

No. 14-2035

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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

Plaintiffs/Appellees,

vs.

**RAY WHITE, MICHAEL MARISCAL,
and KEVIN TRUESDALE,**

Defendants/Appellants.

On Appeal from the United States District Court
for the District of New Mexico
The Honorable Kenneth J. Gonzales
District Docket No. 12-CV-1311 KG/WPL

**APPELLEES' BRIEF REGARDING THE IMPACT OF
THE SUPREME COURT'S DECISION ON THIS APPEAL**

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INTRODUCTION

This Court has asked for briefing on the impact of the Supreme Court's decision on this appeal. The Court need look no further than Justice Ginsburg's concurring opinion, which explained the effect of the Supreme Court's opinion on further proceedings in this case.

In a per curiam decision issued on January 9, 2017, the Supreme Court held that, on the record described by this Court, Officer White did not violate clearly established law. *White v. Pauly*, 137 S. Ct. 548, 580 U.S. ___ (2017) (per curiam). The Supreme Court vacated the judgment of this Court and remanded the case for further proceedings consistent with its opinion. The Supreme Court noted that there were other grounds to affirm the denial of qualified immunity to Officer White but stated that it was expressing no opinion either on these alternative grounds or on whether, in light of the its holding, Officers Truesdale and Mariscal are entitled to qualified immunity. Justice Ginsberg's concurrence, however, explained that the Supreme Court's opinion "does not foreclose the denial of summary judgment to Officers Truesdale and Mariscal" and "leaves open the propriety of denying summary judgment based on fact disputes over when Officer White arrived at the scene, what he may have witnessed, and whether he had adequate time to identify himself and order Samuel Pauly to drop his weapon before Officer White shot

Pauly.” *Id.* at 553 (Ginsberg, J., concurring).

Plaintiffs request that this Court follow the instructions provided by Justice Ginsberg and 1) affirm the district court’s denial of summary judgment as to Officer White based on disputed facts regarding his knowledge of, and participation in, the events that caused the Pauly brothers to defend their home with force and resulted in the use of deadly force against Samuel by Officer White; 2) reaffirm the denial of summary judgment as to Officers Truesdale and Mariscal; and 3) remand the case to the district court for a trial on the merits.

PROCEDURAL HISTORY

On February 9, 2016, this Court denied summary judgment on Officers Truesdale and Mariscal’s qualified immunity claims because a reasonable person in the officers’ position should have understood that their reckless conduct could cause the Pauly brothers to defend their home and could result in the use of deadly force against Samuel by Officer White and that the violative nature of this conduct was clearly established under Tenth Circuit precedent. *Pauly v. White*, 814 F.3d 1060 (10th Cir. 2016). This Court also denied qualified immunity to Officer White, who fired the deadly shot, concluding that “a reasonable officer in Officer White’s position would *not* have probable cause to believe there was an *immediate* threat of serious harm to himself or to Officer Mariscal, who was also behind

cover, such that he could shoot Samuel Pauly through the window of his home without giving him a warning.” *Id.* at 1082 (emphasis in original). This Court, relying on *Graham v. Connor*, 490 U.S. 386 (1989), and its Tenth Circuit progeny, found that it was clearly established that an officer was not entitled to use deadly force unless he was in danger at the exact moment of the threat of force and that Officer White was required, under the circumstances here, to warn Samuel Pauly to drop his weapon. *Id.* at 1083-84. The Officers sought rehearing and rehearing en banc. Both motions were denied. *Pauly v. White*, 817 F.3d 715 (10th Cir. 2016) (*Pauly II*).

The Officers then filed a petition for certiorari. The Supreme Court held that, on the record described by this Court, Officer White did not violate clearly established law and vacated the judgment of this Court. *White*, 137 S. Ct. 548. The Supreme Court determined that the Court had defined “clearly established law” at too high a level of generality and had “failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment.” *Id.* at 552. The Supreme Court noted, however, the existence of an alternative ground to deny summary judgment to Officer White. *Id.* at 552-53. The Supreme Court did not consider this Court’s ruling as to Officers Truesdale and Mariscal and expressed no opinion on whether its decision

had any effect on the denial of qualified immunity to Officers Truesdale and Mariscal. *Id.*

ARGUMENT

I. This Court should affirm the district court’s denial of qualified immunity to Officer White based on disputed facts regarding his knowledge of, and participation in, the events that caused the Pauly brothers to defend their home with force and resulted in the use of deadly force against Samuel Pauly.

Analyzing the effect of the Supreme Court’s decision on Officer White’s appeal requires a brief review of the procedural history of this case from the district court through the Supreme Court.

A. The district court found that Officer White had knowledge of, and participated in, the reckless actions that unreasonably precipitated the need to shoot Samuel Pauly.

The district court, in ruling on Officer White’s motion for qualified immunity, stated that “[w]hile 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.” [Aplt. App. at 680.] The district court did not elaborate on the time frame for these events but the evidence in the record before the district court shows that Officer White was at the scene for several minutes before shots were fired. [Aplt. App. at 118]; *Pauly II*,

817 F.3d at 717. The police recordings establish that Officers Truesdale and Mariscal arrived at the main residence at 11:14 p.m.; Officer White was at the main residence by 11:16 p.m.; and Daniel Pauly's warning shots occurred at 11:19:42. [Aplt. App. at 164.] Thus, Officer White was on the scene for nearly four minutes prior to shots being fired.

Not only was Officer White on the scene for most of the incident but he heard the coercive statements being made by Officers Mariscal and Truesdale. Officer White testified in his deposition that from the time he arrived and parked at the main residence, he could hear Officers Truesdale and Mariscal shouting and yelling at the Pauly residence. [Aplt. App. at 141, 112:3-23.] The district court found that Officers Mariscal and Truesdale were yelling "Open the door! Open the door!" and "Hey, motherf**kers, we've got you surrounded. Come out or we're coming in!" and "We're coming in! We're coming in!" [Aplt. App. at 678, 679 & 555-56, ¶¶ 42-44.] Officer White never identified himself as a police officer during the minutes he was at the scene. [Aplt. App. at 678 & 685.]

Based on Officer White's presence at the scene for nearly the entire incident, the district court found that 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." [Aplt. App. at 687 (emphasis added).] Accordingly, the district court found that Officer White was not entitled to qualified immunity on two independent grounds: 1) Officer White had knowledge of, and participated in, the reckless conduct that precipitated the need for force and 2) disputed issues of fact existed regarding whether it was feasible for Officer White to provide a warning prior to firing the fatal shot. [Aplt. App. at 684-85.]

B. This Court misinterpreted the district court's findings regarding when Officer White arrived at the scene.

On appeal, this Court mistakenly stated that Officer White "arrived just as one of the brothers said: 'We have guns.'" *Pauly*, 814 F.3d at 1066. Thus this Court put Officer White at the scene mere seconds before he fired the fatal shot rather than the nearly four minutes established by the record. As a result of not including the full scope of Officer White's conduct, the Court rejected the district court's determination that Officer White was not entitled to qualified immunity because he had knowledge of, and participated in, the reckless conduct that precipitated the need for force. *Id.* at 1076 ("Officer White did not participate in the events leading up to the armed confrontation, nor was he there to hear the other officers ordering the brothers to "Come out or we're coming in.>"). The Court's

qualified immunity analysis was based solely on its consideration of the events that transpired after the brothers said “We have guns.”

The concurrence in the en banc denial corrected the record, stating that Officer White had been on the scene for several minutes prior to the brothers saying “We have guns.” *Pauly II*, 817 F.3d at 717. The concurrence also noted the existence of a fact question regarding what Officer White heard the other officers yelling at the Pauly home in the minutes he was on the scene prior to the Pauly brothers arming themselves. *Id.*

C. The Supreme Court invited this Court to consider alternative grounds to affirm the denial of qualified immunity to Officer White.

In their opposition to the petition for writ of certiorari, Plaintiffs noted that while this Court’s decision was correct based on the facts that it considered, other facts found by the district court provided additional grounds for denying qualified immunity. *Opp.* at 7-8, n. 2. In its opinion, the Supreme Court explicitly stated that its ruling was based on the record as set forth by this Court (which had Officer White arriving on the scene mere seconds before shots were fired) but that there was an alternative ground to affirm the denial of qualified immunity for Officer White (that Officer White had actually been on the scene for several minutes and was, at a minimum, aware of the coercive acts of the other officers). *White*, 137 S.

Ct. at 552. Justice Ginsberg explained that “[a]s to Officer White, the Court, as I comprehend its opinion, leaves open the propriety of denying summary judgment based on fact disputes over when Officer White arrived at the scene, what he may have witnessed, and whether he had adequate time to identify himself and order Samuel Pauly to drop his weapon before Officer White shot Pauly.” *Id.* at 553 (Ginsberg, J., concurring). The Supreme Court did not grant summary judgment to Officer White but, instead, vacated the denial of qualified immunity to Officer White and remanded to this Court for further proceedings. *Id.* at 553.

The Supreme Court stated that it was expressing no position on the alternative ground for denying summary judgment to Officer White “as it appears that neither the District Court nor the Court of Appeals panel addressed it.” *Id.* at 552. To the contrary, as set forth above, the district court based its denial of qualified immunity to Officer White on two independent grounds, one of which was Officer White’s participation in, and knowledge of, what occurred at the scene in the minutes prior to the Pauly brothers feeling the need to defend their home. In their brief, Plaintiffs requested that this Court affirm this ruling. *See* Appellee Brief at 18 & 32-34. This Court, based on its belief that Officer White arrived mere seconds before shots were fired, did not consider this ground as a basis for affirming the district court’s denial of qualified immunity. *Pauly*, 814 F.3d at

1076.

This Court should accept the Supreme Court's invitation to deny qualified immunity to Officer White based on the facts found by the district court regarding Officer White's knowledge of, and participation in, the events that lead to the Pauly brothers defending their home with force.

II. The Supreme Court's decision has no effect on the Court's denial of qualified immunity to Officers Truesdale and Mariscal and the Court should reaffirm its denial of summary judgment to these officers.

Both the district court and this Court analyzed Officers Truesdale and Mariscal's entitlement to qualified immunity separately from Officer White. The district court denied Officers Truesdale and Mariscal's summary judgment motions for qualified immunity, finding that a reasonable jury could find that the officers' reckless conduct unreasonably created the dangerous situation leading to Officer White's use of deadly force and that the law was clearly established in the Tenth Circuit "that the requisite causal connection for establishing a Section 1983 violation is satisfied if the defendants set in motion a series of events that the defendants knew or reasonably should have known would cause others to deprive the plaintiff of his constitutional rights." [Aplt. App. at 705-707(internal punctuation and citations omitted).]

This Court agreed, finding that qualified immunity was not appropriate

because a reasonable person in the officers' position should have understood that his reckless conduct could cause the Pauly brothers to defend their home and could result in the use of deadly force against Samuel and that the violative nature of this conduct was clearly established under Tenth Circuit precedent. *Pauly*, 814 F.3d at 1075-76.

The Supreme Court's ruling regarding the requirements of "clearly established law" does not affect this Court's ruling regarding Officers Truesdale and Mariscal because the denial of qualified immunity for these two officers was based on particularized Tenth Circuit law regarding an officer recklessly setting in motion a series of events that caused the use of deadly force and not on the excessive force law that the Supreme Court found was too generalized.

The Supreme Court did not consider this Court's ruling as to Officers Truesdale and Mariscal and stated that it was expressing no opinion on the question of whether, in light of the Court's holding on Officer White, Officers Truesdale and Mariscal were entitled to qualified immunity. *White*, 137 S. Ct. at 552-53. Justice Ginsberg, however, explicitly stated that she did not believe that the Supreme Court's ruling on Officer White affected this Court's denial of qualified immunity to Officers Truesdale and Mariscal. *Id.* at 553 (Ginsberg, J., concurring).

Plaintiffs anticipate that the Officers may argue that if Officer White, as the officer who fired the fatal shot, is entitled to qualified immunity, the other officers are also entitled to qualified immunity. *See Pauly*, 814 F.3d at 1091 (Moritz, J., dissenting). This Court did not address this question previously because it held that Officer White was not entitled to qualified immunity. Similarly, this question would not be relevant now if the Court denies Officer White qualified immunity based on the facts found by the district court regarding Officer White's knowledge of, and participation in, the events that lead to the Pauly brothers defending their home with force.

If this Court, however, finds that Officer White is entitled to qualified immunity, it should reject the argument that such a finding compels the conclusion that the other officers are also entitled to qualified immunity. Tenth Circuit law provides that a governmental actor may be liable for the constitutional violations that another committed where the actor "set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights." *Trask v. Franco*, 446 F.3d 1036, 1046 (10th Cir. 2006). The law requires only that the officer's reckless conduct resulted in another person depriving a plaintiff of a constitutional right; it does not require that the person who deprived the plaintiff of a constitutional right be liable under

the law for the deprivation. Consistent with Tenth Circuit law, this Court's analysis focused on whether Officers Truesdale and Mariscal's conduct caused Samuel Pauly to be deprived of a constitutional right and not on whether Officer White was liable under the law for this constitutional deprivation.¹

Even if the Court finds that the constitutional deprivation committed by Officer White cannot be considered if he is entitled to qualified immunity, Officer Mariscal's use of deadly force under these circumstances constitutes excessive force even though Officer Mariscal did not fire the fatal round. [Aplt. App. at 699 (finding Officer Mariscal fired at Samuel Pauly)]; *see, e.g., Bray v. County of San Diego*, 19 F.3d 26 (9th Cir. 1994) (unpublished) (denying qualified immunity to officer who fired weapon but did not fire fatal shot because a reasonable officer should have known that use of deadly force under the circumstances was contrary to established law). The constitutional deprivation committed by Officer Mariscal is sufficient under the law for liability to attach to both Officer Mariscal and Officer Truesdale under Tenth Circuit law. *See Trask*, 446 F.3d at 1046 (officer

¹ This Court found that the evidence was sufficient to establish an excessive force claim against Officer White under the Fourth Amendment and that the law was clearly established. The Supreme Court disagreed with the clearly established prong of this finding but did not question the finding that Officer White used excessive force. Accordingly, this Court's finding that Officer White deprived Samuel Pauly of his constitutional right to be free of excessive force is unaffected by the Supreme Court's ruling.

may be liable for the constitutional violations that another committed where the actor “set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights”); *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995) (“The reasonableness of Defendants’ actions depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants’ own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.”).

Notably, the two cases cited by Judge Moritz in her dissent are both Fourth Circuit cases where the conduct of officers prior to the use of force is not considered. *See, e.g., Elliott v. Leavitt*, 99 F.3d 640 (4th Cir. 1996) (conduct prior to the moment force was used is not relevant in determining whether an officer used reasonable force). Accordingly, an excessive force analysis in the Fourth Circuit considers only the actions of the shooting officer at the moment he or she used deadly force and does not consider whether other officers set in motion a series of events that they knew or reasonably should have known would cause others to deprive the plaintiff of a constitutional right.

It was reasonably foreseeable that Officers Truesdale and Mariscal’s reckless conduct could cause the Pauly brothers to defend their home and could

result in the use of deadly force against Samuel, either by these officers or another officer, and the violative nature of this conduct was clearly established under Tenth Circuit precedent. Officers Truesdale and Mariscal are therefore liable for the use of deadly force against Samuel as a foreseeable consequence of their actions even if Officer White is not liable for excessive force under the Fourth Amendment.²

See, e.g., Malley v. Briggs, 475 U.S. 335, 344 n. 7, 106 S.Ct. 1092 (1986) (§ 1983 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions).

In addition to being contrary to Tenth Circuit law, the position that officers who set in motion a series of events that they knew or reasonably should have known could result in the use of deadly force against a plaintiff are not liable if the shooting officer is found to be entitled to qualified immunity would result in arbitrary findings of liability. In this case, both Officer White and Officer Mariscal shot at Samuel Pauly. It is only happenstance that Officer White fired the fatal shot. Under the position advocated by Judge Moritz (and expected to be adopted by the Officers), Officers Truesdale and Mariscal would escape liability for their

² Other courts have held that under basic notions of proximate cause officers can be liable for a shooting as a foreseeable consequence of their actions even though the shooting itself was not unconstitutionally excessive force. *See, e.g., Mendez v. County of Los Angeles*, 815 F.3d 1178 (9th Cir. 2016) (cert. granted).

reckless actions that created the need for deadly force because Officer White (who purportedly arrived late on the scene and without any knowledge of the reckless conduct) fired the fatal shot. If Officer Mariscal had fired the fatal shot, however, both Officer Mariscal and Officer Truesdale would be liable for excessive force.

Justice Ginsburg instructed this Court that 1) factual disputes regarding whether Officers Truesdale and Mariscal adequately identified themselves as police officers before shouting “Come out or we’re coming” supported a denial of qualified immunity for Officers Truesdale and Mariscal and 2) that the Supreme Court’s ruling on Officer White did not affect the denial of qualified immunity to Officers Truesdale and Mariscal. *White*, 137 S. Ct. at 553 (Ginsburg, J., concurring). These instructions are consistent with, if not mandated by, Tenth Circuit law, and should be followed. This Court should reaffirm the district court’s denial of summary judgment to Officers Truesdale and Mariscal.

CONCLUSION

Plaintiffs respectfully request that the Court follow the Supreme Court and Justice Ginsberg's suggestions and 1) affirm the district court's denial of qualified immunity for Officer White based on the facts establishing that Officer White participated in, or at a minimum was aware of, the conduct leading up to the Pauly brothers feeling the need to defend their home, and 2) reaffirm the denial of qualified immunity to Officers Mariscal and Truesdale.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using WordPerfect X5 with 14-Point Times New Roman font.

Dated this 23rd day of February, 2017.

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CERTIFICATE OF DIGITAL SUBMISSION

I HEREBY CERTIFY that one copy of Appellees' Brief Regarding the Impact of the Supreme Court's Decision on this Appeal was submitted in digital form via the Court's CM/ECF filing system.

I ALSO CERTIFY that no privacy redactions were required to be made.

I ALSO CERTIFY that this digital submission has been scanned for viruses with AVG CloudCare AntiVirus, updated daily, and, according to the program, is free of viruses.

Dated this 23rd day of February, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2017, I mailed one copy of Appellees' Brief Regarding the Impact of the Supreme Court's Decision on this Appeal via U.S. Mail to Mark D. Jarmie, Jarmie & Associates, P.O. Box 26416, Albuquerque, NM 87125-6416.

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