct prior to the shooting death of a suspect by another officer. *See Diaz v. Salazar*, 924 F.Supp. 1088, 1097 (D.N.M. 1996). The Tenth Circuit Court of Appeals, however, has not applied the reckless endangerment doctrine to the conduct of non-shooting officers. Instead, in a 2013 decision, the Tenth Circuit focused on whether the non-shooting officer[12] "caused" the suspect to be deprived of his Fourth and Fourteenth Amendment rights when another officer shot and killed that suspect. *See James*, 511 Fed. Appx. at 746. The Tenth Circuit stated that '"[t]he requisite causal connection is satisfied if the defendant[s] set in motion a series of events that the defendant[s] knew or reasonably should have known would cause others to deprive the plaintiff of [his] constitutional rights.'" *Id.* (quoting *Trask v. Franco*, 446 F.3d 1036, 1046 (10th Cir. 2006)). The Tenth Circuit further stated that to prevail on a Section 1983 claim, a plaintiff must show that the non-shooting officer's actions "were both the but-for and the proximate cause" of the suspect's death. *Id.* (citing *Trask*, 446 F.3d at 1046). However, if a superseding or intervening event, like the suspect's own actions, caused the suspect's death, then an officer cannot have proximately caused the death and the officer is, thus, not liable for that death under Section 1983. *Id*. at 747 (citing *Trask*, 446 F.3d at 1046).

Although neither Plaintiffs nor Officers Truesdale and Mariscal directly analyze Officers Truesdale and Mariscal's actions under the above causation analysis, Plaintiffs' argument concerning the reckless endangerment doctrine raises causation issues similar to those which the Tenth Circuit addressed. Plaintiffs contend, in essence, that (1) Officers Truesdale and

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

Mariscal's actions set in motion a series of events which they reasonably should have known would create a dangerous situation that would cause an Officer, like Officer White, to have a need to use deadly force on an occupant of the house, in this case, Samuel Pauly; and (2) Officers Truesdale and Mariscal's conduct was the but-for and proximate cause of Samuel Pauly's death. It is clearly undisputed that but for Officers Truesdale and Mariscal's decision to walk up to the brothers' house, Officer White would not have shot Samuel Pauly. The evidence of record, however, contains genuine issues of material fact regarding whether Officers Truesdale and Mariscal's conduct prior to the shooting of Samuel Pauly proximately caused Officer White's need to shoot Samuel Pauly. For example, it is disputed whether (1) Officers Truesdale, Mariscal, and White adequately identified themselves, either verbally or by using a flashlight; and (2) the brothers could, nonetheless, see Officers Truesdale, Mariscal, and White considering the ambient light and other light sources. The outcome of these factual issues is material to whether the brothers knew that State Police Officers were outside their house prior to Officer White shooting Samuel Pauly. If a jury finds that the brothers knew that State Police Officers were outside their house, but the brothers, nonetheless, armed themselves and Samuel Pauly pointed a handgun at Officer White, then a reasonable jury could find that the brothers' hostile actions were superseding or intervening causes of Samuel Pauly's death. In that scenario, Officers Truesdale and Mariscal could not be held liable for Samuel Pauly's death, i.e., Officers Truesdale and Mariscal could not have proximately caused Samuel Pauly's death. On the other hand, if a jury finds that the brothers did not know who was outside their house, then a reasonable jury could determine that Officer Truesdale and Officer Mariscal proximately caused Samuel Pauly's death by failing to adequately identify themselves as well as Officer White.

Furthermore, viewing the evidence in the light most favorable to Plaintiffs, a reasonable jury could find the following: there were no exigent circumstances requiring Officers Truesdale, Mariscal, and White to go to Daniel Pauly's house at 11:00 p.m.; Officer Truesdale and Mariscal purposefully approached the house in a surreptitious manner; despite the porch light and light from the house, the rain and darkness made it difficult for the brothers to see who was outside their house; the fact that the brothers' house is located in a rural wooded area would have heightened the brothers' concern about intruders; Officer Truesdale provided inadequate police identification by yelling out "State Police" once; the Officers' use of a hostile tone in stating, "we got you surrounded. Come out or we're coming in" was threatening; statements by Officers Truesdale and Mariscal of "open the door" and other statements of "we're coming in" were, likewise, threatening; it would have been reasonable for Officer Truesdale, Mariscal, and White to conclude that Daniel Pauly could believe that persons coming up to his house at 11:00 p.m. were connected to the road rage incident which had occurred a couple of hours previously; that under these circumstances, the occupants of the house would feel a need to defend themselves and their property with the possible use of firearms; and the incident occurred in less than five minutes. Under these circumstances, a reasonable jury could find that Officers Truesdale and Mariscal's actions set in motion a series of events which they reasonably should have known would create a dangerous situation that would cause Officer White's need to shoot Samuel Pauly. Additionally, a reasonable jury could find that but for Officers Truesdale and Mariscal's decision to walk up to the brothers' house, Officer White would not have shot Samuel Pauly. A reasonable jury could also find that Samuel Pauly's actions did not constitute a superseding cause of his death, i.e., that Samuel Pauly did not know that he was pointing a hand gun at a State Police Officer. Thus, a reasonable jury could find that Officers Truesdale and Mariscal's

conduct proximately caused Samuel Pauly's death. In sum, a reasonable jury could find that Officers Truesdale and Mariscal's conduct caused Samuel Pauly to be deprived of his Fourth Amendment right to be free from excessive force. Clearly, there are genuine issues of material fact which foreclose the Court from granting summary judgment on Count One.

b. Qualified Immunity

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

To resolve the second part of the qualified immunity test, Plaintiffs must show that Samuel Pauly's Fourth Amendment right to be free from excessive force was clearly established at the time of the shooting. "In determining whether the right was 'clearly established,' the court assesses the objective legal reasonableness of the action at the time of the alleged violation and asks whether 'the right [was] sufficiently clear that a reasonable officer would understand that what he is doing violates that right.'" *Cram*, 252 F.3d at 1128 (quoting *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). "[I]n order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992). A plaintiff, however, "is not required to show

that the very conduct in question has previously been held unlawful." *Sh. A. ex rel. J. A. v. Tucumcari Mun. Schools*, 321 F.3d 1285, 1287 (10th Cir. 2003).

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

Having met the test to defeat qualified immunity, the burden shifts back to Officers Truesdale and Mariscal to prove that there is no genuine issue of material fact that would defeat the qualified immunity defense. As discussed above, genuine issues of material fact exist which concern whether Officers Truesdale and Mariscal's conduct prior to the shooting of Samuel Pauly proximately caused Officer White's need to shoot Samuel Pauly. Moreover, viewing the

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

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

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

3. Count Three: the NMTCA Battery Claim

Officers Truesdale and Mariscal argue that they are entitled to summary judgment on the NMTCA battery claim because the undisputed material facts demonstrate that their conduct was

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

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

4. NMDPS Liability Pursuant to the Doctrine of Respondeat Superior

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

IT IS ORDERED that:

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

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

UNITED STATES DISTRICT JUDGE